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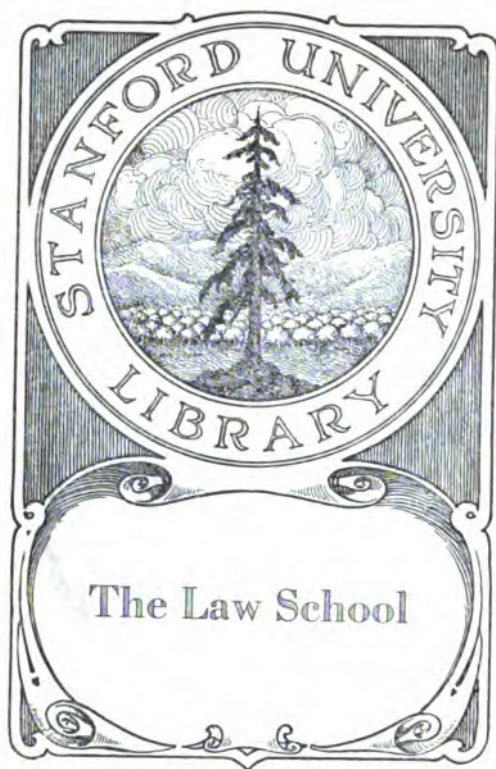
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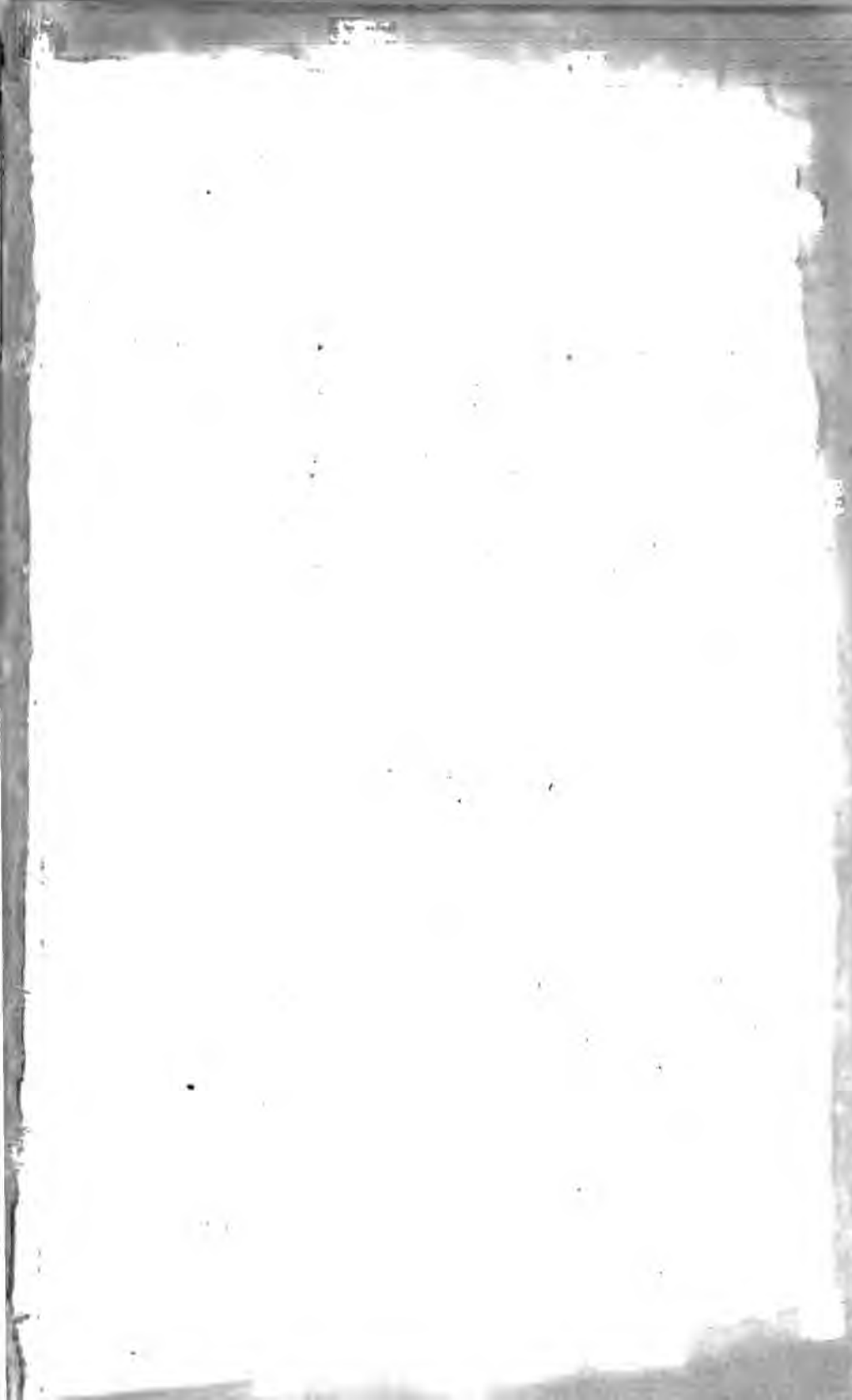
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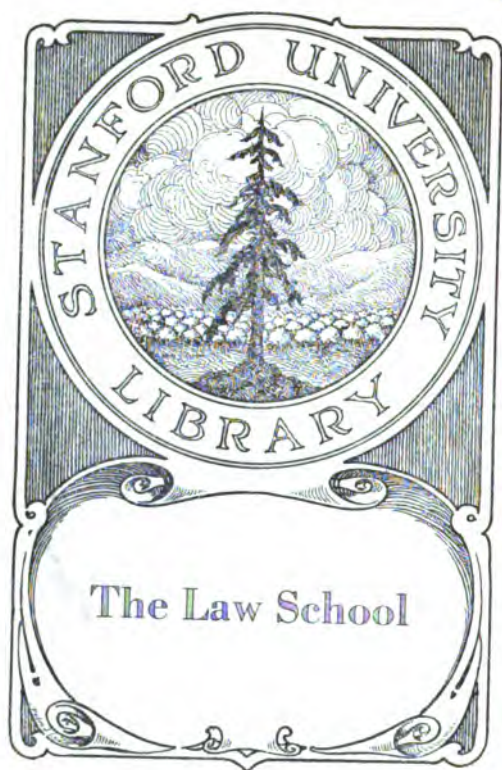
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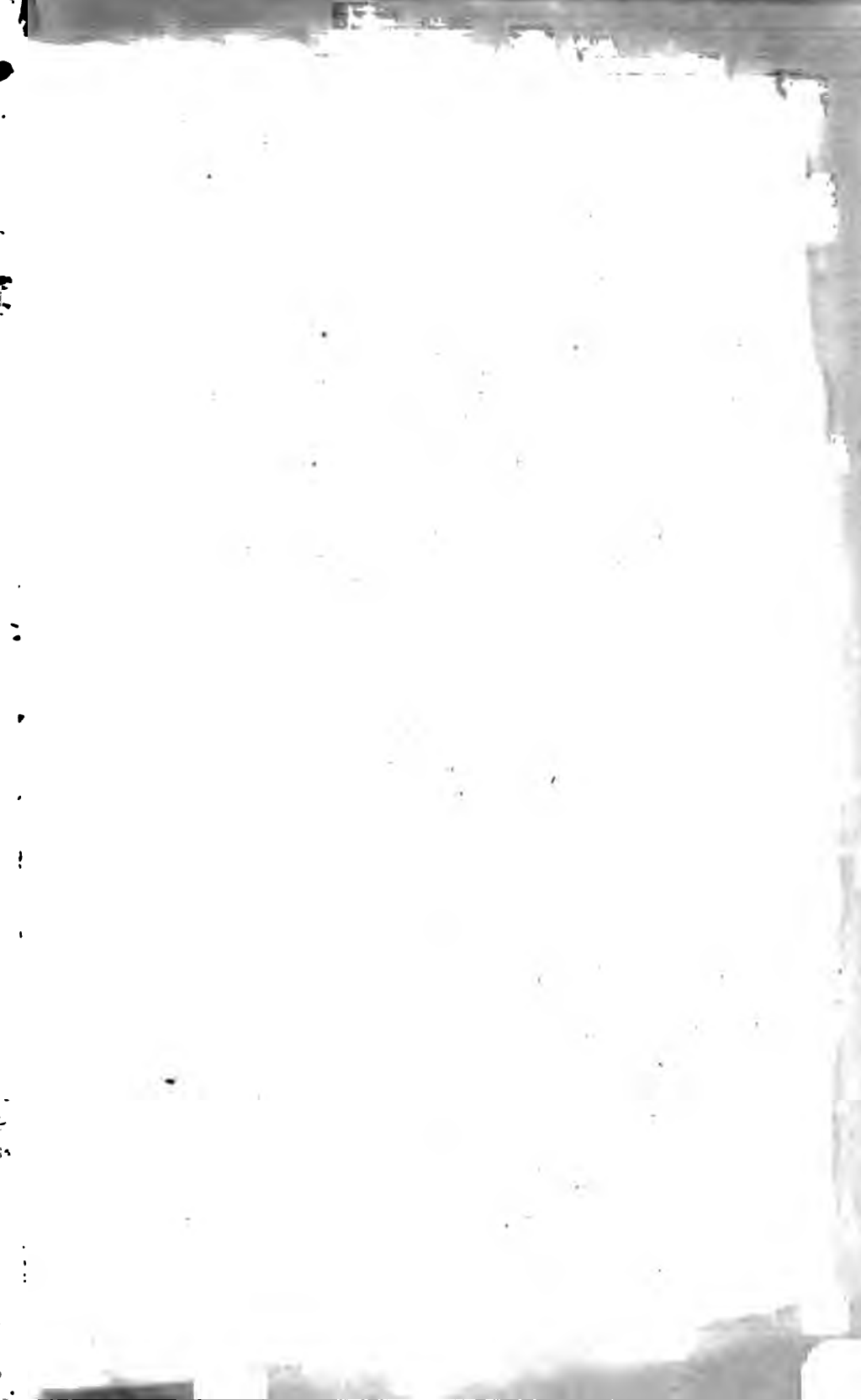
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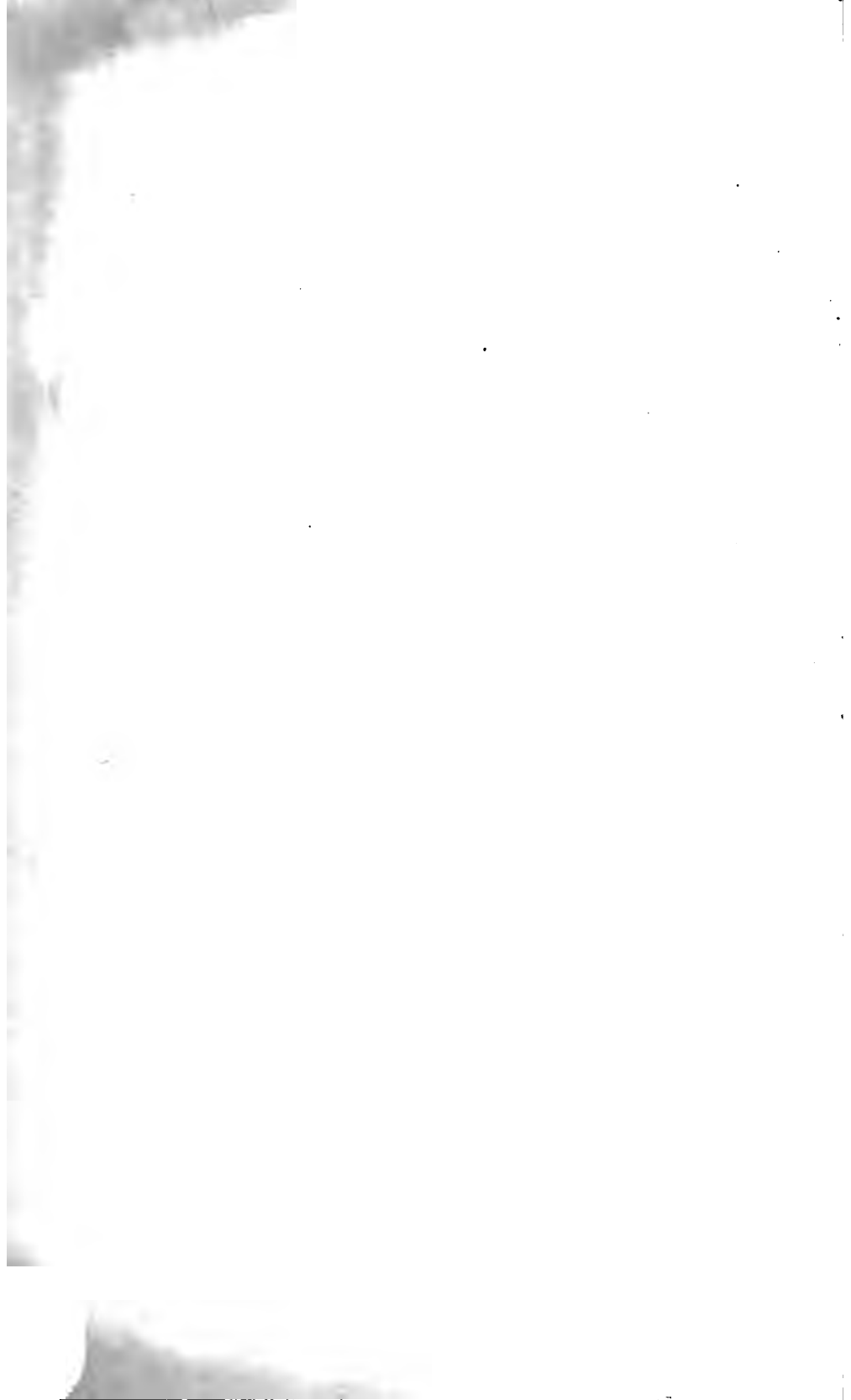
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REPORTS OF CASES

ARGUED AND DETERMINED

IN THE

English Courts of Common Law.

WITH

TABLES OF THE CASES AND PRINCIPAL MATTERS.

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HERETOFORE CONDENSED BY

THOMAS SERGEANT AND JOHN C. LOWBER, ESQs.,

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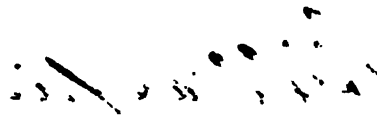
CONTAINING THE CASES OF MICHAELMAS, HILARY, AND EASTER
TERMS, IN THE SIXTH YEAR OF WILLIAM IV., AND OF
TRINITY AND MICHAELMAS TERMS, IN THE
SEVENTH YEAR OF WILLIAM IV. 1835-6.

PHILADELPHIA:

T. & J. W. JOHNSON, LAW BOOKSELLERS,
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1853.



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ARGUED AND DETERMINED

IN

The Court of King's Bench,

WITH

TABLES OF THE NAMES OF THE CASES ARGUED AND CITED,
AND THE PRINCIPAL MATTERS.

BY

JOHN LEYCESTER ADOLPHUS,

OF THE INNER TEMPLE,

AND

THOMAS FLOWER ELLIS,

OF THE MIDDLE TEMPLE,

ESQRE., BARRISTERS AT LAW.

VOL. IV.

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J U D G E S
OF THE
COURT OF KING'S BENCH,
DURING THE PERIOD OF THESE REPORTS.

The Right Hon. THOMAS LORD DENMAN, C.J.
Sir JOSEPH LITTLEDALE, Knt.
Sir JOHN PATTESON, Knt.
Sir JOHN WILLIAMS, Knt.
Sir JOHN TAYLOR COLERIDGE, Knt.

ATTORNEY-GENERAL.
Sir JOHN CAMPBELL, Knt.

SOLICITOR-GENERAL.
Sir ROBERT MOUNSEY ROLFE, Knt.



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C A S E S

ARGUED AND DETERMINED

IN THE

COURT OF KING'S BENCH,

UPON WRITS OF ERROR FROM THAT COURT TO THE EXCHEQUER
CHAMBER,

IN

Michaelmas Term,

IN THE SIXTH YEAR OF THE REIGN OF WILLIAM IV.

The Judges who usually sat in Banc this term were,

LORD DENMAN, C. J.
PATTESON, J.

WILLIAMS, J.
COLERIDGE, J.



DOE on the several Demises of SPILSBURY and others v. Sir FRANCIS
BURDETT, Baronet, and others.

DOE on the same Demises v. SKYNNER and others.

Lands were limited to such uses, &c., as L. should appoint by her last will and testament in writing, to be by her *signed, sealed, and published, in the presence of, and attested by, three or more credible witnesses*. L. signed and sealed an instrument, containing an appointment, commencing thus:—"I, L., do publish and declare this to be my last will and testament;" and ending thus:—"I declare this only to be my last will and testament. In witness whereof I have to this my last will and testament set my hand and seal the 12th day, &c." The attestation was as follows:—"Witness, C. B., E. B., A. B.:" Held, a good execution of the power, on the face of the instrument.

The will being more than thirty years old: Held that, on production of it in the above form, the fact of the attestation was sufficiently proved, though one witness was still alive and was not called. Quære, Whether in general publication be essential to the validity of a will?

THESE were actions of ejectment; the first for lands in Derbyshire, the second for lands in the town and county of Nottingham. On the respective trials, in 1884, *before TYNDALE, C. J., at the Derbyshire Lent Assizes, and LIT-
[*2] TLEDAL, J., at the Nottingham Lent Assizes, verdicts were found for the plaintiffs, subject to the opinion of this Court upon two cases. The facts stated, so far as they are material to the judgment, were as follows.

By a settlement, made (4th and 5th December, 1787) upon the marriage of Lydia Henning Ward with William Augustus Skynner, certain of the lands in question were limited (after certain uses and trusts, which had failed to take effect, or had been exhausted), after the decease of the said Lydia Henning

& S. 512, and *Doe dem. Hotchkiss v. Pearce*, 6 Taunt. 402. *Stanhope v. Keir*, 2 Sim. & Stu. 37, was decided by Sir JOHN LEACH, when Vice-Chancellor : but he afterwards, when Master of the Rolls, laid down a different doctrine in *Buller v. Burt*,¹ and held that the attestation showed that all had been done in the presence of the witnesses, which was stated in the body of the deed. That is consistent with common sense ; the case is as if the witnesses had heard the party say, "I publish," and had signed as witnesses. In *Moodie v. Reid*, 7 Taunt. 355, cited in that case, the question turned on the meaning of the word "published." There, the body of the will specified the signing, but not the publication ; and GIBBS, C. J., said, "The witnesses have clearly attested the signing," though the attestation specified nothing. Now here the body of the will contains an assertion of the performance of all the requisites. It must be contended, on the other side, that the witnesses attest nothing : if they attest anything they attest all that is stated in the will. Admitting, therefore, that the cases, where there is a partial specification in the *attestation, are rightly decided (although they seem opposed to the decisions on [*8] sect. 5 of the Statute of Frauds), the present case is precisely within the rule in *Buller v. Burt*;⁴ and *Ward v. Swift*, 1 Cr. & M. 171, S. C. 3 Tyrwh. 122, is upon the same principle. The retrospective statute of 54 G. 3, c. 168, cannot be considered a legislative declaration that the law requires a specification of the formalities in the attestation ; it was passed merely to remedy the omission of the fact of signing in attestations already made, and it treats the law as doubtful.

Preston in reply. The argument on the other side is, that the attestation has the same effect as if the words used in the body of this will were inserted in the attestation. If that were so, the question in *Ward v. Swift*, 1 Cr. & M. 171, S. C. 3 Tyrwh. 122, could not have arisen ; for Lord LYNDBURST, 1 Cr. & M. 174, 3 Tyrwh. 125, there clearly considered that the publication was asserted in the will.

Cur. adv. vult.

In this term (November 24th), Lord DENMAN, C. J., delivered the judgment of the Court. After reading the material points of the settlement of 1787, and the will, his Lordship proceeded as follows.

The defendants claim under that will, contending that it is made in pursuance of, and is a due execution of, the power in the marriage settlement. The plaintiff says that it is not a due execution of the power in the marriage settlement ; and he claims under the subsequent limitation of the settlement. And one *question in the special case is, whether that will be a due execution [*9] of the powers in the marriage settlement.

At the beginning of the will, Lydia Henning Ward publishes and declares that to be her last will and testament. At the end of it she declares that only to be her last will and testament, and says, "In witness whereof I have, to this my last will and testament," "set my hand and seal the 12th day of September, in the year of our Lord 1789." And then there is signed the name Lydia Henning Skynner, and a seal opposite to it.

On the face of the instrument, therefore, it appears that at the beginning of the will, she publishes it, and at the end she declares it to be her last will and testament, and that she puts her hand and seal to it ; and there is her hand and seal in fact actually put to it. Therefore, on the face of the instrument itself, it purports to be her will, and to be signed, sealed, and published by her, and her name and seal are affixed.

It was proved by the depositions of Charles Ball and Elizabeth Ball, now deceased, as stated in the case, that the will was signed, sealed, and published by Lydia Henning Skynner, in the presence of Charles Ball, Elizabeth Ball, and Ann Ball. Objections were made to these depositions, in this stage of the proceedings, and considering the parties to the suit, were not admissible in evidence ; and also that, there being one of the witnesses who was alive, that witness ought

¹ Cited from MS. See p. 15, post.

to have been called. We think these objections, if well founded on general principles in themselves, are not material in the present case, for the reasons which will be given hereafter.

[*10] But then, as the settlement creating the power requires *the signing, sealing, and publishing, not only to be in the presence of but also to be attested by, three or more witnesses, unless they attest the signing, sealing, and publishing, the mere fact of its being signed, sealed and published, in their presence, would not support the instrument.

The plaintiff says, that the attestation ought to have expressed that the will was signed, sealed, and published, by Mrs. Skynner in the presence of the three witnesses, and that, it being not so expressed, the will is a void execution of the power. On the other hand the defendants say that, whatever might have been the case if some of the requisites of signing, sealing, and publishing had been expressed in the attestation, and it had been silent as to the others, yet this, being a general attestation without going into any particulars, must be taken to affirm that all has been done in the presence of the witnesses which is stated in the body of the will: and, as it is there stated that the will was signed, sealed, and published, the attestation must be taken to attest that all those things have been done.

But it may be said, here are three ingredients, which together make one entire complex substance, which must be verified in toto; and, though each taken by itself is proved, yet, as it does not express that the attestation applies to the whole, it may apply to one or two, or to all the three ingredient parts, and it is uncertain to which it refers, and, therefore, it is uncertain and must be rejected altogether. And several cases on this point are referred to, none exactly *ad idem*, yet containing a sufficient body of legal reasoning and authority to make the principle of these cases applicable to the present.

[*11] *The case most relied upon is that of *Wright v. Wakeford*, which first came on in the Court of Chancery, 17 Ves. 454; on a bill filed for a specific performance of an agreement for the sale of an estate; wherein Lord ELDON directed a case to be made for the opinion of the Court of Common Pleas, which was done; and it is reported in Taunton, 4 Taunt. 213; MANSFIELD, C. J. was of opinion that the attestation must be understood to apply to the signing, as well as to the sealing and delivery; but the other judges, HEATH, LAWRENCE, and CHAMBER, were of opinion that the signature of the parties was not comprehended in the words made use of in the attestation. The principle of this decision was adopted by the whole Court of King's Bench in a subsequent case of Doe dem. Mansfield v. Peach, 2 M. & S. 576; and in *Wright v. Barlow*, 3 M. & S. 512; and by the Court of Common Pleas in Doe dem. Hotchiss v. Pearce, 6 Taunt. 402.

The present case, in our opinion, differs from these, which may have been decided on the ground that, the attestation embracing part but not the whole, the maxim *expressio unius est exclusio alterius* is to be applied to them.

Before the case of *Wright v. Barlow*, 3 M. & S. 512, an act of parliament, (54 G. 3, c. 168) had passed, to remedy the inconvenience and mischief which might have occurred in consequence of the decision of *Wright v. Wakeford*, 4 Taunt. 213, and the other cases: that act had only a retrospective effect: but, if cases similar to *Wright v. Wakeford*, 4 Taunt. 213; and the other cases, [*12] were now to be considered, that act of parliament might be contended *to operate as a legislative declaration that those cases were rightly decided. But, though the act was mentioned in *Wright v. Barlow*, 3 M. & S. 512, it did not draw forth any opinion from the Court that it had the effect of such a legislative declaration.

But there is another class of cases, where the attestation has been general, as in the case here, and their application to the present case must now be considered.

In the case of *Moodie v. Reid*, the Vice-Chancellor, 1 Mad. 516, directed a case to be sent for the opinion of the Court of Common Pleas, which was done, and the case is reported in 7 Taunt. 355. By a marriage settlement, trustees were to stand possessed of certain moneys, in trust for such persons, and for such intents and purposes, and in such manner, as Sarah Crowther, by any deed or instrument in writing to be by her sealed and delivered in the presence of two or more credible witnesses, or by her last will and testament in writing, to be by her signed and published in the presence of, and attested by two or more credible witnesses, should direct or appoint. The execution of the power was by the will of Sarah Moodie, who, after expressing a hope that no means would be taken to set aside her bequests, even though it should be found that due forms were wanting to render them properly valid according to law, concluded thus:—

“These my last bequeaths signed by me this 4th day of February, 1812.

SARAH MOODIE.

Witness A. B.

C. D.

*The two witnesses to the will were examined, and stated that Sarah Moodie signed or subscribed her name in the presence of the witnesses: [*13] and one of them further stated that, from what Sarah Moodie said in her presence and hearing on that occasion, the deponent understood that the paper writing was her will: and another witness said that, from the expressions made use of by the said Sarah Moodie at the time of her signing the said writing, she understood that such writing was the will of Sarah Moodie. The question was, whether this will was a due execution of the power? Lord Chief Justice GIBBS makes some remarks upon this case: he says, “here the power is to be exercised by a will signed and published. Therefore there must be some publication here: the will must be signed, published and attested: and there must therefore be some attestation here, of signing and publication.” He goes on to add, “Though the most respected late Chief Justice of this Court differed from the other Judges in *Wright v. Wakeford*, 4 Taunt. 213, it is established by that case, that the witnesses must attest everything that is necessary for the execution of the power. Here the witnesses have clearly attested the signing; the question is, whether they have attested the other formality, of publication, in attesting the signing. If the act of the testatrix in calling on the witnesses to attest her will, be a publication of it, then their attesting that she signed it, attests her publication also, because they attest that by which she publishes it.”

In that case, on a general form of attestation, the power was held not to be well executed. But, from the *language of the Chief Justice GIBBS, it seems as if the decision had been on the ground that, in fact, there was [*14] no publication, which the power required; but, if there had been in fact a publication, the general form of attestation would have been sufficient. At the same time, however, taking the actual decision and the reasons altogether, we think that it does not lead us to any clear conclusion as applicable to the present case.

Having cited this case, we feel that we ought to notice an opinion expressed by Lord Chief Justice GIBBS, that “a will,” as such, requires no publication. He says, “be publication what it may, a will may be good without it.” The opinion thus expressed, of so very eminent a judge as Lord Chief Justice GIBBS, and more particularly when he called on the bar to say what publication was, and he did not wonder that he had no answer, might certainly be taken to imply that such was the law. We do not at all say whether we think it is law or not, but only that, having cited the case, we do not mean to be taken to acquiesce in that opinion, and we leave the matter as it was before that opinion was expressed.

The next case of a general attestation is that of *Stanhope v. Kier*, 2 Sim. & Stu. 37. The power was for Eugenia Stanhope, “by her last will and testament in writing, or any codicil or codicils to the same, signed and published by her

in the presence of and attested by three or more credible witnesses," to appoint, &c. The execution of the power was by a will in the following amongst other words:—

"I Eugenia Keir, formerly Eugenia Stanhope, hereby give and bequeath all that," &c. &c. ; "and this is my *last will and testament, made and signed in the year of our Lord 1818, on the 19th day of November," &c.
(Signed) EUGENIA KEIR (L. S.)

In the presence of" A. B.
C. D.
E. F.

To a bill filed to have a declaration made as to the property, on the ground that the will was not executed according to the power, the defendant pleaded the will, and set forth the will and attestation, and averred that the will was signed and published in the presence of and attested by three witnesses, &c. &c. On the argument for the bill it was insisted that the appointment was not duly made by the will. It was admitted that the power required that the witnesses should attest the signing and publishing of the appointment, but insisted that the declaration with which the will concluded was in effect a publication, as well as a signing, and that the witnesses, by adding their names to this declaration, attested both facts. The Vice-Chancellor, Sir JOHN LEACH, said he could not assume more from the attestation than that they saw Mrs. Keir sign the instrument, and overruled the plea.

Whether or not we entirely agree with the Vice-Chancellor's observations in this case, we must remark that though the attestation was general, it immediately follows, and may be taken as adopting, a statement by the testatrix that the will was signed by her, not signed and published, in the terms of the power.

It is to be observed that Sir JOHN LEACH was the Master of the Rolls who decided *Buller v. Burt*, which we are now about to mention.

[*16] In the case of *Buller v. Burt*, which was heard before *the Master of the Rolls (Sir JOHN LEACH), on the 25th of February, 1829, which is not reported, but a copy of which case has been furnished to us, Mrs. Louisa Smith, a married woman, being by settlement empowered to dispose of certain personal property by any deed sealed and delivered in the presence of and attested by two or more credible witnesses, executed an instrument purporting to be a disposition of part of that property in favor of the defendant Burt. This instrument concluded with the following words:—

"Signed and sealed at Cotton aforesaid, this 13th day of September, in the year of our Lord 1813, by L. Smith, (L. S.)

Witness,

JOHN H. BURT.
HANNAH BOWLES."

The plaintiffs by their bill alleged that the instrument of the 20th of September, 1813 had never been delivered, and that even if it had been delivered, it was not a due execution of the power. The defendant Burt, who claimed under the appointment, swore that he believed that the instrument had been delivered by Mrs. Smith to his father J. H. Burt, among whose papers it had been found. The only question argued at the hearing was, whether the instrument was a due execution of the power?

The Master of the Rolls (Sir JOHN LEACH), said, "the attestation of the witnesses being considered a part of the appointment, it must follow that when the words, '*witnesses*,' without more, is used in the attestation, it affirms that all has been done in the presence of the witnesses which is stated in the body of the deed. Here, in the body of the deed, it is stated to be signed and sealed, but [*17] it is not stated to have been delivered; *and, as the general word '*witnesses*' can affirm no more than the deed states, there is in this case no attestation of that essential part of that which is required for the due execution of the power, the delivery of the deed; the power therefore is not well

executed." The Master of the Rolls goes on to say, "the case of *Moodie v. Reid*, 1 Mad. 516, 7 Taunt. 355; is in principle a complete authority for this decision. He adds, "the difference in circumstances between the two cases is, only, that there the word 'published' was omitted in the body of the deed, and here the omission is of the word 'delivered.'"

In this case, therefore, the general form of attestation was held not sufficient to make the instrument a good execution of the power; but the reason is very satisfactorily explained in the judgment of the Master of the Rolls, in which judgment we fully acquiesce.

The latest reported case on this subject is *Ward v. Swift*, 1 Cr. & M. 171; S. C. 3 Tyrwh. 122. And there, under indentures of lease and release, a power was given to Mary Swift to appoint, as she by any deed, &c., or by her last will and testament to be by her duly executed and published under her hand and seal, in the presence of, and to be attested by, three or more credible witnesses, should direct, limit, or appoint, &c. And, on the 5th of August, 1801, the said Mary Swift signed, sealed, and delivered, as and for her last will and testament, an instrument, of which the signature and attestation are as follows:—

"In witness whereof I have set my hand and seal hereto, this 5th day of August, A. D. 1801, in the presence of the under written.

MARY SWIFT." (L. S.)

"*Signed, sealed, and delivered, this 5th day of August, 1801, as the last will and testament of the said testatrix, Mary Swift, who, in her [*18] presence, and in the presence of each other, have put our names as witnesses thereof.

H. F.

I. G.

R. F."

On the trial of an issue, the jury found that Mary Swift signed, sealed, and delivered the instrument as her last will and testament, in the presence of the three witnesses who attested the execution. The Court of Exchequer, on a case reserved, certified that it was a due execution of the power. The main question seems to have been, whether there was a publication of the will. This case was much relied upon for the defendants. We do not feel that it operates farther than to show that the precise words of the power need not be pursued in the attestation, but that an attestation containing equivalent words may be good.

Here the power requires that the will should be signed, sealed, and published, in the presence of, and be attested by, three or more witnesses. The will, on the face of it, has all the requisites which the power requires. It purports to be published, and to be signed and sealed; and the attestation is a general one, and which we are of opinion, in the language of the Master of the Rolls in *Buller v. Burt*, ante, p. 15, affirms that all has been done in the presence of the witnesses which is stated in the body of the instrument. And, therefore, upon the form of the instrument, we are of opinion that it is a good execution of the power.

*Our principal remarks hitherto have been on the attestation; but, [*19] besides the attestation, it is necessary to have the fact proved by evidence, that it was signed, sealed, and published, in the presence of three or more witnesses.

We before stated that the depositions were objected to, on the ground that depositions, taken under the circumstances these were, could not be received in evidence; and also that, one of the subscribing witnesses being alive, that witness ought to have been called, notwithstanding the case of *Wright v. Doe dem.* Tatham, 1 A. & E. 3; but we said these objections were immaterial for the reasons we should afterwards, and which we now, give.

The will is more than thirty years old, and therefore proves itself, without calling any witnesses, even were they all alive.

But then, on the will being put in, it must appear to be witnessed in such a way as proves that, on the face of it, it was regularly executed according to the power; and, as we are of opinion that the attestation goes the whole length, as far as the mere attestation goes, that all the requisites of the power were complied with, it therefore purports, on the face of it, to have been executed with all the requisites, and it then becomes an instrument which proves itself, just as much as any other instrument of that age, whether deed, or will, or other instrument, proves itself.

Something was said in argument respecting the Statute of Frauds, which requires all devises of lands to be in writing, and signed by the party so devising the same, or by some other person in his presence and by his express directions, and to be attested and subscribed in the presence of the said devisor by [*20] three or more credible *witnesses; and there is no doubt whatever but that an attestation in the present form would, both on principle and decided cases, be sufficient to satisfy the words of the Statute of Frauds. All that the statute requires to be done by the testator himself is, that he should sign the will; and one may call that the statutory power or direction; and then, if it be in fact signed and witnesses put their names as witnesses to a document with the signature before their eyes, and that is all that the statute requires them to attest, no doubt, one would suppose, could ever be entertained that that was an attestation of the signing. But, as the power in this case requires other things to be attested besides the signing, we think it requires more discussion and consideration than would arise on the Statute of Frauds; and therefore, though, as far as it goes, the attestation under the Statute of Frauds may assist the decision, something more is requisite to enable us to come to the conclusion we have done.

The special case presents other points for our consideration, as to the effect of the proceedings in the Court of Chancery and the copyhold court, and the fines. But, in the view we have taken of the case, those points need not be noticed.

Upon the whole of the case, we are of opinion that there must be judgment for the defendants.

The same question that we have been considering arises also in the case of Doe dem. Spilsbury and another v. Skyner and others; and in that case also there must be judgment for the defendants.

Judgment for the defendants in each case. See *Pearse v. Morrice*, 2 A. & E. 84.

[*21] *WILLIS and Another, Assignees of NORCLIFFE, a Bankrupt, v. The Governor and Company of the Bank of ENGLAND.

Giving cash for a bank post bill is a payment within the protection extended by stat. 6 G. 4, c. 16, s. 82, to "all payments really and bona fide made" to any bankrupt before the commission.

N. committed an act of bankruptcy, and on the same day absconded with two £500 bank post bills drawn in London, payable to himself, which he afterwards endorsed in blank. At Gloucester, where a branch bank of the Bank of England is established under stat. 7 G. 4, c. 46, s. 15, he delivered the bills to S., saying he wanted gold for them. S., who was known at the branch, delivered them to the agent there, and received £1000 in gold, first endorsing them, at the agent's desire, to the Governor and Company of the Bank of England. S. paid over the whole £1000 to N., having no interest in the bills, and having acted merely as his friend and agent. The commission had not then issued. Neither S. nor the bank agent knew of the act of bankruptcy. The bills were sent to the Bank of England from the branch, uncanceled. The practice at the branch banks, when bills are changed there, is, to take an endorsement and send them up uncanceled: Held,

First, that the delivery of the £1000 to S. for the bills was a transaction between the Bank of England and N. the bankrupt, by their respective agents.

Secondly, that the changing of the bills, whether considered as a purchase of them, or as a payment in discharge of the liability of the Bank, was not a valid transaction,

unless protected by sect. 82 of the Bankrupt Act, as a payment made without notice of an act of bankruptcy.

N. absconded (as above stated) March 12th. Application was made by solicitors on the 16th to the Bank of England, to stop the bills, describing them, and stating that N. had absconded with them. On the 8th of April the same solicitors again applied at the Bank to the same effect, and it was then stated that a fiat of bankruptcy against N. was expected by every post. The bills were changed at Gloucester, April 12th: Held, that there was sufficient notice to the Bank to take away the protection of 6 G. 4, c. 16, s. 82; and that such notice to the Bank operated as notice to the branch bank, a reasonable time having elapsed for transmitting it before the bills were received there from S.

TROVER for three bank post bills. Plea, the general issue. At the trial before ALDERSON B., at the Lancaster Spring Assizes, 1834, the plaintiffs had a verdict for £1500, subject to the opinion of this Court on the following case:—

Charles Norcliffe, before his bankruptcy, carried on trade at Liverpool as a dealer in zinc. On the 2d of March 1833, Messrs. Blackstock and Bunce, solicitors in London, received on account of the said C. Norcliffe £1600, which, on the same day, they paid to the Bank of England, and obtained from the Bank three bank post bills for £500 each (which are those in question), and one for £100, all dated March 2d, 1833, payable to *Norcliffe or his order, at [22] seven days' sight, and accepted by the Bank at the time they were issued.¹

On the same day, the bills were remitted by Blackstock and Bunce to Mr. Grace at Liverpool, then the attorney of Norcliffe, who on the 4th March paid them over to Norcliffe. On the 12th March, 1833, Norcliffe absconded from Liverpool, and committed an act of bankruptcy on that day. On the 16th, Messrs. Blackstock and Bunce, in consequence of instructions from Liverpool, applied to the Bank of England in London to stop the payment of the bank post bills, and informed the Bank that Norcliffe had absconded from his creditors with the bank post bills in question; whereupon an entry of such application was made by the defendants in their books in the following terms, which entry was seen at the time by the clerk of Messrs. Blackstock and Bunce who made the application:—

"Messrs. Blackstock and Bunce, 18 Serjeants' Inn, Fleet Street, solicitors, on behalf of Robert Grace of Liverpool, apply to stop payment of the four following bank post bills with which Charles Norcliffe of Liverpool has absconded, viz.

"No. M. 7040 to Charles Norcliffe £500."

(Similar descriptions were given of the other three bills.)

*On the 8th of April the bill for £100 was presented at the Bank by [23] a Mr. Graves; but payment was withheld, in consequence of the stop, on the indemnity of Messrs. B. and B., and the holder was referred to them; but they ultimately paid Mr. Graves the amount of his claim upon the £100 bill, and the Bank, with Graves's consent, paid the amount of the bill to Messrs. B. and B. as agents of Norcliffe's assignees. On the same 8th of April, the defendants were again informed by Messrs. B. and B. that Norcliffe had absconded with the bills, and were also told by them that the necessary documents for a fiat of bankruptcy against Norcliffe were then expected by every post, and they were again requested not to part with the £100 bill; and accord-

¹ The bills were in the following form:—

Bank Post Bill.

No. M. 7042.

London, 2d March, 1833.

At seven days' sight, I promise to pay this my sola bill of exchange to Charles Norcliffe, Esquire, or order, five hundred pounds sterling, value received of Messrs. Blackstock and Co.

Accepted, 2d March, 1833.

H. BRENT.

For the Governor and Company of the Bank of England.

T. NEEDHAM.

*500 T. S.

wd. E. R.

ingly the defendants withheld the payment on the said indemnity of Messrs. B. and B.

The said Charles Norcliffe was acquainted with a Mr. Smallridge, an attorney and proctor at Gloucester, who had transacted business for him as his attorney some time before, Norcliffe having formerly kept an inn at Stroud in Gloucestershire. Norcliffe, on the 12th of April, 1833, applied to Smallridge, and explained to him that he wanted £1000 in gold, to pay off a mortgage, in exchange for two of the bank post bills he then produced, which were two of the bills the subject of the present action.

Mr. Smallridge, on the same 12th of April, applied to the agent for the Bank of England branch at Gloucester for £1000 in gold, in exchange for the said two bank post bills. Smallridge was known to the agent, who gave him £1000 in gold in exchange for the two bills. Smallridge immediately afterwards handed over the £1000 in gold to Norcliffe. Smallridge was examined

[*24] *as a witness for the plaintiffs at the trial, and stated that he gave no value for the bills, and had no interest in them, but handed the whole amount of the proceeds over to the bankrupt without any deduction, and that he acted merely as the friend and agent of Norcliffe in the transaction. The two bills so changed at Gloucester were endorsed in blank by the bankrupt some time after the 12th of March, and before he delivered them to Mr. Smallridge, but at what precise period did not appear. On applying for change, Smallridge was required by the agent of the branch bank to endorse the bill, and he did so before receiving the cash, as follows:—"Pay the Governor and Company of the Bank of England. C. Smallridge." At the time of this transaction, Smallridge did not know that Norcliffe had absconded from his creditors or committed an act of bankruptcy.

The said two bank post bills were, in the usual course of business, remitted by the said agent of the governor and company of the Bank of England at Gloucester, to the Bank of England, on the 16th of April, 1833, and the governor and company gave notice thereof to Messrs. B. and B. by the following letter:—

"Secretary's Office, Bank of England, 17th April, 1833.

"Gentlemen—The bank post bills for £500 each" (mentioning the numbers and dates), "stated by you to have been embezzled, were this day presented at the Bank for payment; and, upon application at this office, you will be furnished with the particulars of the information collected as to the holder of the bills. The Governor and directors of the Bank of England cannot engage to withhold payment of the bills, unless they are furnished by *you (and [*25] that immediately) with evidence to impeach the title of the holder. I am," &c.

"M. B. SAMPSON."

The bills when remitted to London were not cancelled. Bank post bills changed at the branches are required to be endorsed, and are not cancelled at the branches. Such bank post bills frequently circulate about the country as cash for a very considerable period, and they have a great circulation.

On the 11th of April, 1833, the said C. Norcliffe applied to Messrs. Tugwell and Co., bankers at Bath, to whom he was known, having some time before had an account with them as bankers, to change the third bank post bill for £500 (No. 7041), also the subject of the present action. Tugwell and Co. gave him cash for the same; and Norcliffe thereupon endorsed the said bill in the banking-house of Tugwell and Co. and delivered it to them. Tugwell and Co. afterwards paid away the bill for value to Messrs. Smith and Moger of Bath, and they afterwards paid the same for value to one Lathbury. The case then stated various transfers of this bill for value, in the course of which (April 22d) it came a second time to the hands of Tugwell and Co. for value; was again paid away for value by them; and, ultimately, was paid (May 29th), by one W. Templeton, to a clerk of the Bristol Bank of England branch, as cash to be remitted to His Majesty's Exchequer, on account of the collection of the taxes; and the Bank

of England gave the Exchequer credit for the amount. The last-mentioned bill was remitted in the usual course of business, on the 31st of May, 1833, by the branch bank at Bristol to the said governor and company, who *there-upon gave notice thereof to Messrs. Blackstock and Bunce by a letter [*26] to the same effect as that already set forth.

On the 18th of April, 1833, a fiat in bankruptcy was issued against Norcliffe, under which he was duly found and declared a bankrupt, and the plaintiffs were duly appointed his assignees. And the case stated a demand and refusal of the three bills before action brought.

The question for the opinion of the Court was, whether the plaintiffs were entitled to recover the three bank post bills for £500 each, or any of them, from the defendants. The case was argued in last Trinity term.¹

Wightman for the plaintiffs. First, as to the bills changed at Gloucester. If they had been presented and changed at the Bank in London, the assignees might have recovered them. It was long since held, that endorsement by or on behalf of a bankrupt, after the act of bankruptcy, passed no property, *Thompson v. Frere*, 10 East, 418; *Pinckerton v. Adams*, 2 Esp. 611; and the law, since stat. 6 G. 4, c. 16, s. 82, is still the same, as against those who know, or have reason to know, that an act of bankruptcy has been committed. Here the Bank in London had such notice and accepted it, as appears by the transaction with Graves. It makes no difference that the bills were presented to the branch bank at Gloucester. Notice to the Bank in London was notice with relation to all the places where they carry on their business. Before stat. 7 G. 4, c. 46, it was doubted *whether the Bank of England could, lawfully, carry on the [*27] business of banking otherwise than under the immediate direction of the governor and company; and therefore by that act, sect. 15, the governor and company were empowered to authorize agents to carry on such business for them at any place in England, and to invest such agents with the requisite powers of superintendence.² Then, if they think proper to establish branches in several places, notice given at the Bank, the head office, is notice to the agents of the Bank at the branches, whether notice to the agents would be notice to the Bank or not. It may be said that there would *be an inconvenience to the Bank in obliging them to send a notice to all their branches, correspond- [*28] ing with the notice received at the establishment in London: but, if they have the benefit of carrying on business at several places, they must take it subject to that charge; and, on the other hand, it would impose an almost insurmountable difficulty on private persons to require that they should give such notice to

¹ June 5th. Before Lord DENMAN, C. J., LITLEDALE, PATTESON, and WILLIAMS, JR.

² Stat. 7 G. 4, c. 46, s. 15. "And to prevent any doubts that might arise whether the said Governor and Company, under and by virtue of their charter, and the several acts of parliament which have been made and passed in relation to the affairs of the said Governor and Company, can lawfully carry on the trade or business of banking, otherwise than under the immediate order, management and direction of the Court of Directors of the said Governor and Company; be it therefore enacted, that it shall and may be lawful for the said Governor and Company to authorize and empower any committee or committees, agent or agents, to carry on the trade and business of banking, for and on behalf of the said Governor and Company, at any place or places in that part of the United Kingdom called England, and for that purpose to invest such committee," &c., "with such powers of management and superintendence, and such authority to appoint cashiers and other officers and servants as may be necessary or convenient for carrying on such trade and business as aforesaid; and for the same purpose to issue to such committee," &c., "cashier or cashiers, or other officer or officers, servant or servants, cash, bills of exchange, bank post bills, bank notes, promissory notes and other securities for payment of money: provided always, that all such acts of the said Governor and Company shall be done and exercised in such manner as may be appointed by any by-laws," &c., to be made by the General Court of the Governor and Company, or, in the absence of such by-laws, by direction to be given as in that section is pointed out. "Provided always, that in any place where the trade and business of banking shall be carried on for and on behalf of the said Governor and Company of the Bank of England, any promissory note issued on their account in such place shall be made payable in coin in such place as well as in London."

the branches. They may not even know where such branches exist. In the case of a notice by carriers, notice to the principal has been held notice to the agent immediately employing the carrier; *Mayhew v. Eames*, 3 B. & C. 601. In *Porthouse v. Parker*, 1 Camp. 82, where a bill was drawn upon John Parker by Wood, as agent of the defendants George, James, and John Parker, and there was no proof of Wood's authority to draw, but the bill was accepted by an agent of John, on his account, Lord ELLENBOROUGH held that no proof of express notice of dishonor was necessary, as one of the defendants was an acceptor, and his knowledge was the knowledge of all. So here, in law, knowledge at the Bank was knowledge at the branches; if, in fact, notice was not sent to them from the Bank, it was negligence in the governor and company; and, if a loss is to be sustained by one of two innocent parties, he who has been negligent must suffer. The practice of the Bank, as stated in the case, cannot assist the defence, as the plaintiffs were not cognizant of it.

As to the third bill, it would be difficult to support the plaintiffs' claim, the bill having been presented by a person who had no notice of the act of bankruptcy, and who, therefore, would have been protected by sect. 82 [*29] of the bankrupt act, and might have maintained an action against the Bank if payment had been refused. As to that bill, therefore, the case is not pressed.

Maule, contra.—Unless the communications of Messrs. Blackstock and Bunce to the Bank can be considered a notice to the branch bank at Gloucester, the payment of the £1,000 to Smallridge on Norcliffe's account, by that branch, was protected by stat. 6 G. 4, c. 16, s. 82, as a payment *bonâ fide* made to the bankrupt, before the commission, by persons who had not, at the time of such payment, notice of the act of bankruptcy. The eighty-second section was introduced to mitigate the hardship of the former bankrupt law on the subject of payments to the bankrupt, and was an extension of former enactments for the same purpose. One of these was stat. 1 J. 1, c. 15, s. 14, upon which it was held, in *Wilkins v. Casey*, 7 T. R. 711, that a liberal construction ought to be put, Lord KENYON observing, that "the object of it was to protect certain payments made to a bankrupt, that common sense and justice required should be deemed valid payments, and in this instance to correct the rigor of the bankrupt laws." The giving of an acceptance, afterwards paid, was there held to be protected by the word "payment" in the statute. In *Hill v. Farnell*, 9 B. & C. 45; see *Baxter v. Pritchard*, 1 A. & E. 456, where a party had bought books of the bankrupt, a hop merchant, and paid for them after acts of bankruptcy, which, however, were unknown to the buyer, it was held that such payment was [*30] protected by sect. 82 of 6 G. 4, c. 16, although *the circumstances in that case were stronger in favor of the assignees, than in *Cash v. Young*, 2 B. & C. 413, which was relied upon for the defendant. Suppose, in the present case, the bankrupt himself had been known to the agent at the branch bank, and had got the bills exchanged by him, *Hill v. Farnell*, 9 B. & C. 45, would have been applicable. Whether the bankrupt had title to the notes or not, the payment of £1,000 for them by the agent was made *bonâ fide*, and in ignorance of the act of bankruptcy, and was therefore within sect. 82. The Bank, then, is not affected by the bankrupt's want of title to transfer the bills, but has a right to hold them, at least till the money given for them be repaid.

But further, this was not a transaction immediately between Norcliffe and the branch bank agent. Smallridge had no notice of the act of bankruptcy; he took upon himself to pay Norcliffe for the bills; that payment, when made, would be protected by sect. 82 of the Bankrupt Act; and if Smallridge, in consequence, had a good title to the bills, so had the branch bank, to which he transferred his right. [PATTERSON, J. Smallridge did not give a farthing for the bills. You assume that the plaintiffs could not have recovered them back if they had continued in his hands; but it is clear they could.] If he paid for the bills it is immaterial, as to the operation of the statute, how he was enabled to do so, or whether he handed them over or kept them. The agent at the

branch bank gave the £1,000 as a payment to him, he professing to give title to the bills; and if he could not give title, he is liable to the Bank of England. The delivery of the bills by Smallridge was not a presenting for payment: the transaction *was, that a party, happening to be known at the branch bank, obtained the accommodation of sovereigns for paper. Bank post [*31] bills, drawn in London, it is well known, are payable there only. In general, bills or notes, made payable by a corporation simply, are not payable wherever that corporation has an agent: the bill, even of an individual, is not payable in any place where his agent happens to be, unless the agent be there for the purpose of making payments. And, as to the Bank, the act 7 G. 4, c. 46, s. 15, directs that promissory notes issued at any branch shall be made payable in coin there, but makes no provision for the payment in coin of London bank post bills at the branches: it may, therefore, be concluded that the bank need not pay gold at the branches for such bills. If payment could have been demanded at Gloucester, Norcliffe, though unknown, might have applied for it himself. The bills were not cancelled as paid bills. There is nothing in the case to show that this branch had authority to pay them. [PATTESON, J. Smallridge in his evidence, declared that he had no interest in the bills, but acted merely as the friend and agent of Norcliffe.] That was but his own opinion as to the legal effect of the situation in which he was placed. In one sense he had no interest; but he had an interest at least as the holder of a negotiable security.

The case may be put on a ground independent of stat. 6 G. 4, c. 16, s. 82. There bills have been considered, on the part of the plaintiffs, as if they were an ordinary chattel, over which the holder can only give such right as he himself has, unless there has been a sale in market overt. But in the case of negotiable instruments, especially these, which pass like the currency *of the country, the party taking has a good title, independent of the right of [*32] the party transferring. A doctrine has indeed prevailed, that the person taking a negotiable instrument must show that he used such caution as a prudent man acquainted with business would exert; but this gave rise to many complicated questions, and the law has now nearly reverted to the old rule, which was that of certainty and convenience, that the *bona fide* holder of a negotiable instrument for value is entitled as against every one. It would probably be considered now, if the precise point arose, that the real question was *bona fides*: this may be inferred from the language of the Court of Exchequer in *Foster v. Pearson*, 1 Cro. M. & R. 855; S. C. 5 Tyr. 262, and from late dicta of learned Judges at Nisi Prius. It was held, in *Crook v. Jadis*, 5 B. & Ad. 909; and see *Backhouse v. Harrison*, 5 B. & Ad. 1098, that, to impeach the holder's title, gross negligence must be shown; but the question of gross negligence would probably be considered as part of the question of *bona fides*. [Lord DENMAN, C. J. It would, perhaps, be more correct to say that the same facts might raise the presumption of gross negligence or that of fraud. The facts might show a determination to wink at anything.] In the present case, the instruments being negotiable, a good title might be taken, though from a party having a bad one.

Then as to the notice. The stopping of payment at the bank is not a duty, but an accommodation rendered to the public. Here the first transaction relied upon as a notice (March 16th) had reference merely to the stopping of payment. It was, at all events, not a *notice of an act of bankruptcy. [LITTLE-DALE, J. The notice stated that Norcliffe had absconded from his creditors, and with bills payable to himself.] The application was made by Blackstock and Bunce on behalf of Grace, but without showing who were the parties claiming, or by what title. Neither was the communication of April 8th a notice, specifically, of an act of bankruptcy. To bind the rights of parties who might be interested, it should have been precise, and have pointed to some act of bankruptcy committed at some particular time. But, supposing that this was a good notice, it was not a notice throughout England. "Notice" in sect.

82 of the bankrupt act means knowledge. A party is not bound to use diligence to obtain it; nor is the Bank obliged to give it at all the branches. If notice is given to a wholesale house by assignees, or a party robbed, not to take particular bills, the house will take such bills at their peril: but are they bound to write by the next, or by what post, to all their agents? The party robbed, or the assignee, must look after his own interests, and give the proper notices himself. [PATTESON, J. The case here is rather more favorable to you than that of a private house or an individual, because there the party wishing to stop the bill could not so well be expected to know who were the agents.] Here it is true that the Bank is the party liable to pay, but the agents are not agents *ad hoc*; and an individual, in such a case as this, would not be bound to give notice to an agent who was not employed as such for the purpose of making payments. [PATTESON, J. The agent at Gloucester paid the amount of the bills and took a special endorsement. He might not be bound to do this, but the case does not state that he exceeded his authority.] The whole transaction [*34] *shows that this was not a payment of the bills by the Bank. They took them as part of the ordinary currency of the country. The bills were handed over to the branch bank, and money given in exchange, on the credit of Smallridge who endorsed them. [PATTESON, J. Did you ever hear of the acceptor of a bill taking it from the holder, otherwise than as paying it?] This was as if the agent of a banker, in collecting debts, took one of his employer's notes among other money. The cases of notice to one of several partners do not apply, because each partner authorizes every other to act for him in the business to which the notice relates. The practice of giving such notices to the branch banks as are here insisted upon would be of little use, because the bills circulate as currency without being carried to the banks; and it would be very inconvenient if the branch banks had to run the risk of stopping every bill of which notice had been given to the bank in London, till a letter could be written to London and the answer received. The desire of a party, that payment should be stopped, does not give an authority to stop, as against a *bond fide* holder.

Wightman in reply. Stat. 6 G. 4, c. 15, s. 82, and the case of *Hill v. Farnell*, 9 B. & C. 45, may apply to the third bill; though before the last bankrupt act it might have been contended, on the authority of *Bishop v. Crawshaw*, 3 B. & C. 415, that the assignees were entitled to recover, even for this. As to the other two. It is said that the transaction at Gloucester was merely a giving of money in exchange for bills, on Smallridge's credit. But the bills [*35] were presented *to and paid by an agent of the bank. He claimed nothing for commission. If it had been a purchase, he would not have given the full value in gold. The endorsement was as a receipt; and it was made to the Governor and Company of the Bank of England, not to any intermediate party. [PATTESON, J. If the agent had wished to circulate it again, he must have endorsed in the name of the bank, which was the acceptor.] Smallridge here was a mere messenger, like the defendant in *Coles v. Wright*, 4 Taunt. 198. See *Shaw v. Batley*, 4 B. & Ad. 801. It is said that the Bank was not liable to pay these bills at the branches; but these are instruments which may be presented for payment anywhere; and, if payment is in fact made at one of the branches, though unnecessarily, it makes no difference where the bill is cancelled. Supposing the case to be within Sect. 82 of the bankrupt act, there was here sufficient notice of an act of bankruptcy. No formal notice is necessary: it is sufficient if the facts are made known; and they were so here by the two communications of Messrs. Blackstock and Bunce, the last referring to the first. The trouble which the defendants would have in giving notice to the branches cannot alter the legal duty. If they are not bound to do so, they need not, if they had only one branch establishment. [LITTLEDALE, J. If it would be inconvenient to an individual to send notices to the branch banks, it would also be a great inconvenience to the bank to send such notices

with all the requisite particulars.] The bank post bills drawn in London need not be paid at the branches at all. But the bank in this case might easily have sent word to the branches, if any bills came endorsed by Norcliffe, not to pay them; or at least not to *go out of the ordinary course in paying them. [*36]

[Lord DENMAN, C. J. The bank are strangers to the party giving the notice to stop. What duty do you say that notice imposes on them?] It is a warning both to them, and to their branches, that if they pay such a bill they do so at their peril. It is asked by what post the notice ought to be forwarded to the branch banks? In this case, it is sufficient to say that at any rate a reasonable time for sending the notices had elapsed. *Cur. adv. vult.*

Lord DENMAN, C. J., in this term (Nov. 23d), delivered the judgment of the Court.

This was an action of trover to recover three bank post bills for £500 each, all of which were in the possession of Norcliffe, the bankrupt, at the time when he committed an act of bankruptcy by absconding on the 12th of March, 1833, and all of which he disposed of after the act of bankruptcy, and before the issuing of the fiat for the commission, which took place within two months from the act of bankruptcy, viz., on the 18th of April.

On the 16th of March notice was given to the Bank of England, in London, that the bankrupt had absconded from his creditors with the bills. And on the 8th of April further notice was given to the Bank of England, in London, that the necessary documents for a fiat in bankruptcy against Norcliffe were expected by every post.

One bill was passed by the bankrupt on the 11th of April to Messrs. Tugwell & Co., bankers at Bath, who gave cash for it, and from them it passed through several other hands, and, ultimately, came to the Bank of *England [*37] branch bank at Bristol, on the 29th of May, 1833.

Messrs. Tugwell & Co., had no notice of any act of bankruptcy committed by Norcliffe, and, with respect to the bill passed to them, the only question is, whether the case comes within the 82d Section of 6 Geo. 4, c. 16, as a payment *bonâ fide* made to the bankrupt, and, therefore, valid. Now, the cases of *Cash v. Young*, 2 B. & C. 413, and *Hill v. Farnell*, 9 B. & C. 45, have established the position, that a purchase of goods for ready money paid at the time comes within that section; and we see no reason why the taking a bank post bill for which cash is given at the time should not be equally within the same section. Messrs. Tugwell & Co., therefore, acquired a property in the bill, and could pass the same to others: it follows, that the plaintiffs cannot maintain this action as to that bill: and, indeed, that point seems to have been conceded in the course of the argument.

The other two bills were delivered by Norcliffe endorsed in blank to Mr. Smallridge at Gloucester, on the 12th of April, in order that he might obtain cash for them from the Bank of England branch bank at Gloucester, Mr. Smallridge being acquainted with the agent of the Bank of England there. Smallridge obtained cash for the bills from the branch bank, and, by direction of the agent there, endorsed the bills, "Pay the Governor and Company of the Bank of England. J. Smallridge." Smallridge, however, was merely agent for Norcliffe, to whom he immediately handed over the cash, and had no interest of any kind in the bills: he had no notice of any act of bankruptcy committed by Norcliffe, nor had the agent at Gloucester.

*It is contended, and we think rightly, that these bills were not presented for payment to the branch bank; for, though the 7 G. 4, c. 46, [*38] s. 15, requires that bank post bills issued by the branch banks shall be payable there, as well as in London, yet the converse is not enacted, and bank post bills issued in London are not payable at the branch banks. They were presented, as they might have been to any other bankers, asking for change. Still the question is, to whom were they presented and delivered at Gloucester? and the answer is undeniable, that they were presented and delivered to the Bank of

England (the defendants) at Gloucester, not to the individual who was their agent there, as an individual. The Bank of England carry on the business at Gloucester by the agent, who, in the terms of 7 G. 4, c. 46, s. 15, was carrying on the banking business there "for and on behalf of the said governor and company:" the money paid for the bills was the money of the Bank of England, and the bills were endorsed to the Bank of England. The transaction at Gloucester took place therefore between the defendants by their agent on the one hand, and Noreliffe by his agent (Smallridge) on the other. Independently of the eighty-second section of 6 G. 4, c. 16, no property in the bills would pass to the defendants from Noreliffe, on account of the previous act of bankruptcy. And the payment by the defendants to him, whether made by way of purchase of the bills, or by way of discharging their liability as acceptors, can only be protected under the eighty-second section, provided they had no notice of any act of bankruptcy committed by him.

This reduces the case to the question, what was the effect of the notices given [39] to the Bank of England *in London? We are clearly of opinion that those notices, taken together, even if any doubt could be raised as to the first, amount to notice of an act of bankruptcy committed by Noreliffe. The general rule of law is, that notice to the principal is notice to all his agents, *Mayhew v. Eames*, 3 B. & C. 601; at any rate, if there be reasonable time, as there was here, for the principal to communicate that notice to his agents, before the event which raises the question happens.

Considering that direct notice was in this case given to the defendants themselves of the bankruptcy of the holder of the bills, we steer clear of the doctrine (lately much disputed) of negligence or imprudence in the party receiving negotiable instruments for consideration, and without fraud.

We have been pressed with the inconvenience of requiring every trading company to communicate to their agents everywhere whatever notices they may receive; but the argument *ab inconvenienti* is seldom entitled to much weight in deciding legal questions; and, if it were, other inconveniences of a more serious nature would obviously grow out of a different decision.

For these reasons we are of opinion that the plaintiffs are entitled to recover the value of two of the bills in question, but not of the third; and the verdict must be reduced to £1000.

Verdict to stand for £1000.

[40]

*The KING v. The Inhabitants of WOKING.¹

By a local act, the soil of a river was vested in trustees of a navigation, who were to receive the profits of such navigation, and apply them in the first instance in repairs and amendments, and in keeping the river navigable, &c. By the same act, confirming certain articles of agreement, it was provided that M. should receive, out of the profits of the said navigation, so much for every ton, &c., navigated on the river, and that D. should receive so much for every ton navigated on the said river within his own land situate in the parish of S. And that the trustees should pay to the persons to whom any shares of the profits should be allotted, in the manner provided by the act, such respective shares yearly, after deducting the costs of repairing and amending the premises, and executing the trusts. Satisfaction for damages to lands, &c., by cutting passages or heightening the waters, was to be paid by the trustees out of the profits of the navigation, before the persons entitled to shares of the profits should receive such shares.

Tolls were taken as follows:—On vessels using the whole line of the navigation, 4s. Between a certain point above the parish of W., and the beginning of W., 8s. From the beginning to the end of W. (and to a point below), 2s. 6d. From thence to the lower end of the navigation, 2s.: Held,

1. That the poor-rate payable by the trustees for the part of the navigation in W. was to be estimated, not by the increase of toll taken within W., but by a mileage calculation, the gross amount of toll upon any voyage including W. being distributed evenly over the line travelled, and the amount payable by W. being calculated by the pro-

¹ See *Rex v. The Earl of Portmore*, 1 B. & C. 551.

portion which the length of navigation in W. bore to the whole of the line travelled, whether the voyage extended over the whole length of navigation, or a part of it, including W.

2. The expense of repairs being equal through the whole line, that the amount of such repairs was to be deducted on a like mileage calculation.
3. That, in estimating the rateable profits, the compensations to M. and others were not to be deducted. And this, even in the instance of compensation for injury to a mill situate within the parish of W.
4. Also (on the assumption that lands in W. were rated at rack-rent and no more), that ten per cent. was to be deducted from the rateable amount, for the tenant's profit.

By a rate for the relief of the poor of the parish of Woking in Surrey, the Earl of Portmore and John Stephen Langton, Esq., were rated, as proprietors of the river Wey navigation, on £325, at the sum of £16 5s. They appealed to the sessions on the grounds, that they were not liable to be rated, and that they were overrated, and the sessions allowed the appeal, subject to the following case.

By stat. 22 & 23 Car. 2, c. 26, private, "for settling and preserving the navigation of the river Wey," the river was declared navigable, and the soil of the *river, and so much of the banks as extended on any side of any cut made since 1650, and the locks, sluices, towing-paths, wharfs, &c., were [*41] vested in trustees, who were "to receive the profits of the said navigation, and apply them in the first place in and towards the reparation and amendments of the said river, banks, sluices, dams, tumbling bays, and premises, used for and in order to the navigation of the said river, and for making and continuing the same navigable, and for servants' wages to be by them employed in and about the premises, and for the management thereof," and to dispose of the residue as was after directed; and they were authorized (under certain restrictions) to remove, alter, and amend all impediments, &c., to the navigation.

By the same act, confirming certain articles of agreement, it was provided that Lord Montagu, his heirs, executors, &c., "should receive out of the profits of the said navigation 2½d. for every ton, chaldron, or load navigated on the said river;" that Thomas Dalmahoy, his heirs, executors, &c., should receive 4d. for every ton, chaldron, or load navigated on the said river within his own land, situate at Depdeene, in the parish of Stoke, next Guildford, besides £20 per annum for a wharf, situate in the same parish; and that the corporation of Guildford should receive 1d. for every ton, &c., navigated on the said river or any part thereof. And that the trustees "should pay to the person or persons to whom any share or shares of the profits of the said navigation should be allotted respectively, in the manner provided by the said act, and his or their heirs and assigns, such respective parts and shares of the clear and neat profits of the said navigation yearly and every year *for ever, after deducting of [*42] the costs, charges, and expenses of the repairing and amending of the said premises, and executing the trusts in the said trustees reposed." And further, that certain recompense and satisfaction should be appointed, to be paid out of the profits of the navigation to any person who had received damage in his lands or tenements by the cutting of passages or heightening of waters in order to the navigation of the river; and that the satisfaction so allotted should be paid out of the profits of the navigation, before the respective persons to whom such shares of the profits of the said navigation should be allotted should be admitted to receive their respective shares of the said profits.

The act provided that the river should not be navigated without the leave of the trustees, and empowered them to take from the owners of vessels "passing upon the river or any part thereof, the sum of 4s. for every chaldron of coals, and 4s. for every load or ton of corn," &c., and so after that rate for a greater or less quantity. The following tolls have been fixed by the present trustees :—

			s. d.
"Between Guildford Wharf and the river Thames,	-	-	4 0
Between Depdeene Wharf and the river Thames,	-	-	4 0

	s.	d.
Between Stoke and the river Thames, - - - -	3	6
Between Bowers and the river Thames, - - - -	3	0
Between Triggs, or Send Heath, and the river Thames, -	1	6
Between Newark and the river Thames, - - - -	2	0

And so on according to the distances, with similar rates, decreasing in the same proportion, from the Thames to Guildford.

[*43] *Triggs is in the parish of Woking, and Send Heath is in the parish of Ripley;¹ and that part of the navigation which is in the parish of Woking extends from a spot between Bowers and Triggs to a spot between Triggs and Newark. If the increased toll is considered to be earned for the use of the navigation between the points above named, then the sum of 3*d.* per ton is payable in respect of that part of the navigation situate in the parish of Woking.

There are no toll-houses or paying-places on the river, but the entire tolls for the whole navigation performed are paid at once.

The whole length of the navigation is 27,060 yards: the length in Woking parish 4049 yards.

Upon an average of the last three years,

The gross receipts for the tonnage upon the navigation
are, - - - - - £5923 16 10

Gross receipts, deducting for tonnage not passing through
Woking, - - - - - 4705 12 6

The latter sum is made up of

Receipts of the thorough trade (going the whole line of
navigation), - - - - - 4311 13 1

The short trade passing through Woking, - - - - - 393 19 5

£4705 12 6

[*44] The share of Woking in the gross receipts for the whole
tonnage of the *navigation, upon a mileage calculation, is - - - - - £886 9 11

Share in such gross receipts, deducting for tonnage not
passing through Woking, upon a mileage calculation, 688 14 2½

That is,

Woking's share of the thorough trade, - - - - - £630 5 4½
of the short trade, - - - - - 58 8 9½

The share of Woking in the tolls upon a calculation of
3*d.* per ton, being half the 6*d.* rise for Triggs and
Send Heath, according to the scale set forth in the
case, for every ton passing Woking, is - - - - - £309 0 0

Then followed an estimate (on the same average of three years) of

The general expense of the navigation, exclusive of com-
pensations, - - - - - £2566 19 4

The compensations, viz.: to Mr. Dalmahoy, to the Cor-
poration, to Lord Montagu; and for mills (one only
in the parish of Woking); amounting in the whole to 1226 3 0

The expenses of the navigation in Woking were stated to equal the expenses
in the other parts of the navigation, regard being had to comparative length.

The share of Woking in the whole expenses, exclusive
of compensations, on a mileage calculation, was stated
at - - - - - £384 2 10

¹ On the side of the river Wey opposite to Woking.

*Share in the compensations, on the like calculation, -	£183	9	10	[*45]
The net income of the navigation, on an average of three years, is -	-	2230	14	
The share of Woking in the net profits, upon a mileage calculation, without deduction, -	-	333	16	10
Ten per cent. would be a reasonable deduction from the net income for tenants' profit, leaving -	-	2007	13	1
Share of Woking after such deduction, -	-	300	8	10

The questions for the opinion of this Court were,—First, whether the sum in which the appellants are liable to be rated by Woking is to be ascertained by the proportion which the length of the navigation in Woking bears to the whole length thereof; and, if so, what deductions are to be made from that sum:

Secondly, whether the sum in which the appellants are to be rated, is to be ascertained by the amount of tonnage on all goods carried through Woking, at the rate of 3*d.* per ton; and, if so, what deductions are to be made from that sum.

If the Court should adopt the first mode of ascertaining the amount of rate, the appellants claimed to make the following deductions from the amount (£886 9*s.* 11*d.*) stated as the share of Woking in the gross receipts for the whole tonnage upon a mileage calculation.

1. Tonnage not passing through Woking (thereby reducing the share, as before stated, to £688 14 <i>s.</i> 2½ <i>d.</i>), -	-	-	-	[*46]
	-	£197	15	
*2. Share in the general expenses on a mileage calculation, excluding compensations, -	-	384	2	10
3. Share in compensations, on the same calculation, -	-	183	9	10

The last two sums were to be deducted from £688 14*s.* 2½*d.* And from the residue, after such deduction (£121 1*s.* 6½*d.*), the appellants claimed further to deduct,

4. Tenants' profit, 10 per cent., -	-	£12	2	0
Leaving, as the sum on which the appellants were to be rated, -	-	108	19	6½

If the Court should adopt the second mode of ascertaining the amount of rate, and should hold that the gross receipts applicable to Woking were to be calculated at 3*d.* per ton on all goods carried through Woking, the appellants claimed to make from the sum produced by such calculation the second, third, and fourth of the above deductions: in which case the deductions would exceed the receipts. The respondents denied that any of the above deductions could be made.

This case was argued in Hilary and Easter Terms, 1835.¹

Thesiger, Clarke, and M. Chambers, in support of the order of sessions. First, the rate is to be ascertained by the amount of tonnage on all goods carried through Woking, at 3*d.* per ton. It was settled by *Rex v. Milton*, 2 B. & Ald. 112, *Rex v. Palmer*, 1 B. & C. 546, and *Rex v. The Earl of *Portmore*, 1 B. & C. 551, that the proprietors of a navigation are rateable in every parish through which it passes, in respect of their land covered with water, there situate, and used for such navigation; and they are rateable in each parish in proportion to the profit which their land, within that parish, used in the navigation, produces: *Rex v. Kingswinford*, 7 B. & C. 236; *Rex v. Lower Mitton*, 9 B. & C. 810. Where the profits are equal throughout the line of navigation, the amount to be levied in any particular parish may be ascertained by the proportion which the length of navigation within the parish bears to the whole line; but, if they are unequal, the rate must be regulated by the amount of

¹ January 24th, before Lord DENMAN, C. J., LITLEDALE and WILLIAMS, Js.; and (the argument having been adjourned) April 25th, before Lord DENMAN, C. J., LITLEDALE, TROTTER, and COLERIDGE, Js.

profit within the parish. This principle was recognised in *Rex v. Chaplin*, 1 B. & Ad. 926. Here the rate of tonnage in Woking varies from that in other parts of the navigation; and therefore the assessment must be according to the amount of tonnage earned in that particular parish, which is 3*d.* per ton, if the 6*d.* paid on that part of the navigation which lies in Woking, and not paid below, be divided between Woking and Ripley. It is true that, according to this mode of assessment, the company will have no profits in Woking to be rated; but that cannot affect the principle of rating; and the parishes in which more is actually earned will gain the more.

Then as to the deductions. First, it is clear that the compensations to Lord Montagu and others must, by the local act, be made before the proprietors can receive any dividend. The compensations are the outgoings; they never come [*48] into the account of profits, but must be settled *before any rateable subject-matter accrues. If there were no profit more than sufficient to pay them, there would be no beneficial occupation. *Rex v. Liverpool*, 7 B. & C. 61. And, if these compensations are to be regarded as outgoings which would cause the property to let at a lower rent, they must be excluded from consideration in calculating the rate. *Rex v. The Trustees of the Duke of Bridgewater*, 9 B. & C. 68, *Rex v. Adames*, 4 B. & Ad. 61. The compensations are at no time any part of profits arising within the parish; they accrue in respect of the whole navigation; they have no necessary connexion with land anywhere, but are personal merely, and are like the tolls granted to the proprietors of Hunslet Mills, in *Rex v. The Aire and Calder Navigation Company*, 3 B. & Ad. 533. The cost of repairs must also be excluded, upon the principles laid down in *Rex v. Kingswinford*, 7 B. & C. 236, and according to the decision in *Rex v. The Oxford Canal Company*, 10 B. & C. 177. The propriety of deducting 10 per cent. (which the case states to be a reasonable proportion) for tenant's profit, appears from the judgment of the Court upon the second objection in *Rex v. Joddrell*, 1 B. & Ad. 408.

Sir John Campbell, Attorney-General, and *Gaselee*, contrà. The rate ought to be charged according to the proportion which the length of navigation in Woking bears to the length of the whole line. The principle of mileage is reasonable and convenient, and most conformable to the intention of the local [*49] act, upon which the decision of this case entirely depends. The act, in *the several clauses stated in the case, evidently treats the navigation as one entire concern. The payment of rates is one of the purposes to which, according to the evident intention of the act, "the profits of the said navigation" (generally) are, in the first instance, to be applied. The clause authorizing the trustees to take toll evidently contemplates a general mileage toll. The payments to Lord Montagu are to be made "out of the profits of the said navigation" generally. The expense of repairs is in proportion to the length of the navigation in each parish; but, according to the appellants, the trustees may make an arbitrary apportionment of tolls, and thereby distribute the burden of rates as they think proper. This is a power which they ought not to exercise. The principles laid down in *Rex v. Kingswinford*, 7 B. & C. 236, are not disputed; but this is not a case to which they apply. There may be a reason for rating canals differently according to the difference of profits in one parish and another, which does not apply to rivers, viz., that the land taken for a canal was yielding some profit in the parish before, and liable to be rated there in proportion to the profit so produced, in which case it may be said that the principle of rating the land ought not to be altered.

As to the deductions, it must be admitted that the expense of repairs ought to be allowed for. With respect to the compensations, which are an interest possessed by certain parties in the navigation, there is no reason that they should be paid and deducted before the rate can be assessed. The case does [*50] not show the nature of the compensations to Lord Montagu and the *corporation of Guildford; but all these payments appear to be in the

nature of a rent. The groats payable to Mr. Dalmahoy are a rent to him for his land in the parish of Stoke. One mill appears to be in the parish of Woking; but the payment is not made in respect of the building situate there: it is for the water withdrawn from the mill by the navigation generally. There is nothing to show that Woking ought to suffer on account of any of these charges. *Cur. adv. vult.*

Lord DENMAN, C. J., in this term (November 25th), delivered the judgment of the Court.

The rule by which canal companies are to be rated is laid down in the case of *Rex v. Kingswinford*, 7 B. & C. 242, in these words: "The true principle is this: a canal company is to contribute to the relief of the poor in each parish through which the canal passes in proportion to the profit which they derive from the use of their land in that parish." It is also truly observed, in the same judgment, that, if the traffic be the same throughout the whole line of the canal, every part of the canal will earn an equal proportion of the tolls. On the other hand, that, if the profit vary in different parishes, the rate also must vary.

Apply that principle to the present case. The thorough trade pays one gross sum for the whole line, and all parts of the line are equally profitable: the proportion of the parish of Woking must, therefore, be ascertained by a mileage calculation, with reference to the whole line. Again, the short trade, as it is called, *pays one gross sum for the whole distance gone over, and all parts of that distance are equally profitable: the proportion of the parish [51] of Woking must, therefore, be ascertained by a mileage calculation, with reference to the whole distance gone over. The tolls earned by passing over parts of the canal which do not include the parish of Woking will be wholly excluded.

By the facts found in the case, the true proportion of the parish of Woking in the gross receipts, according to this calculation, is £688 14s. 2½d.

The next question is, what deductions, if any, ought to be made from this sum? The necessary repairs and expenses must, of course, be deducted, and, as they are found to be equal throughout the line, the proportion of the parish of Woking is to be ascertained by a mileage calculation, and is found by the case to be £384 2s. 10d.

Mr. Dalmahoy's groats are payable in respect of the use of the canal within his land in the parish of Stoke; and, therefore, if they could be deducted at all, they must be deducted from the profits in that parish, and not from the profits in the parish of Woking. But these groats, as well as the percentages to Lord Montagu, and to the corporation of Guildford, are payable out of the *profits* of the canal, and are in truth nothing more than rent charges: they do not affect the value of the occupation, or the rent which a tenant would give, but only show amongst whom and in what proportion the rent, or profits, are to be divided. The poor rates must be paid on the whole of the profits by those who receive them, viz.: the proprietors, and they must settle the matter as they can with those who are entitled to share the profits with them.

*The same reasoning applies to the compensation to the mills, for they also are payable out of the profits. One only of the mills is situate [52] in the parish of Woking, the compensation paid to which is £65 6s.; but, for the reasons stated above, we think that not even this sum can be deducted.

Upon the whole, the gross receipts earned in the parish of Woking are found, according to the principles here laid down, to be £688 14s. 2½d. From that sum must be deducted £384 2s. 10d. for repairs and expenses, leaving a balance of £304 11s. 4½d., from which 10 per cent. for tenants' profits, amounting to £30 9s. 1½d., must be deducted, according to the rule laid down in *Rex v. The Trustees of the Duke of Bridgewater*, 9 B. & C. 68. The case, indeed, does not state distinctly that lands are rated at rack-rent and no more, in the parish of Woking; but, as it finds that 10 per cent. is a reasonable deduction for tenants'

profits, we presume that the fact is so; and this deduction must be made in order to equalize the rate; and the sum at which the proprietors of the navigation ought to be rated will then stand £274 2s. 2½d.

Rate to be reduced accordingly.

[*53] *CHARLES FREDERICK, Baron de RUTZEN, and MARY DOROTHEA, his Wife, v. FARR.

Accounts of rent, signed by a person, styling himself clerk to a steward, but not shown to have been employed by such steward, otherwise than by the accounts themselves, are not evidence, after the decess of both, to prove the receipt, either by the clerk or the steward, of sums of money therein mentioned.¹

Where improper evidence is received, and a verdict given for the party adducing it, the Court will grant a new trial, although there be other evidence to the same point in favor of the same party; unless they see clearly that the improper evidence could not have weighed with the jury, or that the verdict, if given the other way, would have been set aside as against evidence.

DEBT. The first count was for tolls and duties, due and payable to the Baron and Baroness de Rutzen, in respect of divers cattle, goods, and merchandises brought for sale into a fair and market, belonging to the plaintiffs in right of the Baroness de Rutzen, holden at Narberth in Pembrokeshire. There was a second count for tolls and duties (not mentioning on what articles), due and payable to the plaintiffs as owners of the fair and market, in the same right. *Plea, Nil debet.* On the trial before GURNEY, B., at the Haverfordwest Spring Assizes, 1834, the plaintiffs claimed the fair and market under a grant from James 2 (dated Nov. 17th, 4 Ja. 2), to Sir John Barlow, knight and baronet, from whom they claimed to deduce title to an estate, called the Slebech estate, including the fair and market, by different assignments. Among other proofs, a lease of the tolls of the market by Ann Trevanion, through whom title was made, to John Bateman, for lives, at a specified rent, was produced; and a rental of the Slebech estate was also put in, in the handwriting of Gilbert James, a deceased steward of Ann Trevanion, in which he debited himself with the receipt of different payments of the rents reserved on this lease; and there was [*54] also *put in a rental, in the handwriting of John Protheroe, a deceased clerk of Gilbert James, in which also Gilbert James was debited with the receipt of certain payments of these rents. It was proved by a clerk, who was in James's service at the same time with Protheroe, that the latter had to make out James's accounts for him. Both these pieces of evidence were objected to; but the objections were overruled. A considerable body of other evidence was put in, showing the receipt of the tolls by the different parties through whom the plaintiffs claimed, or their lessees; and the plaintiffs had a verdict. In Easter term, 1834, Sir *James Scarlett* obtained a rule to show cause why this verdict should not be set aside, and a new trial had, by reason of the reception of the account in Protheroe's handwriting. The rule was obtained on other grounds also; but on these no decision took place. In Easter term last (Tuesday, April 28th),

Sir *John Campbell*, Attorney-General, *Cresswell*, and *John Evans* showed cause.² The account objected to is in the writing of an authorized agent of the party charged by the writing; and this agent was proved to have been employed by the party as clerk, and to have kept his accounts for him; so that he had authority to charge him as steward. If the entry does not bind the steward, it

¹ The recital of facts in the judgment will be found to vary in some degree from the statement in the introductory part of the case. It has been thought advisable to frame the marginal abstract on the judgment, as representing the supposition upon which the learned Judges proceeded in deciding the case: but the principle of the decision is little, if at all, affected by the variance.

² Before Lord DENMAN, C. J., LITTLEDALE, PATTERSON, and COLERIDGE, Js.

must have been meant to bind the writer himself, and then it is unquestionably admissible. It may be compared to a pass-book at a banker's. It is true that the agent does not sign; but that is immaterial. Supposing, however, that the evidence was inadmissible, it may be rejected; and there will still be more than sufficient to support the verdict. That being so, the *Court will not send the case back to a new trial. This was decided by the Court of [*55] Common Pleas in *Doe dem. Lord Teynham v. Tyler*, 6 Bing. 561. It is true that the decision of the Court of Exchequer in *Crease v. Barrett*, 1 C. M. & R. 919; S. C. 5 Tyrwh. 458, is not quite consistent with that case. [Lord DENMAN, C. J. In *Rex v. Sutton*, 4 M. & S. 544, 548, *LE BLANC, J.*, says that, if some parts of the evidence received be inadmissible, and others admissible, the Court has not the means of referring the verdict to those parts only which were admissible; and that it is their habit in such a case to grant a new trial.] That was said of criminal cases expressly.

Sir *W. W. Follett* contra. To make this account admissible, it must be such an account as shows a liability in the writer. The parol evidence was, that Protheroe, being James's clerk, kept his accounts. How can such an account make Protheroe liable? Even admitting that it may make James liable, it is not written by James, and is not therefore an entry charging the writer. As to the argument that this evidence is merely superfluous, and that the case was proved without it, the Court will not take upon themselves to decide as to the degree of weight which the jury might have attached to it. Besides, it was clearly evidence likely to produce considerable effect on the point as to which it was adduced.

(*Chilton* and *E. V. Williams* on the same side were not heard, the Court intimating that they would consider whether any further argument were necessary.)

Cur. adv. vult.

*Lord DENMAN, C. J., in this term (November 25th) delivered the [*56] judgment of the Court.

In order to prove the plaintiffs' title to a market, for disturbing which this action was brought, recourse was had to certain leases found among their muniments, and also to certain accounts of rent for the same market, found in the same place. Some of these were accounts signed by the person who was then steward to the plaintiffs' ancestor, wherein he charged himself with the amount of such rents. To these no objection was made. Other accounts, of the same nature, were produced, signed, not by such steward, but by a person styling himself clerk to such steward. There was no parol evidence to show that this person was ever employed by the steward; but the papers were tendered as speaking for themselves. They were severally objected to when tendered, but the learned Judge admitted them in evidence. We are clearly of opinion that they were not admissible, because they do not purport to charge the person whose signature they bear.

We were, however, strongly urged to discharge this rule for a new trial, even though this evidence may have been improperly received, on account of the manifest preponderance of the proof arising from that which was unobjectionable. To induce us to adopt this course, *Doe dem. Lord Teynham v. Tyler*, 6 Bing. 561, was strongly pressed upon us, founded as it was upon some former precedents both in this Court and in the Common Pleas. The same argument was urged in the Court of Exchequer, where evidence had been improperly rejected, in *Crease v. Barrett*, 1 Cr. M. & R. 919; S. C. 3 Tyrwh. 458; but the answer was given: It *may be that the evidence may be readily explained, [*57] and may not weigh in the least against the very strong evidence to which it was opposed; but we cannot, on that account, refuse to submit the question to the consideration of another jury. Mr. Baron PARKE, who pronounced the judgment of that Court, discusses the point at large; and a new trial was granted, because the Court could not say that if the evidence had been received it would have had no effect with the jury; nor that it was clear, beyond all doubt, if the

verdict had been the other way, that it would have been set aside as improper.

In like manner, we are not convinced that the documents improperly admitted did not weigh with the jury in forming their opinion, or that their verdict, if given for the defendant, must have been set aside as against evidence. On this point, therefore, the rule must be made absolute; and we need not refer to the numerous other points that have been debated. Rule absolute.

[*58] TOWNLEY, Assignee of WRIGHT, a Bankrupt, v. CRUMP and Another. Nov. 2.

A party having goods in his own warehouse at Liverpool sold them, and gave the following delivery order to the vendee:—"We hold to your order 89 pipes," &c., "rent free to the 29th November, next." The goods remaining in the same warehouse unpaid for till the vendee became bankrupt. In an action of trover for the goods by the assignee, evidence was given that, by the usage of Liverpool, goods sold while in warehouse are delivered by the vendor handing to the vendee a delivery order; and that the holder of such order may obtain credit with a purchaser as having possession of the goods.

Held that, as between the original vendor and vendee, the right of lien was not divested by giving such delivery order.

Also, that the bankrupt had not possession of the goods as reputed owner, with the consent of the true owner, within the meaning of stat. 6 G. 4, c. 16, s. 72.

TROVER for wine, laying possession in the plaintiff as assignee. Pleas. 1. Not guilty. 2. That the plaintiff, as assignee, was not possessed, &c., concluding to the country. 3. As to the conversion of twenty-eight pipes and one hogshead, that, before the bankruptcy, and before the times when, &c., viz., on &c., the defendants bargained and sold to Wright, the bankrupt, and he bought of them, the said twenty-eight pipes and one hogshead of wine, at the rate of &c., to be paid for by Wright's accepting a bill of exchange in that behalf; that he accepted the same for the amount of the wines, payable at three months; that the bill was presented when due, but not paid; that the defendants at the time of the bankruptcy, and at the times when, &c., were and still are the holders of the said bill; that a large sum, viz., &c., the price of the said pipes and hogshead, was, at the time of the bankruptcy, and at the times when, &c., and still is, unpaid to the defendants; and that the said pipes and hogshead were not delivered by the defendants to Wright at any time before or at or after the said sale; but the same, and each and every part thereof, at the time of the sale, were in the custody and possession of the defendants; and that they so continued and remained, from the time of the said sale continually, until and after the bankruptcy, and from thence continually until and at the said times

[*59] when, &c.; of all which (notice to *plaintiff); whereupon and whereby the defendants acquired and had a lien upon the said pipes and hogshead for the said price thereof, and became and were entitled to retain the same until the said price should be fully paid and satisfied; wherefore, and because the said price, &c., at the said times when, &c., was wholly due and unpaid, unsatisfied, and untendered to the defendants, they, when requested as in the declaration mentioned, refused to deliver the said pipes and hogshead to the plaintiff, and did, after the bankruptcy, at the said times when, &c., retain and keep the same under and by virtue of the said lien, and as they lawfully might, &c., which keeping, &c., was the conversion in the introductory part of this plea mentioned. Verification.

Replication. 1. and 2. Similiter. 3. De Injuria.

At the trial before Lord ABINGER, C. B., at the last Summer assizes at Liverpool, it appeared that the defendants, at the time of the transactions in question, were wine merchants at Liverpool; and that they sold the wine mentioned in the third plea to the bankrupt Wright on the 29th of September, 1834, it being then held by the defendants in bonded warehouses which they had at Liverpool.

An invoice was delivered at the time, stating the wine (described by marks and numbers) to be bought by Wright of Crump and Co., the price payable by acceptance at three months; which acceptance Wright gave. On the 29th of September the defendants gave Wright the following delivery order:—

“Liverpool, 29th September, 1834.

“Mr. Benjamin Wright,

“We hold to your order 39 pipes and 1 hhd. red wine, marked J. C. J. M. No. 41 a 67—69 a 80—pipes, No. 105 hhd., rent free, to 29th November next.

“John Crump and Co.”

*The bill accepted by Wright was dishonored, and the amount never paid. A fiat in bankruptcy issued against Wright, January 28th, 1835, [*60] and he was thereupon declared a bankrupt, and the plaintiff appointed assignee. A demand and refusal of the wine were admitted; as also, “that the invariable mode of delivering goods sold while in warehouses in Liverpool is by the vendors handing to the vendees delivery orders.”

For the plaintiff it was proposed to give evidence, that the order in question was equivalent to an accepted delivery order; but the Lord Chief Baron held such evidence inadmissible. The plaintiff’s counsel then called Mr. Preston, a broker and merchant, who held bonded vaults in Liverpool; and he stated that the practice was to deliver goods while in warehouses by handing delivery orders, which were not usually given until payment, or something equivalent, had been received for the goods; that such orders varied in their form; that delivery orders were given resembling that in question; and that in his opinion the present order would obtain credit for the holder with a purchaser. He was proceeding to state that he should consider the possession of such an order possession of the property; but the Lord Chief Baron refused to admit this evidence. The witness, however, said that, as a matter of custom, the goods specified in such a delivery order would be considered the property of the person holding the order. It was not stated that the defendants had made any transfer in their books. The Lord Chief Baron was of opinion that no sufficient delivery was shown to divest the lien of the defendants: he observed that the giving of an invoice, or bill of lading, does not take away the right to stop in transitu, if there has been no actual delivery of the goods; and he directed a non-suit, giving leave to move to enter a verdict for the plaintiff for the value [*61] of the twenty-eight pipes and one hoghead.

Cowling now moved¹ that such verdict might be entered, or a new trial had. The facts admitted and proved showed a constructive delivery to Wright before he became bankrupt. It is clear that, if the wine, instead of being the property of the warehousemen in whose vaults it was, had belonged to a third person, who had sold it to the bankrupt, and had given him such delivery order upon the warehousemen, the handing of such order to them by the buyer would have been a constructive taking possession by him, and the order could not have been countermanded; *Abbott on Shipping*, part 3, c. 9, s. 15, b. p. 379, 5th ed. So it would have been also in the present case, if Wright had sold to another person, and the defendants had given a delivery order to such person. *Stoveld v. Hughes*, 14 East, 308; and *Green v. Haythorne*, 1 Stark. N. P. C. 447, show this; but the present case is a stronger one in favor of the vendee’s right. In a note to the fourth American edition of *Abbott on Shipping* (by the Hon. JOSEPH STORY, one of the Judges of the Supreme Court of the United States), it is said;² “and where goods are sold, lying in the vendor’s warehouse, on credit, and they are sold by marks and numbers, so that no farther designation is necessary, and it is a part consideration of the bargain that they may remain there, rent free, at the option of the vendee, and for his benefit, *until the vendor shall want the room, there is in point of law a complete delivery of the goods, and the transit is ended, as much as if the [*62]

¹ Before Lord DENMAN, C. J., PATTERSON, WILLIAMS, and COLERIDGE, Js.
² § 881, note (1), to part 3, c. 9, s. 16, b. Boston, 1829.

goods were in the warehouse of a stranger." And *Barrett v. Goddard*, is cited from *Mason's (American) Reports*.¹ [Lord DENMAN, C. J. I do not know that we can allow these works to be cited as authorities, though Mr. Justice STORY is a very able commentator, and it would be desirable to find that the American authorities agreed with the opinion we may form. PATTESON, J. You maintain here that the possession is changed by a delivery order which the vendor makes upon himself. No custom going to such an extent as that was recognised in *Dixon v. Yates*, 5 B. & Ad. 313.] The question did not arise in that case; the delivery orders there mentioned were drawn by the vendor on the warehouseman: here the vendor and warehouseman are the same person, and therefore the delivery orders are in the nature of accepted delivery orders. It is plain from *Abbott*, as before cited, that if the vendor had given the bankrupt a delivery order addressed to and accepted by the vendor's agent, the warehouseman, the possession would have been changed; and there seems no reason for a distinction, where the vendor acts as his own warehouseman and agent. *Stoveld v. Hughes*, 14 East, 308, and *Green v. Haythorne*, 1 Stark. N. P. C. 447, do not authorize such a distinction. The ground of decision in those cases is, that the facts show an executed delivery. And, further, it would be a fraud upon

[*63] the public if a purchaser *might go into the market with the symbol of property, which these orders clearly are, and yet should be liable to have the contract of sale to him rescinded. The holder of such an order has what amounts to a reputed ownership of the goods. A delivery order is not like a bill of lading, which merely serves to show who is the owner: holding a delivery order is having actual possession. Its effect is like that of a dock warrant, as stated in *Spear v. Travers*, 4 Camp. 253, 4, and *Lucas v. Dorrien*, 7 Taunt. 278 (judgments of the Court). The words "rent free" in the delivery order show that the defendants, on giving it, considered themselves as becoming merely warehousemen for the bankrupt. At all events it should have been left to the jury, whether or not the facts amounted to a taking of possession. The delivery order was entirely a mercantile instrument, the effect of which they were competent to judge of. *Cur. adv. vult.*

Lord DENMAN, C. J., on a subsequent day of the term (November 19th), delivered the judgment of the Court. After referring to the facts above stated, as to the custom with respect to delivery orders, his Lordship said: There was a total failure of proof that, where a vendor who is himself the warehouseman sells to a party who becomes bankrupt before the goods are removed from the warehouse, the delivery order operates, by reason of this custom, to prevent a lien from attaching; and I think it is not contended that there is any general usage which could divest this right in such a case, upon the insolvency of the vendee. Cases have been cited, but none where the question arose between the [*64] original *vendor and vendee. As to reputed ownership, it is quite clear that the seventy-second section of stat. 6 G. 4, c. 16, would not apply, for it refers to cases where the bankrupt shall "by the consent and permission of the true owner" have goods in his possession. Here the bankrupt, if he had possession, was himself the true owner, under the contract of sale. There will therefore be no rule. *Rule refused.*

¹ 8 *Mason's Reports of Cases argued and determined in the Circuit Court of the United States*, p. 107. Boston, 1828. The judgment cited was delivered by STORY, J.

SMITH v. ELDRIDGE. Nov. 2.

In an action for work, labor, and materials, the plaintiff delivered a particular, claiming £1308, and stating that the full particulars could not be comprised in three folios. On summons for a better particular, with dates and credits, the plaintiff said he had no credits to give, and the summons was dismissed. The cause was afterwards referred, with all matters in difference; the costs to abide the event of the award. The plaintiff, in opening his case before the arbitrator, admitted payment of several sums,

and claimed only £400. The arbitrator awarded £63 to the plaintiff for his alleged causes of action, and £9 to the defendant for matters not in question in the suit. Held, that the Court could not stay the taxation of the plaintiff's costs, and order each party to pay his own.

Per PATTESON, J. A plaintiff is not bound, in his particular, to state the items of reduction which he admits; it is sufficient if he states the items of his own demand, and the amount admitted as going in reduction.

Thesiger moved for a rule to show cause why the taxation of the plaintiff's costs in this cause should not be stayed, and why each party should not pay his own. The amount of debt endorsed on the copy of the writ of summons was £1303. A declaration was delivered, with a particular, stating that the plaintiff claimed £1303, for work, labor, and materials, found and provided in the building of a certain messuage, &c.; the full particulars of which could not be comprised in three folios. The defendant took out a summons, calling on the plaintiff to show cause why he should not deliver "a further and better account in writing, with dates and credits, of the particulars of the plaintiff's demand." On the attendance before COLERIDGE, J., the defendant's attorney said [*65] *that the greater part of the plaintiff's claim had been paid; and he relied upon the sixth section of Reg. Gen. Trin. 1 W. 4, 2 B. & Ad. 788. The plaintiff's attorney stated that he had no credits to give; whereupon the learned Judge said that he could not try the cause, and dismissed the summons. The cause, and all matters in difference, were referred at nisi prius, the costs to abide the event of the award. The plaintiff's attorney, in opening his case before the arbitrator, stated that the defendant had paid the plaintiff several sums on account, and that the plaintiff claimed £400 as the balance.* The arbitrator awarded that the defendant was indebted to the plaintiff in the sum of £63, and no more, for the matters in the declaration mentioned; and that the plaintiff was indebted to the defendant in the sum of £9 for goods sold and delivered, in addition to the moneys due and allowed to him by the arbitrator in this action. The defendant now stated, on affidavit, that, if the plaintiff had originally claimed only the amount awarded, he should not have defended the action, for that the plaintiff was in insolvent circumstances. *Thesiger* now cited *Adlington v. Appleton*, 2 Camp. 410; admitting, however, that a difficulty would arise if the Court should think the present case analogous to those in which a cause has been referred to arbitration, the costs to abide the event, and, after an award in the plaintiff's favor, the defendant has moved for costs under stat. 43 G. 3, c. 46, s. 3, which the Court has not granted, see *Holder v. Raitt*, 2 & E. 445; but he denied that any analogy could be drawn between a case decided on the particular words of that statute and one turning upon the rule in question, on which the Court might exercise a discretion. *[PATTESON, J. The case of *Campbell* has been misunderstood. It has been [*66] inferred from it that the plaintiff was bound to give the items which he admitted as reducing his demand: but that has been long overruled. The practice at chambers is, that the plaintiff states the items of his own demand, the amount by which he admits it to be reduced, and the balance for which he really proceeds. Lord DENMAN, C. J. The defendant here should have tendered what was actually due. He knew what he had paid.] But not what the plaintiff insisted upon.

Lord DENMAN, C. J. I think we have power to grant this rule. The arbitrator has decided the whole case upon the merits, and, in so doing, has determined this particular right.

PATTESON, WILLIAMS, and COLERIDGE, Js., concurred. Rule refused.

BARLOW and WIFE v. LEEDS. Nov. 2.

A. gave a promissory note to B. and C. jointly, for money lent to him, one half by each. B. died, and A. took out administration, with the will annexed, to her effects. C. sued

him on the note. C. was a legatee, and was charged by A. with having goods of the testatrix in her hands. On motion to stay proceedings in the action, upon A. paying half the principal and interest of the note into Court, and giving C. a discharge for the residue:

Held, that the case was not one in which this Court, by virtue of its equitable jurisdiction, could interfere.

MRS. BARLOW, while single, and her sister, advanced £50 each to the defendant, their brother, for which he gave his note for £100 to them jointly: The sister died, and the defendant took out administration with the will annexed.

[*67] The surviving sister and her husband *sued him on the note. The defendant paid half the principal and interest into Court under a judge's order, to abide the event of an application to this Court, and offered the plaintiffs a discharge for the other half, to which he claimed an equitable title as administrator. Mrs. Barlow was a legatee under the will; and the defendant alleged that she and her husband had effects of the testatrix in their hands, which they had refused to give up.

Kelly now moved, on affidavits stating the above facts, and others which it is unnecessary to set forth, that proceedings might be stayed, the defendant giving such discharge as above mentioned. If the plaintiffs recover the whole £100, they will be trustees for the defendant as to one half, and he will be obliged to sue them in equity. And the affidavit shows grounds for apprehending that, if the plaintiffs obtain possession of this sum, the half may not easily be recovered back. The defendant is willing to pay such costs as the Court may think reasonable. [Lord DENMAN, C. J. Is there any case in which the Court has consented to such an application?] None has been found, but the Court has an equitable jurisdiction, which it will exert, if there are no disputed facts, to prevent an obvious injustice.

Lord DENMAN, C. J. Can we go into such an inquiry as this on affidavits? It would be trying the merits of a suit in equity. We cannot do it.

PATTESON, WILLIAMS, and COLERIDGE, Js., concurred. Rule refused.

[*68]

*CANN v. FACEY. Nov. 3.

Where a Judge has certified to deprive of costs under stat. 48 Eliz. c. 6, s. 2, in a case within the statute, the Court cannot order the plaintiff's full costs to be taxed notwithstanding the certificate, on the ground that the Judge gave an erroneous reason for certifying.

TRESPASS for shooting a dog. Plea, that certain persons broke and entered defendant's closes or lands, and with dogs trampled upon and destroyed his growing crops; that defendant, upon their leaving the closes, gave the said persons notice that, if the said dogs or any of them came upon the said closes again, he would shoot them; that the said persons, not regarding such notice, suffered and permitted the said dogs again to enter the said closes and trample upon and destroy the crops; wherefore defendant for the causes aforesaid, and because he could not otherwise prevent the said dogs from further trampling, &c., did shoot at and wound one of the said dogs so being on the said land and trampling upon the said crops, as he lawfully, &c., and the same is the dog mentioned in the declaration. Replication, de injuriâ. On the trial before GURNEY, B. at the last Exeter assizes, evidence was given on both sides, as to the matter of justification. The jury found a verdict for the plaintiff; damages twenty shillings. Application was afterwards made to the learned Judge to certify under stat. 48 Eliz. c. 6, s. 2, on the ground that the plaintiff might have proceeded under the malicious trespass act, 7 & 8 G. 4, c. 30, s. 24. The learned Judge accordingly certified, stating in Court that he did so for the above reason.

Crowder now moved for a rule to show cause why the Master should not tax Vol. XXXL—4

to the plaintiff his full costs notwithstanding *the certificate.¹ The learned Judge certified under a mistaken apprehension as to sect. 24 of [*69] the Malicious trespass act. The section contains a proviso, excluding from its operation "any case where the party trespassing acted under a fair and reasonable supposition that he had a right to do the act complained of." If therefore the plaintiff had gone before a magistrate, his complaint would not have been entertained. If a judge certifies without giving any reason, the Court may not have power to interfere; but it is otherwise if he gives an erroneous reason. [COLERIDGE J. How can you get over the words of stat. 43 Eliz. c. 6, s. 2, that, if it shall be signified or set down by the judge before whom the cause was tried, that the damages shall not amount to forty shillings, the judges before whom any such action shall be pursued, "shall not award for costs to the party plaintiff any greater or more costs than the sum of the debt or damages so recovered shall amount unto, but less at their discretion?" If, indeed, it appeared that the judge had certified in a species of action which is excepted by the statute, the question would be different.] The judge who tries the cause has a discretionary power as to certifying, but he must exercise it within legal bounds. The judgment of an arbitrator in his award is conclusive, if he states no reason, but not if he states a wrong one. If it is apparent that the judge, in certifying, has exercised his discretion under a mistake of the law, there is nothing in the statute of Elizabeth to prevent the Court from rectifying this, like any other *mistake of a judge or jury. In a case mentioned in Twigg v. Potts, 4 Dowl. P. C. 266, this Court is said to have referred [*70] a certificate back to the learned judge who made it.

LORD DENMAN, C. J. There is no foundation for a rule. The words of stat. 43 Eliz. c. 6, s. 2, are (His Lordship here read the section). In this case, the learned Judge who tried the cause has certified under the statute: and when the Judge certifies there is an end of the question. We cannot increase the damages; and we cannot inquire under what influence he exercised the discretionary power vested in him. Perhaps in this case it might have been a strong proceeding on the part of the learned Judge to refuse certifying.

PATTESON, J. I am of the same opinion. I always understood that under the statute of Elizabeth the Court never interfered with the discretion of the Judge, but would only inquire whether or not he had the power to certify at all.

WILLIAMS and COLERIDGE, Js., concurred.

Rule refused.

¹ Also to increase the damages to 50s., or for a new trial, on the ground that the verdict, as to amount of damage, was against evidence. Rule refused.

*HOOPER v. STEPHENS and Wife. Nov. 3.

[*71]

Where it has been agreed between debtor and creditor that the latter shall receive goods in reduction of his demand, the delivery of such goods operates as a payment within stat. 9 G. 4, c. 14, s. 1, to bar the statute of limitations.

ASSUMPSIT for the price of hay sold to the wife before marriage. Pleas, non-assumpsit, and the statute of limitations. On the trial before Lord DENMAN, C. J., at the Gloucester Summer Assizes, 1835, the plaintiff, to take the case out of the statute, proved that, after the delivery of the hay, and within six years of the commencement of this action, the wife (who was then single, and kept a public house) said to the plaintiff, "Mr. Hooper, you must make use of some spirit, I know; why not have it of me? As long as I owe you money for hay, if it is ever so little it will be a way to lessen the debt." The plaintiff said he would take a gallon of gin at 12s., and a jar filled with gin was sent to him. It was contended that this delivery of goods by the wife was equivalent to a part payment, and barred the statute; and Hart v. Nash, 2 Cro. M. & R.

337 (in the Court of Exchequer) was referred to. On the other hand, it was urged that the delivery could not operate as a *payment*, inasmuch as the defendants, if now suing for the price of the spirits, could only declare as for goods, and not for a liquidated sum of money. The Lord Chief Justice gave leave to the defendants to move to enter a nonsuit; and the plaintiff had a verdict.

Ludlow, Serjt., now moved according to the leave reserved. The plaintiff [72] must rely upon the clause in *Lord TENTERDEN's act, 9 G. 4, c. 14, s. 1, which provides that nothing therein contained "shall alter or take away or lessen the effect of any payment of any principal or interest made by any person whatsoever." To bring this case within the proviso, there ought to have been what is technically and properly called a payment; such as might formerly have been given in evidence under the general issue. This transaction was not such a payment. [Lord DENMAN, C. J., *Hart v. Nash*, 2 Cro. M. & R. 337, appears to be in point.]

The Court¹ took time to inquire as to the decision in *Hart v. Nash*, 2 Cro. M. & R. 337, which was not yet reported; and, in the same term (November 7th),

Lord DENMAN, C. J., said: *Hart v. Nash*, 2 Cro. M. & R. 337, decided in the Court of Exchequer, rules the present case. Where anything is received, upon agreement, in reduction of a debt, that is a payment sufficient to take the debt out of the statute of limitations. Rule refused.

¹ Lord DENMAN, C. J., PATTESON, WILLIAMS, and COLERIDGE, Ja.

[73] *GAMBRELL v. The Earl of FALMOUTH and AUSTIN. Nov. 3.

To a declaration for an excessive distress for rent, defendant pleaded that the whole sum distrained for was due and in arrear, concluding to the country, on which plaintiff joined issue: Held that, on this issue, defendant was not precluded from insisting on certain arrears, by the fact that, since they became due, other arrears had become due and had been distrained for. And this, although, on the first distress, the warrant and notice stated the distress to be for rent due up to a day named, being subsequent to those on which the arrears now in question accrued; and although, on the second distress, the defendant stated that it was for rent due since the last distress.

CASE for taking an excessive distress for 5*l.* 10*s.*, whereas only 1*l.* 8*s.* was due. Plea, that the whole was due and in arrear (not stating for what time), concluding to the country. Similiter. On the trial before Lord DENMAN, C. J., at the last Berkshire assizes, it appeared that the plaintiff held the premises, on which the distress was made, as weekly tenant, of the defendant, the Earl of Falmouth, originally at a rent of 2*s.* 6*d.* per week; and that, on the 30th of June, 1834, Lord Falmouth gave the plaintiff notice to quit, or to pay double rent; that Lord Falmouth afterwards gave a second notice to the defendant to quit on the 8th of December, 1834, or to pay double rent, namely 10*s.* per week; that, on the 6th of February, 1835, he levied a distress for 4*l.*, being eight weeks' rent at 10*s.*, due from the 8th of December to the 2d of February, and being stated, in the warrant and notice, to be for rent due up to the latter day. The plaintiff brought an action for this distress, as excessive, and recovered judgment. On the 27th of April, 1835, the defendant Austin levied the distress for which the present action was brought, on a warrant for 5*l.* 10*s.*, being rent in arrear on the 22d of April, and it was shown that he stated this to be for rent due since the last distress. The plaintiff's counsel contended that the distress was not authorized by stat. 4 G. 2, c. 28, s. 1. In answer, [74] the defendants offered proof that there were *arrears of rent unsatisfied, which had accrued on days antecedent to the accruing of those arrears which were distrained for on the 6th of February, 1835; and that such previous arrears made up the 5*l.* 10*s.* at the rate of the original rent. The plain-

tiff's counsel contended that these could not be taken into account; but the Lord Chief Justice received the evidence, and the defendant had a verdict.

Ludlow, Serjt., now moved for a new trial. Although it is competent to a landlord to distrain on one account, and avow on another, yet that principle is inapplicable to a case where the complaint is that too much has been distrained for. The distress on the 6th of February, 1835, must be considered as having the effect of a statement of account by Lord Falmouth, up to that day. "It is the duty of a landlord to make a distress, at once, for his whole rent, if he can find sufficient goods on the premises; for various distresses are vexatious to the tenant. And, therefore, at the common law, if the landlord made an insufficient distress when he might have taken more, a second distress for the remainder of the same rent was illegal: for it was his own folly not to have taken enough at first; but if it appeared that he could not find a sufficient distress on the land, then it seems, that even at the common law, he might distrain again." *Bradby on Distresses*, ch. 5, p. 130.¹ The statute 17 Car. 2, c. 7, s. 4, enables the landlord, in the cases pointed out, to make successive distresses, if the distress shall not be found to be of the full value of the arrears distrained for; but it *is not pretended here that such was the case on the first occasion, or that there was not then a sufficient distress on the premises for [*75] all the arrears claimed at the time.

PATTESON, J. No doubt a man is not entitled to distrain at different times for a rent due on the same day. But if rent become due at different times, he may distrain separately. Independently of that, look at this issue. The question is, whether the sum was in arrear or not. If it is not satisfied, it is still in arrear.

WILLIAMS, J. I understand the objection to be that, because the defendants assumed to distrain for rent not proved to be due, they were precluded from justifying themselves by showing that there was other rent in arrear. I do not see why they are to be prevented from showing that rent was in arrear, different from that for which they at first claimed.

COLERIDGE, J. The objection, if there be one, is to the reception of the evidence. But what is the issue? Whether so much is due and in arrear. I cannot conceive why arrears are not to be taken into consideration, because there has been a distress, since they accrued, under which they were not satisfied. It may be very true, that the landlord thought he had covered all the arrears by the first distress. But that is not to prevent him, under this issue, from showing what was really due.

LORD DENMAN, C. J. The issue is, how much was due? The objection now raised is, that the defendants cannot say that more was due at the former period, *than they then claimed. That objection does not apply, as the pleadings stand. There seems to me to be no ground of complaint, [*76] either in law or in justice. Rule refused.

¹ Citing *Wallis v. Savill*, 2 Lut. 1536. Anon. Cro. Eliz. 18.

DOE on the Demise of BENJAMIN PREEDY, v. HOLTOM and another. Nov. 4.

Devise to A. of the messuage in S. in which testator resided, with the buildings to the same adjoining, and all those several closes in S. aforesaid, called C., D., and E. (with the brick-kiln erected thereon), and F., with their appurtenances, part of the farm and lands then in testator's own occupation. Devise, further, to B. of a second messuage, and of all other the testator's lands and hereditaments in S. except those before devised to A. Under this will, B. claimed two cottages in S. which, when the will was made, adjoined the messuage resided in by the testator, but were not in his occupation, and were divided by a wall, which he had built from the messuage. Held, that the words referring to the testator's own occupation applied only to the premises mentioned after the words "to the same adjoining;" that evidence was admissi-

sible to show the situation of premises, and by whom they were occupied; but that those facts, being proved, did not raise such an ambiguity as warranted the reception in evidence of declarations made by the testator when giving instructions for his will, to show that he intended B. to have the cottages.

THIS ejectment was tried before WILLIAMS, J., at the Oxfordshire Summer Assizes, 1836. The premises claimed were two cottages, with gardens, outhouses, &c., at Swalcliffe, Oxfordshire. The defendants made title under Joseph Preedy, the elder brother of the lessor of the plaintiff. Both brothers claimed the premises in question under the will of their father.

The testator, by his will, produced at the trial, devised to trustees all his real estate, upon trust that his said trustees and the survivor of them and the heirs of such survivor should, during the minority of his eldest son Joseph Preedy, receive the rents and profits of all that messuage or tenement in Swalcliffe aforesaid wherein he the said testator then resided, with the offices, outhouses, barns, stables and other edifices and buildings, yards and gardens, to the same adjoining, and all those several closes or enclosed grounds, pieces and parcels of land [77] lying and being in Swalcliffe aforesaid, called or *known by the several names of Cow House, Trenchill, Lower Trenchill, Fernhill, Close taken out of Trenchill, together with the brick kiln erected thereon, and the Farhill, with their appurtenances, part of the farm and lands then in his own occupation, as the same should become due, and did and should stand and be possessed of such rents, issues, and profits, upon the trusts and for the intents and purposes thereafter expressed and declared concerning the same; and, when and so soon as his said son Joseph Preedy should have attained the age of twenty-one years, then did and should be seized of and in all that his said messuage or tenement in Swalcliffe aforesaid wherein he then resided, with the offices, outhouses, barns, stables, and other edifices and buildings, yard and garden to the same adjoining, and the said several closes or inclosed grounds, pieces and parcels of land in Swalcliffe aforesaid last thereinbefore particularly mentioned, with their appurtenances, in trust for his said son Joseph Preedy, his heirs and assigns for ever.

And upon further trust that they the said trustees and the survivor of them, and the heirs of such survivor, did and should, during the minority of his, the said testator's, son Benjamin Preedy, receive the rents, issues, and profits of all that his messuage or tenement in Swalcliffe aforesaid called the Old Grange, with the offices, outhouses, and other edifices and buildings, yard and garden, to the same adjoining, and all and every other his closes or inclosed grounds, pieces and parcels of land, and other hereditaments, in Swalcliffe aforesaid, with their appurtenances, except what he had thereinbefore devised to or in trust for the use of his eldest son Joseph Preedy, as the same should become due: and [78] did and should stand *and be possessed of such rents, issues, and profits, upon the trusts, and for the intents and purposes thereafter expressed and declared concerning the same; and when and so soon as his said son Benjamin should attain his age of twenty-one years, then upon trust that they his said trustees or the survivor of them, or the heirs of such survivor, did and should stand and be seized of and in all that his said messuage or tenement in Swalcliffe aforesaid, called the Old Grange, with the offices, outhouses, and other edifices and buildings, yard and garden to the same adjoining, and all and every his said closes or inclosed grounds, pieces and parcels of land and other hereditaments in Swalcliffe aforesaid, last thereinbefore mentioned, with their appurtenances, in trust for his said son Benjamin Preedy, his heirs and assigns for ever.

The question at the trial was, whether the cottages with the gardens, &c., passed to the trustees for Joseph under the first part of the will, or for Benjamin under the subsequent devise of all the closes and hereditaments not before devised. For the plaintiff, evidence was given that the testator lived in the messuage at Swalcliffe at the time when he made his will; that the cottages

had formed part of the Swalcliffe farm, but that the testator had separated them from it by a wall, and that, before and at the time when the will was made, they were so separated, and were in the occupation of tenants. It was further proved, for the plaintiff, that there were cottages on the Swalcliffe estate, a quarter of a mile from the place where the testator resided. Evidence was also given as to the comparative value of the Swalcliffe and Grange properties. And, for the purpose of showing that the testator intended the two *cot- [*79] tages in question to pass under the second, and not the first clause of his will, the plaintiff's counsel proposed to prove certain declarations made by the testator, when giving instructions for his will: but this evidence was objected to, and excluded. The learned judge in summing up told the jury that the question was one of law, and that in his opinion the cottages adjoining the Swalcliffe farm passed to Joseph by the will; but that the plaintiff should have leave to move to enter a verdict for him if the Court of King's Bench should hold, upon the facts proved, that the words of the devise were not sufficient to pass the premises in question to the trustees for Joseph's use. The defendants had a verdict, and leave was given to move.

Ludlow, Serjt., now moved that a verdict might be entered for the plaintiff, or a new trial had on account of the rejection of evidence. The cottages passed to the trustees for Benjamin, the lessor of the plaintiff, by the residuary clause. It is true they may be said to adjoin the tenement on which the testator dwelt, according to the first clause, but that requires, not only that the buildings, &c., which are to pass for the benefit of Joseph shall adjoin the testator's residence, but also that they shall have been "part of the farm and lands in his occupation" at the time when he made his will. If there is a doubt as to the meaning Benjamin, who, as the residuary legatee, stands in the situation of an heir at law, is entitled to a construction in his favor: nothing is to be taken from him unless expressly devised. As to the evidence; extrinsic evidence was admitted in explanation of the will, and from that a difficulty resulted, which required *further parol evidence to explain it; for it [*80] appeared that the premises "adjoining" those inhabited by the testator were not "in his own occupation." This is one of the cases in which *TINDAL*, C. J., lays it down, in *Miller v. Travers*, 8 Bing. 247, that "the difficulty or ambiguity which is introduced by the admission of extrinsic evidence, may be rebutted and removed by the production of further evidence, upon the same subject, calculated to explain what was the estate or subject-matter really intended to be devised." [*WILLIAMS*, J. The extrinsic evidence adduced was only for the purpose of showing the situation and divisions of the property, and the manner in which it was occupied; there was nothing beyond that, to introduce evidence of declarations. *PATTESON*, J. The declarations were offered to show what was meant by the will; the other evidence only showed what was within the terms of the will. Lord *DENMAN*, C. J. Evidence might be given to show what were the parcels. That evidence, in the present case, did not introduce any ambiguity. It was as if the testator had said "I devise my cottages," and you had offered evidence of declarations by him that he meant his house in London.] The evidence which it was here proposed to offer was, that the testator directed his will to be so framed as to pass the cottages to the use of Benjamin.

Lord *DENMAN*, C. J. The testator devises to the trustees for Benjamin all his closes, pieces of land, and other hereditaments in Swalcliffe, except what he has before devised to or in trust for the use of his eldest son. What has he so devised? The rents and profits *of the messuage in Swalcliffe wherein he resided, with the offices "and other edifices and buildings, yards and [*81] gardens, to the same adjoining." Among these are the cottages in question. But he then gives some lands as "part of the farm and lands then in his own occupation;" and it is contended that this makes his own occupation a necessary part of the description of all that he gives to the eldest son. I think that is not

so, but that part of what is given is adjoining to the residence of the testator, and part in his occupation. Then property is here shown to exist, which precisely answers the terms of the will. Upon this point there is no doubt. The learned Judge, therefore, would not have been justified in receiving evidence of declarations for the purpose of showing the testator's intention. The ambiguity was not raised which might have rendered such declarations admissible. See *Richardson v. Watson*, 4 B. & Ad. 787. If the testator gave instructions which have not been followed, that cannot now be helped.

PATTESON, J. We are desired to read the will as if the words were "edifices and buildings to the same adjoining, and now in my own occupation." That, I think cannot be done. Extrinsic evidence must be received, for the purpose of showing what a will refers to; but not to clear up a difficulty in the terms of the will. If the evidence here tendered had been admitted, it would have been for the purpose of showing that the language of the devise in question meant "adjoining, and now in my occupation." That would have been receiving

[*82] evidence to construe the will.

*WILLIAMS, J., concurred.

COLERIDGE, J. The only expression restricting the words "other edifices and buildings, yards, and gardens," is "to the same adjoining." The words "part of the farm and lands now in my occupation," refer to other premises. No ambiguity was raised here. Some extrinsic evidence is necessary for the explanation of every will. If the words Blackacre be used, there must be evidence to show that the field in question is Blackacre. But here the declarations were offered in reality for the purpose of construing the expressions of the will, and giving them a more extended meaning than the words themselves bear.

Rule refused.

ROBINSON, Gent., One, &c., v. GOMPERTZ. Nov. 5.

An affidavit of service of notice on a creditor under the compulsory clause of the Lords' Act (32 G. 2, c. 28, s. 16) is not sufficient if it state merely that the notice was left with the landlady of the house where he lodges; or with a person at the house where he resides, who afterwards stated that she acted as his servant, and had delivered it to him, she herself making no affidavit, and there being no affidavit of belief that the statement of such person was true.

A MOTION was made before LITTLEDALE, J., in the Bail Court, that the defendant might be brought up under the compulsory clause (sect. 16) of stat. 32 G. 2, c. 28. In the affidavit of service of notices, it was stated that a detaining creditor named Treppass had been served by leaving the notice with the landlady of the house where he lodged. LITTLEDALE, J., on reference to a case in 3 Dowl. P. C.,¹ held this insufficient.

[*83] *F. V. Lee now renewed the motion in this Court, on an amended affidavit stating that Treppass had been served with notice "by delivering the same to, and leaving it with, a female of the name of Miss Wood, at the house in which the said Charles Stephen Treppass resides, situate," &c., "and which said Miss Wood did, on this present 5th of November, inform this deponent that she acts as the servant of the said Charles Stephen Treppass, and that she did, on the 10th day of October last, deliver the said notice to the said Charles Stephen Treppass." [PATTESON, J. She might have made an affidavit herself. COLERIDGE, J. It only appears by the statement she is said to have made, that she acts as servant. WILLIAMS, J. You do not even allege that you believe it to be true.]

Lord DENMAN, C. J. I think this is not enough, though I am sorry that a party should be defeated on such a point. An allegation of service in this form

¹ Probably *Gardner v. Green*, 3 Dowl. P. C. 843.

admits of the suggestion, that a person may have been collusively stationed at the house to receive the notice, and give the answer.

PATTERSON, WILLIAMS, and COLERIDGE, Js., concurred. Rule refused.¹

¹ DOE on the Demise of HUNGATE v. BOR. Jan. 31.

To make a rule absolute, on no cause being shown, it is not sufficient that a deponent should swear to notice of the rule nisi having been left at the dwelling-house of the opposite party, in his absence, with a person who afterwards told the deponent that she had delivered the notice; the deponent must state that he believes this to be true.

Sir F. Pollock, Attorney-General, moved to make a rule absolute for staying proceedings till payment of costs in a former ejectment. The affidavit of service of the rule nisi stated that a copy had been left by the deponent at a house, with a female who described herself as the occupier, and who said that the lessor of the plaintiff and his wife both *lodged there, but were at present out; and who, on seeing the notice directed to Lieutenant Hungate, said that the lessor of the plaintiff called himself Sir [*84] William Hungate; that she promised to deliver the notice; and that, two days afterwards, the deponent called again, and saw the same female, who said that the lessor of the plaintiff was out, and that she had delivered the notice to him. The deponent did not, however, swear to his own belief either that the delivery had taken place, or that the lessor of the plaintiff lived at the house in question.

Per Curiam. (Lord DENMAN, C. J., LITLEDALE, WILLIAMS, and COLERIDGE, Js.) The affidavit does not go far enough. It is important that we should enforce every security against collusion.

Sir F. Pollock, Attorney-General, then prayed that the rule might be enlarged.

Per Curiam. That is objectionable, because then you will gain the whole object of your rule. But you may add a fresh affidavit, and apply to a Judge at chambers.

The rule was afterwards made absolute, on the affidavit being re-sworn, with the addition that the deponent believed the delivery to have taken place.

GYE, Assignee of MILLS, an Insolvent Debtor, v. HITCHCOCK and Others. Nov. 6.

An insolvent debtor executed a warrant of attorney, on which judgment was signed, and he afterwards went to prison. Subsequently his goods were seized and sold under a fi. fa. on the judgment, and the proceeds were paid to the judgment creditors. The insolvent petitioned, and his effects were assigned under the Insolvent Debtors' Act, 7 G. 4, c. 57:

Held, that the assignee might recover the proceeds of the sale from the judgment creditors, as money had and received to the use of the assignee after the subscribing of the petition, on section 34 of the act.

ASSUMPSIT. The declaration stated that, after the insolvent had subscribed his petition, the defendants were indebted to the plaintiff, as assignee, for money by them had and received to the use of the plaintiff as assignee. Plea, non-assumpsit. On the trial before Lord DENMAN, C. J., at the London sittings in last July, it appeared that, on the 12th of September, 1834, the insolvent gave a warrant of attorney to the defendants, upon which judgment was signed on the 15th of October. On the 20th, the insolvent went to prison, *and [*85] afterwards, on the same day, his goods were taken in execution upon a fi. fa. under the judgment: they were sold on the 23d of October, and the money paid to the defendants on the 31st. On a subsequent day the insolvent subscribed his petition to the Insolvent Debtors' Court; and on the 16th of November the assignment to the plaintiff was made. The action was brought to recover the proceeds of the sale. The defendant's counsel objected that they were not liable in this form of action; but the Lord Chief Justice ruled that the action lay, and a verdict was found for the plaintiff for the amount of the proceeds, his Lordship reserving leave to the defendant to move to enter a nonsuit.

Hoggins now moved accordingly. By the thirty-fourth section of the Insolvent Debtors' Act (7 G. 4, c. 57), no person after the imprisonment shall avail himself of any execution issued on any warrant of attorney executed by the insolvent. The plaintiff was, therefore, entitled to treat the execution and sale

as void, and might have brought trover for the goods, on the ground that no title passed to the defendants. But if he bring money had and received, this affirms the sale, according to the principle laid down by Lord KENYON in *Smith v. Hodson*, 4 T. R. 217. [PATTESON, J. That was an action for goods sold and delivered, which of course affirmed the sale.] The money here could be had and received to no use but that of the judgment creditors. [Lord DENMAN, C. J. Why are they to receive the proceeds from the sheriff?] There was no [*86] assignee at the time of the sale, and, therefore, the money at any rate *could not be had and received to the use of the plaintiff. [PATTESON, J. The assignment has relation, as in bankruptcy.]

The Court¹

Refused the rule.

¹ Lord DENMAN, C. J., PATTESON, WILLIAMS, and COLERIDGE, Js.

ROE on the several Demises of EDMUND WILKINS and JOHN WILKINS v. JAMES WILKINS. Nov. 6.

In ejectment, the defendant, upon notice from the plaintiff, produced a deed; and it was proved that the defendant's attorney had stated, before the trial, that the defendant claimed through that deed: Held, that this entitled the plaintiff to put it in, without proving the execution, before the defendant's case was opened.

A woman living apart from her husband, obtained a demise of property for a term. The husband's representative brought ejectment against a party who claimed to have had adverse possession for more than twenty years, and who had obtained and held possession without knowing of the husband's existence: Held, that it was no misdirection to direct the jury to find for the plaintiff, unless they thought that such possession was adverse to the wife; inasmuch as, if adverse to the wife, it was adverse to the husband, and not otherwise.

EJECTMENT for premises in Gloucestershire. On the trial before Lord DENMAN, C. J., at the last Gloucester assizes, it appeared that Edmund Wilkins claimed as administrator to Joseph Wilkins, the elder, deceased; and that John Wilkins claimed as administrator to Ann Wilkins, deceased, the wife of Joseph Wilkins the elder. The title of Joseph Wilkins the elder rested upon a lease of the premises in question, made to Ann Wilkins, which the plaintiff had given the defendant notice to produce, and which was called for at the trial, and produced by the defendant. No evidence was given of the execution; but it was proved on the part of the plaintiff, that the defendant's attorney had said, shortly [*87] before the trial, that the defendant claimed under the *lease. The Lord Chief Justice was of opinion that this dispensed with proof of the execution; but he gave leave to move to enter a nonsuit. It further appeared that Ann Wilkins had married Joseph Wilkins, the father, in 1777, from whom she afterwards separated; and, her husband being still alive, married, or lived as wife with Bryant. After this, Bryant took into his occupation the premises in question, being a certain part of the waste of the manor of Henbury. He died in 1809. At the time of his death, Joseph Wilkins the younger, a son of Ann Wilkins and her first husband, was living with Ann Wilkins. She obtained a lease of the premises in question (being the lease above mentioned) from the lords of the manor of Henbury, conveying to "Ann Bryant, widow," a term of ninety-nine years from March 25th, 1812, determinable on certain lives, which were not extinct at the time of the trial; and she afterwards, in March, 1813, gave up this lease to her son, signing, at the same time, the following memorandum, "Joseph Wilkins took to all that Ann Bryant had for maintaining of her and two children from May 10th, 1810, to March 25th, 1813." After this, Joseph Wilkins occupied the premises and built a house there. He afterwards went to Demarara, leaving the premises to be managed by the defendant, and died in 1821, devising them to him. The defendant had occupied them from the time when Joseph Wilkins, the son, left England, to the commencement of the present action. Ann Wilkins died in 1823; and Joseph Wilkins, the father, in

1826. It did not appear that Bryant or Joseph Wilkins, the son, had been aware of the existence of Joseph Wilkins, the father, from the time when Ann Wilkins began to live with Bryant. The Lord Chief Justice directed the jury to find for *the plaintiff, unless they were of opinion that the occupation by Joseph Wilkins, the son, and the defendant, was adverse to Ann [*88] Wilkins. Verdict for the plaintiff.

Ludlow, Serjt., now moved to enter a nonsuit, or for a new trial on the ground of misdirection. First, it is true that, when a party produces a deed which has been called for, under which he himself claims, the other side may treat the execution of the deed as proved. But that principle is applicable only where it appears that the party producing rests his case, at the trial, on the validity of the deed. Here, the party producing, being the defendant in ejectment, was not called upon to show any title till the plaintiff had proved a title. The plaintiff cannot assume, upon evidence of anything passing out of Court, what the defendant's case is to be, for the purpose of relieving himself from the burden of proof. Secondly, the Judge ought to have told the jury that the question was, whether the occupation was adverse to Joseph Wilkins, the father; for the plaintiff claims through him. In order to explain an occupation, and to show that it is enjoyed under a recognition of the title of another claimant, it is necessary to show some privity between the occupier and the claimant. Here it is attempted to infer a recognition, by the occupier, of a claimant whose existence he is ignorant of, from the mere circumstance that such unknown party has a legal claim in right of another person, whose title the occupier is supposed to recognise. Such a legal claim, unknown to all parties at the time, cannot constitute an implied acknowledgment.

Lord DENMAN, C. J. It is clear that the lease was properly received in evidence without proof of its *execution. *Knight v. Martin*, Gow's N. P. C. 26, shows this. It did indeed appear, in that case, that both parties claimed [*89] under the same agreement: but extrinsic evidence was admitted to show that fact; and the rule necessarily supposes that such a fact must be shown by extrinsic evidence; for it could not appear from the inspection of the deed till the deed could be read. As to the second point, if the possession was adverse to the wife it was adverse to the husband. The husband had allowed her to enjoy the property, and took no part in the management of it. The jury considered that her permission to her son to live in it, in consideration of his supporting her, gave him no title adverse to her; and therefore he had no title adverse to her husband.

PATTESON, J. I am of the same opinion. DALLAS, C. J., in *Knight v. Martin*, Gow's N. P. C. 26, draws a distinction between cases where parties claim the same interest, and those where they claim adversely; but here the contending parties had clearly one common interest in the title created by the deed.

WILLIAMS and COLERIDGE, Js., concurred.

Rule refused.

*PEPPER v. WHALLEY. Nov. 6.

[*90]

Since the Rule (Hil. 4 W. 4), that the entry of proceedings on the record for trial, or on the judgment roll, shall be taken to be, and shall be, the first entry of the proceedings upon record, it is not necessary to enter upon the *Nisi Prius* record a plea in abatement and judgment of *respondet ouster* thereupon.

THE plaintiff declared in covenant, and the defendant pleaded in abatement, upon which plea the plaintiff had judgment of *respondet ouster*. The defendant then pleaded *non est factum*, on which the plaintiff joined issue. The plaintiff made up the issue on the *nisi prius* record without any entry of the plea in abatement or the judgment thereon, and delivered it to the defendant with notice of trial. The defendant, before the assizes for which

the notice was given, returned the issue to the plaintiff, saying that he should not accept it in its then form. The plaintiff afterwards redelivered the issue in the same state; and the defendant attempted to return it again, but the plaintiff refused to accept it. On the trial before TADDY, Serjt., at the last Chester assizes, the cause was tried as undefended, and a verdict found for the plaintiff.

John Jervis now moved¹ (on affidavit) for a rule to show cause why the verdict should not be set aside, on the ground of mis-trial, or why judgment should not be arrested. The rule is, that the nisi prius record must contain an entry of the plea in abatement and judgment, when there have been such proceedings. In *Dubartine v. Chancellor*, 5 Mod. 400; 12 Mod. 190; Carth. 447; 1 Ld. Raym.

[*91] 329; a judgment² was set aside on this *very ground. It is true that, in an Anonymous case, 1 Salk. 4, which occurred afterwards, it was said, "the old course was to deliver in a copy of the whole record; viz. the declaration, plea in abatement, &c., and issue; but the Court made a rule for the future that a copy of the *narr.* and issue should only be paid for." But it appears that this rule did not prevail; for, in a later case, *Coombe v. Pitt*, 3 Burr. 1423, 1682, an objection being made to the plea roll, that it omitted the mention of a plea in abatement, the Court, instead of holding that the entry of it was unnecessary, said that the irregularity had been cured by the defendant's accepting the issue on the nisi prius record, which was also without the plea in abatement. Here the issue was not accepted. The reason of the rule appears to be this; that the plea ought of course to contain all the pleadings; but, if the nisi prius roll do not contain the plea in abatement, there will be a variance between the two records. [COLERIDGE, J. The old theory was that the nisi prius was a transcript of the plea roll. PATTESON, J. By the late rule, "the entry of proceedings on the record for trial, or on the judgment roll (according to the nature of the case), shall be taken to be, and shall be in fact, the first entry of the proceedings in the cause, or of any part thereof, upon record," Reg. Hil. 4 W. 4, General Rules and Regulations, 15, 5 B. & Ad. vi. There can be therefore no longer any variance.] That shows the importance of entering all the pleadings on the nisi prius roll; otherwise they will not appear at all. At any rate, it has never been understood that the entries on the nisi prius roll are to be confined to the issues which the jury are to try: the pleadings terminating [*92] in issues at law are always entered *there, even when they do not leave anything to be inquired of by the jury. The rule now contended for is laid down in 2 Chitty's Archbold, Pr. K. B. book 2, part 1, page 572, 5th ed.

Cur. adv. vult.

Lord DENMAN, C. J., in the same term (November 25th), delivered the judgment of the Court.

This was a motion for a new trial, or to arrest the judgment, after verdict for the plaintiff; and the ground was that, there having been a plea in abatement and judgment of *respondeat ouster*, no entry of that plea and judgment was made on the nisi prius record.

The case of *Dobarteen v. Chancellor*, 1 Ld. Raym. 329; 5 Mod. 400, in 10 W. 3, was referred to, in which a judgment was set aside under similar circumstances, except that in that case the plea roll had the plea in abatement, but the nisi prius roll had not, and it should rather seem that the Court proceeded on this variance.³ At present, since the 15th rule of Hilary term, 1834, 5 B. & Ad. vi., the nisi prius roll is the first entry on record, and therefore no such variance can exist.

In a subsequent case in 1 Ann., Anonymous, 1 Salk. 5, it is stated that the Court altered the practice, and directed that, for the future, only the declaration

¹ Before Lord DENMAN, C. J., PATTESON, WILLIAMS, and COLERIDGE, Js.

² The verdict, according to the reports in Lord Raymond, in 12 Mod., and in Carthew.

³ See note (a) in the case in 1 Ld. Raym. 329. In the report, 12 Mod. 190, it is said that the entry was omitted in the issue roll; but this seems to mean the nisi prius record.

and issue should be paid for; thereby making it unnecessary to enter the plea in abatement and judgment of *respondeat ouster* on the nisi prius record: and this appears to *be reasonable, for they are quite immaterial to the question ultimately to be tried between the parties. [*93]

In *Combe v. Pitt*, 3 Burr. 1682, a similar objection was made; but, as the defendant had accepted the issue, the Court held that he had cured the irregularity, if any. In the present case it is stated that the defendant refused the issue, and that irregularity is not cured.

We are however of opinion that there is no irregularity, that the part of the proceedings omitted is wholly immaterial, and therefore no rule should be granted. Rule refused.

*POOLEY v. GOODWIN. Nov. 7.

[*94]

Defendant being indebted to plaintiff in 150*l.*, and being employed by T. to perform works for which he was receiving a percentage, wrote an order to T. to pay plaintiff 150*l.* out of the first moneys due to defendant. Afterwards, being indebted to B. in 997*l.*, he executed a deed reciting the above facts, assigning and transferring to B. such sums as then were or should become due to him, defendant, from T., in trust, first to pay plaintiff the 150*l.*, and, secondly, to retain the residue towards payment of the 997*l.*; with covenants that he would not receive the money, nor revoke, &c., that he had right to assign, had not incumbered, and for further assurance. Defendant afterwards received 150*l.* from T.; and plaintiff sued him for money had and received, and on an account stated: Held,

1. That the action lay for the 150*l.*, though no proof was given of T.'s assent to the order: and though, at the time of making the order, nothing was due from T.; and though, at the time of making the deed, there was not 150*l.* due from T., and it was, at such times, uncertain to what extent defendant would be employed by T.; and though plaintiff was not a party to the deed.
2. That plaintiff was entitled to give secondary evidence of the order, upon proof of a *bond fide* search for the original among plaintiff's papers only.
3. That such secondary evidence was furnished by a paper, admitted by defendant's attorney to be a true copy of an affidavit sworn, but not filed, by defendant in proceedings against another party, such paper stating the order to have been written by defendant, and setting it out, though no evidence was given that the attorney had compared the paper with the original affidavit or order.
4. That, on such secondary evidence it must be presumed that the order was properly stamped.
5. That the deed was not a mortgage, but an absolute assignment of the defendant's earnings.
6. Upon its appearing that, at and since the time of executing the deed, less than 500*l.* was due from T. to defendant, and that not so much as would make up 500*l.* was likely to be earned from that time to the conclusion of defendant's employment with T.: Held, that the deed required no more than a 3*l.* stamp, under stat. 55 Geo. 3, c. 184, Sched. Part I. tit. Conveyance.

ASSUMPSIT for money had and received, and on an account stated. Plea, non assumpsit. The action was brought in pursuance of a rule of court made under the interpleader act, stat. 1 & 2 W. 4 c. 58, s. 1. On the trial before Lord ABINGER, C. B., at the last Liverpool assizes, the following case was opened for the plaintiff. The defendant was an architect employed by the Commissioners for paving and lighting Manchester, to build a new town hall. He was to receive a commission of seven and half per cent. on the money expended: and this per centage he regularly drew for and obtained up to 1829. In that year he became indebted to the plaintiff to the amount of £150; and, on being pressed for payment, he wrote the following *letter to Mr. Thorpe, then comptroller for the Commissioners:— [*95]

"SIR,

"I hereby authorize you to pay to John Pooley, Esq., sen., £150 from my commission as architect to the town hall of Manchester, out of the first moneys ordered to be paid to me. His receipt shall be a sufficient discharge for the

same, this being the balance of account between John Pooley and myself, as settled this day, the 22d of September, 1829.

(Signed)

“FRANCIS GOODWIN.”

“To John Thorpe, Esq., Comptroller.”

On the 15th of July, 1830, the defendant executed a deed of assignment to John Vaughan Barber and William Marshall, whereby, after reciting that he was indebted to the plaintiff in 150*l.*, and that he was indebted to Barber and Marshall in 997*l.* 8*s.* 11*d.* for money advanced and lent to him and paid for his use, and interest thereon, and that he, the defendant, was employed by the above-mentioned Commissioners as architect, etc., and that, being unable to pay the said debts, he had agreed to assign to B. and M. all and singular the sum and sums of money which was or were then, or should thereafter become due to him for his commissions, charges, and expenses as such architect, the defendants assigned and transferred to B. and M. all and every the sum and sums which then was and were or should at any time thereafter become due from and payable by the Commissioners to him the defendant, for or on account of his commission, etc.; upon trust, first to pay the costs, and then to pay the 150*l.* due to the plaintiff, and to retain the residue towards payment of the debt [*96] *of 997*l.* 8*s.* 11*d.*, and the interest thereon. The deed contained a power of attorney to B. and M., and covenants by the defendant to pay the 997*l.* 8*s.* 11*d.*; that he would not receive the money nor revoke the power, nor do any act whereby B. and M. might be hindered in recovering payment; that he had not done any act to incumber; and for further assurance. The defendant was afterwards arrested, and in April, 1832, was discharged under the Insolvent Debtors' Act. He admitted,¹ on the trial, that he had received £150 from the Commissioners since his discharge. The plaintiff did not produce the order of 22d of September, 1829; but showed that diligent search had been made for it among his papers. It was contended that this did not let in secondary evidence of the contents; but the Lord Chief Baron overruled the objection. The plaintiff then put in a paper purporting to be an affidavit by the defendant, made in the King's Bench, entitled between the defendant and the Commissioners, in which the defendant, after stating that he had signed the order, set it out. It was proved that the defendant's attorney had admitted, in conversation with the plaintiff's attorney, that the paper was a true copy (except as to the jurat) of an affidavit sworn by the defendant, but not filed or used. For the defendant it was then objected, that the order was not proved to have been stamped, or assented to by Thorpe, or to have been examined with the original; but the Lord Chief Baron permitted the copy to be read. The deed of 15th July, 1830, was then tendered in evidence. It had a 5*l.* stamp only; and its reception was objected to, on the grounds, that the stamp [*97] was *insufficient, and that the plaintiff was no party to the deed. It was proved that, when the deed was executed, £30 was due to the defendant from the Commissioners; that, since then, he had earned £367, of which £297 were his earnings since his discharge under the Insolvent Debtors' Act, to the time the action was brought; that he had earned £40 more since the commencement of the action, and that it was not likely that above £600 more would be expended, making therefore an addition of not above £45 to the commission; and making in all not above £482 to be and become due, at and since the execution of the deed. A verdict was then taken for the plaintiff for £150, and leave given to move to enter a verdict for the defendant.

Boileau, in this term,² moved accordingly. First, the search for the order of 22d September, 1829, was insufficient. The papers of the Commissioners, and

¹ By order of this Court, forming part of the above-mentioned rule made under the Interpleader Act.

² The motion came on twice, Nov. 8d, and Nov. 7th; before Lord DENMAN, C. J., PATTERSON, WILLIAMS, and COLERIDGE, Js.

of their comptrollers, ought to have been searched. Secondly, the admission by the defendant's attorney does not go far enough: it should have been shown that he had compared the two papers; and, at any rate, that the order was stamped, as it ought to have been, being a "bill of exchange," or "order for money." In stat. 55 Geo. 3, c. 184, Sched. Part 1, Bill of Exchange, the words are "Inland bill, draft, or order for the payment of any sum of money, weekly, monthly," etc., "where the total amount of the money, thereby made payable, shall be specified therein, or can be ascertained therefrom," and "where the total amount of the money thereby made payable shall be indefinite;" and *it is declared that "all bills, drafts, or orders for the payment of any sum of money out of any particular fund which may or may not be avail- [*98] able, or upon any condition or contingency which may or may not be performed or happen, if the same shall be made payable to the bearer, or to order, or if the same shall be delivered to the payee, or some person on his or her behalf," shall be deemed to be inland bills, etc. Thirdly, the order was simply a request addressed to Thorpe, and might be revoked by the defendant at any time, at all events, until the acceptance of it by Thorpe, or some one on the part of the Commissioners, which was not proved. Fourthly, the stamp on the deed of 15th July, 1830, was insufficient. By stat. 55 G. 3, c. 184, Sched. Part 2, the deed, as a conveyance, the expressed consideration of which (the two debts) exceeded £1000, should have had a £12 stamp; or, as a mortgage, since the sum secured exceeds £1000, a stamp of £6. Fifthly, the defendant could not assign his future earnings; *Robinson v. Macdonnell*, 5 M. & S. 228. Lastly, since the plaintiff is no party to this deed, he is not entitled to use it. The declaration, therefore, is not supported.

The Court took time to consult with the Lord Chief Baron, intimating that, if they should consider the points proper to be argued, a special case should be stated. In the same term (November 19th),

Lord DENMAN, C. J., said: Several objections were taken to the verdict. It was necessary to prove that an order had been given for the payment of the money to the plaintiff, and that order was not produced. *But, in the [*99] opinion of the Lord Chief Baron, it was shown that a diligent and *bonâ fide* search had been made for it. Then it was argued, that there was no evidence that the order had been stamped. But the defendant himself had set out the order in his affidavit; and, in the absence of evidence to the contrary, we must presume it to have been duly stamped. But then it is objected that only a copy of this affidavit was produced: it was, however, admitted to be a true copy by the defendant's attorney. Then the deed was objected to, as having only a £5 stamp, which was said to be insufficient. But we think this deed was not a mortgage, but an absolute assignment of the commission due to the plaintiff; and, as it was proved that this did not amount to £500, the stamp is sufficient. The trial took place under a rule of Court; but we should not have thought it, therefore, the less necessary to direct a new trial if improper evidence had been admitted. We do not, however, think this was the case; and there must, therefore, be no rule. Rule refused.

The KING v. The Archdeacon of MIDDLESEX and Another. Nov. 9.

THIS case is already reported, 8 A. & E. 615.

*In the Matter of NEWBERY, Gent., One, &c. Nov. 9. [*100]

Money was invested in stock, pursuant to a will, for the benefit of a legatee. An attorney obtained the legatee's authority, and a power from her trustee, to sell out the stock, representing that it might be better invested in a mortgage, and that he would

find a proper security. The money was sold out, and the proceeds received and held by the attorney, he paying interest on the amount to the legatee, who did not know that the money had not been reinvested. Inquiries being afterwards made, he admitted, after some evasion, that he had not reinvested the sum; but, upon being further urged, promised that he would do so, and at length proposed a mortgage (which was thought insufficient) on property of his own. No further satisfaction being offered, the legatee moved the Court against him, and a rule was made, by consent (the attorney having filed no affidavit), ordering that he should reinvest the money in stock, on or before the 24th of June then next, and pay costs, and, on default, that an attachment should issue against him. The money was not reinvested, nor costs paid, and on June 25th, a *fiat* in bankruptcy issued against the attorney, who, in October, obtained his certificate. The rule and allocatur were served, and the costs demanded, in August. On motion made afterwards for an attachment pursuant to the above rule: Held,

That, under these circumstances, the certificate was no answer to the application, and that the attachment might issue.

G. T. WHITE, in last Hilary term, obtained a *nisi* for an attachment against Jacob Newbery, an attorney of this Court, for not investing certain moneys pursuant to a former rule of the Court, and for not paying 21*l.* (costs) pursuant to the said former rule, and to the Master's allocatur. The affidavits on which the present rule was obtained stated the following among other facts.

James George by his will left certain estates to William Hiscock and John Waugh, his executors, in trust to sell, and to stand possessed of the produce, upon trust, as to one-seventh part, to lay out the same in government stock or real securities, and to pay the dividends, interest, or yearly produce to Sarah George, afterwards Sarah Spratley, during her life. After the testator's death, the trustees invested the one-seventh share in three per cent. bank annuities, and paid the interest to Sarah, the legatee. In 1830, Waugh died. Hiscock, the surviving trustee (now dead), was in embarrassed circumstances, and was not competent to the management of his own affairs, being impaired in his [*101] intellect. Newbery, who had been the testator's *solicitor, and had been employed in the business of the executorship, and was Hiscock's private solicitor, remained, after Waugh's death, the sole active manager of the trust fund; and he informed Mrs. Spratley that more interest could be made of the trust money if laid out on mortgage: she therefore, under his advice, and on his assurance that he would immediately provide a proper security for the money, signed the following authority, dated August 24th, 1831:—"Mr. Hiscock. As I am informed that the trust money to which I am entitled for my life under the will of the late Mr. James George, of which you are the surviving executor, may be laid out at 5 per cent. upon mortgage of freehold security, I shall be obliged by your investing it in that way, instead of its remaining in the 3 per cent. reduced stock." Newbery soon afterwards obtained from Hiscock a power of attorney, not to the bankers who had been employed to purchase the stock and receive the dividends, but to Newbery and his agent, to sell out the stock. It was accordingly sold (December, 1831), and produced 555*l.*; and Mrs. Spratley, who deposed to these facts, stated that, as she was informed and believed, the amount was remitted to him, and applied by him to his own use. Newbery paid her 5 per cent. interest on the sum which should have been invested, and she, consequently, supposed that the investment had been made. In November, 1832, being led by circumstances to suspect Newbery, she made particular inquiries of him as to the investment of the principal, and, the answers being unsatisfactory, she authorized Bellringer and Frankum, her relations, to insist, on her behalf, that the money should be reinvested in stock. [*102] They made several *applications to him in 1833, but received evasive replies, and were at length told by him that the money remained in his hands uninvested. He then promised to reinvest it, but failed to do so; and in January, 1834, being further pressed, he offered a mortgage of property of his own as a security, which, being considered inadequate, was rejected. Afterwards (February 3d, 1834), Newbery made a further promise to reinvest in a

month, but omitted doing so, and, about the end of the month, his clerk again proposed the mortgage, stating that, if it were not accepted, the claimants would get nothing. In Easter term, 1834, a rule was moved for and made absolute (May 6th), Newbery filing no affidavit, whereby it was ordered (upon hearing counsel on each side, and by consent) that Newbery should reinvest in the names of Bellringer and Frankum, on or before the 24th of June then next, 658*l*, 3 per cent. stock, "which on the 27th day of December, 1831, was sold out and received at the Bank of England by virtue of a power of attorney executed by one William Hiscock, the surviving trustee appointed by the will of James George deceased, and since applied by the said Jacob Newbery to his own use:" and it was referred to the Master to tax the costs of that application, to be paid, when taxed, by Newbery to Sarah Spratley. And it was further ordered that, in default of the money being invested and costs paid within the time aforesaid, an attachment should issue against Newbery for his contempt. The rule, with the Master's allocatur, was served on Newbery on the 8th of August, 1834, and payment of the costs demanded, but they were not paid. At the same time, Newbery, on being asked, said that he had not reinvested the money.

*On the 25th of June, 1834, a fiat in bankruptcy issued against Newbery; and in the October following he obtained his certificate. Bellringer and Frankum deposed to their belief that he had become bankrupt with a view to deprive Mrs. Spratley of her money. [*103]

An affidavit by Newbery was filed in opposition to the present rule, for the purpose of showing, among other things, that the mortgage offered by him would have been a sufficient security; it also stated that, when he consented to the former rule, he had reason to suppose that his circumstances would enable him to make the reinvestment, but that he afterwards became embarrassed, in consequence of which a fiat in bankruptcy issued against him on the 25th of June. The affidavit contained other statements contradicting or explaining those made in support of the rule.

Platt now showed cause. Before the 8th of August, when Newbery was called upon to comply with the rule of Easter term, 1834, he had become a bankrupt, and compliance was out of his power. An attachment is granted to enforce the more speedy performance of something which a party is in law compellable otherwise to do. But here, the costs, and the 658*l*. to be reinvested, were a debt provable under the commission; see *Riley v. Byrne*, 2 B. & Ad. 779; an action for the 658*l*., or for the costs (if they had been so recoverable), would have been barred by the certificate; and consequently no attachment lies.

G. T. White contra. The Court clearly meant to intimate, by the rule of Easter term, that Newbery had fraudulently procured the stock to be sold out. That rule was made absolute without any affidavit being filed in opposition.

*Newbery was in contempt when he omitted to comply with the rule on the day appointed. [COLERIDGE, J. Where a party has become [*104] bankrupt, it appears from *Baron v. Martell*, 9 D. & R. 390, that, in order to obtain an attachment, it must be shown that he was in contempt before the certificate. Lord DENMAN, C. J. Is there any authority for an attachment issuing, where the demand was made at a time when the party could not comply?] A time was fixed, here, the 24th of June; and immediately afterwards Newbery became bankrupt. [Lord DENMAN, C. J. The rule is, that there shall not be an attachment without a demand and refusal. Here the demand was after the party had become bankrupt.] In the case *In the matter of Bonner*,¹ where an attorney who had been bankrupt was called upon to repay money, and fraud was imputed to him, Lord TENTERDEN said, "Let the attorney dare to tell the Court that, having obtained this money in his professional character, he will not pay it over because he is protected by his certificate, and I shall know how to deal with him." [Lord DENMAN, C. J. Then you impute to the

¹ Cited in the case of the same name, 4 B. & Ad. 813.

attorney here, that, when the demand was made, he had by his own act put it out of his power to pay. COLERIDGE, J. Does it appear, in the case *In the matter of Bonner*,¹ how long the attorney had obtained his certificate? He may have been able to pay when Lord TENTERDEN used the language.] This is a case in which an action of tort would have lain, but that a technical difficulty might have arisen as to the party to be made plaintiff on the record: and to such an action the certificate would have been no answer. *Parker v. Crole*, 5 Bing. 63, shows that such a defence *is not available in an action for selling out stock contrary to orders, and fraudulently. [Lord DENMAN, C. J. The present rule does not call upon the party to answer a case of fraud, nor does it appear that he was so called upon by the former rule.] The rule of May 6th shows that he then stood charged with selling out stock under a power of attorney from Hiscock, and applying it to his own use; and from this, and the order that he should reinvest or an attachment peremptorily issue, it is evident that a case of fraud was then before the Court. At least the Court will now refer it to the Master to ascertain whether deception was not practised in obtaining the authority to sell out.

Lord DENMAN, C. J. I am unwilling to exercise the summary jurisdiction of the Court in a case of this kind, unless I see clearly that the circumstances warrant us in so doing. But my brothers think this a case in which the jurisdiction may be exercised, and I am of the same opinion. The process of attachment was inchoate before the bankruptcy, and the bankruptcy took place under circumstances of so much suspicion, that I think we are authorized in saying that it was incurred for the purpose of avoiding compliance with the order of Court. We may then give effect to our own rule, which was in progress before the bankruptcy took place, and order this attachment to issue. I also think that there is distinct proof of fraud.

PATTESON, J. I am of opinion that this rule must be absolute. The stock in question was sold out, a long time ago, I think not fraudulently. It does not appear that Newbery actually led any one to suppose that he *had [*106] invested the proceeds. When it was ascertained that they had not been invested, he was called upon to make the investment, and it then appeared that he had applied the money to his own use, and had it not to lay out. Upon this the rule of May 6th was made, calling upon him to invest the money on or before the 24th of June, on pain of an attachment; and when the matter became pressing, on the very day after the 24th of June, that fiat in bankruptcy issued. One cannot but see that this was done to get rid of the necessity of complying with the rule of Court.

WILLIAMS, J. I think this rule must be absolute. It does not appear that by the 24th of June, Newbery had done anything towards complying with the rule of Court, and it seems clear that he had no intention of doing so. I think a ground of fraud is clearly laid.

COLERIDGE, J. The facts of this case raise an almost irresistible presumption of fraud. The money was put into Newbery's hands, not that he might hold, but that he might lay it out on mortgage. He held it for a long time, not having, as it appears, any means of becoming himself a mortgagor, and paying five per cent. interest. That is a circumstance in the case against him. Why should he have made those payments of interest? Being urged to reinvest the money, he gives promises which are not fulfilled, and an application is at last made against him to this Court. He files no affidavit, and consents to the rule being made absolute on payment of costs. That is another circumstance weighing against him. By that consent he gains the opportunity of fixing a particular [*107] day for the reinvestment; he does not then reinvest, *and on the day following a fiat in bankruptcy issues; a fact which is unexplained. Without saying how it would be if fraud had not been proved, I am of opinion that in this case the rule for an attachment must be absolute. Rule absolute.

¹ Cited in the case of the same name, 4 B. & Ad. 818.

HALL v. MIDDLETON. Nov. 9.

In *assumpsit* for money lent, payment was pleaded; the plaintiff new assigned, and non *assumpsit* was rejoined. The plaintiff at the trial, claimed £15 for money lent in August 1833, and proved an acknowledgment by the defendant after that time, that he owed the plaintiff £15. The defendant gave evidence of his having paid the plaintiff £15 in October, 1833. The under-sheriff, in summing up, stated the question for the jury to be, whether or not the £15 said to have been lent in August 1833, had been so lent. The plaintiff had a verdict. On motion for a new trial, or to enter a verdict for the defendant:

Held, that the proper question for the jury was, whether or not there had been two debts; that the defendant was not precluded from taking this point by the evidence of payment which he had produced at the trial; and that, there having been some evidence of a second debt, a new trial must be had.

ASSUMPSIT for money lent, and on an account stated. Pleas, to the first count, payment; to the second, non-*assumpsit*, on which issue was joined. Replication to the first plea, that plaintiff sued, not for the non-performance of the promises in the first plea mentioned, and in full satisfaction and discharge whereof defendant paid plaintiff the sum in that plea mentioned, but for the non-performance of another and different promise made by defendant to plaintiff, in manner and form as in the first count mentioned. Verification. Rejoinder, non-*assumpsit*: and issue thereon. The cause was tried at Chesterfield, on the 1st of December, 1834, before the undersheriff of Derbyshire, on whose notes, produced as after-mentioned, the following facts appeared. The plaintiff claimed 15*l.* for money lent in August, 1833. A witness proved for the plaintiff that, in October, 1833, the defendant acknowledged owing the plaintiff 15*l.* for money borrowed; and that, in February, 1834, on being asked why he had not paid the plaintiff the 15*l.* he owed him, the defendant answered that he had paid *it when his uncle's affairs were settled. Another witness proved that, on the occasion alluded to, no such settlement took place. For the [*108] defendant, a witness stated that, in the latter end of October, 1833, the plaintiff called on the defendant, and asked him for 15*l.*, which the defendant paid, with 4*s.* 6*d.* for the loan, and the plaintiff said, "it would make it right of all accounts." The plaintiff had a verdict for 15*l.* and interest. The defendant's solicitor, after the verdict had been given, requested the under-sheriff to put to the jury whether there were two sums of 15*l.* lent, or whether there was any other sum lent than that mentioned in the first count of the declaration; but the under-sheriff refused. *Maule*, in Hilary term, 1835, obtained a rule, on production of the under-sheriff's notes, and on affidavits,¹ *to show cause [*109] why there should not be a new trial, or a verdict entered for the defendant, on the ground that the under-sheriff had improperly refused to put the

¹ *Maule*, in the first instance, moved (January 18th) without producing the under-sheriff's notes, or an affidavit accounting for the non-production. It being objected that this was contrary to the rule laid down by the Court (see *Mansfield v. Brearey*, 1 A. & E. 347; *Burney v. Mawson*, 1 A. & E. 348, note (a)); he urged that the rule was recent, and probably not known to the parties now applying, that the statute 3 & 4 W. 4, c. 42, gave no direction on this subject, and that a considerable delay must take place before the notes could be procured. The Court said that they would confer with the other Judges as to the practice. On the following day, Lord DENHAM, C. J., stated that the Court of Exchequer had acted upon the rule laid down in the above-mentioned cases, and that this Court would adhere to it for the future. Time was however given to *Maule*, in the present instance, to procure a copy of the notes, and, in the same term (January 20th), he produced it, with an affidavit by the clerk of the defendant's attorney, stating that the copy (annexed to the affidavit) had been delivered to the deponent by the under-sheriff, who said at the time that it was a true copy, and contained the whole of the notes taken by him at the trial. A rule nisi was then granted. On showing cause it was contended that, although this rule had been granted, the defendant could not avail himself of it, having come to the Court too late, through want of diligence in procuring the notes; that the rule of practice laid down by the Court was well known before Hilary term, 1835; and that there had been laches even after time was given to obtain the notes. The objection, however, was not noticed by the Court.

above question, which was stated, on affidavit, to have been suggested immediately on the close of the summing up; and likewise (which also appeared by affidavit only) that the under-sheriff had merely put it to the jury, whether the 15*l.*, said to have been lent to the defendant by the plaintiff in August, 1833, had been so lent.

W. H. Watson now showed cause. The Court will give credit to the under-sheriff's notes, as to the facts stated in them, rather than to the affidavits. It is true that, where there is a new assignment, the plaintiff must show that there was a second trespass, or, in a case like the present, a second debt. Here the plaintiff proved a debt. It did not appear in evidence that there was any other. But the defendant, instead of taking this objection when the plaintiff had closed his case, called witnesses for the purpose of establishing a payment applicable to the debt which had been proved. Failing to do so, he changes his course, and contends that the question which ought to have gone to the jury was, whether or not two debts had existed. But, after having virtually admitted that there were two debts, and rested his defence upon a payment of the debt newly assigned, he cannot come to the Court, alleging that he took a wrong point at the trial, and claiming their interference to set him right. In *Pratt v. Groome*, 15 East, 285, it appeared, affirmatively, by the plaintiff's case, that only one place was in question; and, in the same manner, in *Oakley v. Davis*, 16 East, 82, [*110] that there was only one *arrest really complained of. [*PATTESON, J.* The defendant here was not at liberty to prove payment of the debt newly assigned, not having rejoined payment of it. The evidence of payment must have been given to identify the debt spoken of by the plaintiff's witnesses, with that of which payment had been pleaded.]

Maule, contra. The question raised on the record was, whether there were two debts or only one; and that ought to have gone to the jury. The evidence of payment was given to identify the debt paid with that first pleaded to. (He was then stopped by the Court.)

LORD DENMAN, C. J. We agree in the view taken on the defendant's part. The only issue was, whether or not there was a second debt. Any question as to payment of that debt was immaterial.

PATTESON, J. The rule must be absolute for a new trial, as there was some evidence of a second debt. If there had been no such evidence at all, the defendant would have been entitled to have a nonsuit entered.

WILLIAMS and COLERIDGE, Js., concurred.

W. H. Watson prayed the Court to make an order, to enable the plaintiff, under Reg. Gen. Hil. 2 W. 4, I. 64, 3 B. & Ad. 383, to recover his costs if he succeeded on the second trial; contending that this ought to be done, where the Court saw that it was consistent with equity.

Per Curiam. We do not see that in the present case.

Rule absolute for a new trial.

[*111] The KING v. The Justices of CAMBRIDGESHIRE. Nov. 10.

In an order of justices for stopping up a highway as unnecessary, under stat. 55 G. 3, c. 68, s. 2, the following recital: We, A., B., and C., "justices," &c., "assembled at a special sessions held," &c., on, &c., "having upon view found" that a certain part of a highway called, &c., is unnecessary:—sufficiently shows that the justices viewed such highway together, and at the time when the order was made.

Such order, if not made on a joint view, would be bad.

A direction in such order, that the land of the discontinued highway be sold by the surveyors to H. J. A., whose lands adjoin thereto, if he shall be willing to purchase the same, if not, to some other person or persons, for the full value thereof; is sufficient under stats. 55 G. 3, c. 68, s. 2, and 18 G. 3, c. 78, s. 17, though the form of an order given in the schedule (No. xviii.) to the latter act introduces the words "for the full value thereof," after the words "purchase the same," as well as in the subsequent part of the sentence.

It is not necessary to the validity of such an order, that a certificate of sale should be subjoined to it, pursuant to stat. 18 G. 3, c. 78, Sched. No. xix.; or that any direction should be given in the order, as to the application of the purchase money.

A public highway led over the land of H. J. A. He opened another road over his own land, between the same points, which the public used, and they ceased using the former road. Nine years afterwards, he obtained an order of justices for stopping up the old road as unnecessary, under stat. 55 G. 3, c. 68, s. 2. Held, by Lord DENMAN, C. J., and PATTESON, J., that such order might properly be made, and that it was not necessary to proceed as in case of diverting a highway under 18 G. 3, c. 78, s. 16.

Also, by Lord DENMAN, C. J., PATTESON and WILLIAMS, Js., that the justices might properly state in their order that they had viewed the old road, if they had viewed the ground over which the right of way was, although the road itself had gone into disuse.

Also, by Lord DENMAN, C. J., and PATTESON, J., that an order directing the surveyors to sell the soil of the old highway to H. J. A., whose lands adjoin, if he will purchase, if not, to some other person, for the full value, is not bad, although H. J. A. be himself the surveyor; at least if no fraud appear.

The general rule is, that the Court will not, on application for a certiorari, notice objections raised by affidavit; at least where they might have been brought before the sessions on appeal. As to exceptions, *quære*.

IN Hilary term last a rule was obtained calling upon the justices of Cambridgeshire to show cause why a certiorari should not issue to remove into this Court an order made by them at their quarter sessions in the preceding October, confirming an order of justices in special sessions. The latter order was as follows:—

“Cambridge to wit. We Francis Dayrell, Esq. and the Rev. John Addison Carr and George Pearson, clerks, three of his Majesty’s justices of the peace for the said county of Cambridge acting in and for the division of Linton in the said county, assembled at a special sessions held at the Crown Inn at Linton in the said county *on Thursday the 11th day of September, 1834, having [*112] upon view found that a certain part of a common and ancient king’s highway called the Walden way, leading from the township of Fulbourne in the said county,” &c. (then followed a description of the road, which was mentioned as situate in the parish of Babraham, and as passing, in one part, “through a plantation in the occupation of Henry John Adeane, Esq.”), “is useless and unnecessary, do hereby order the same to be stopped up and discontinued, and the land and soil thereof to be sold by the surveyors of the highways of the said parish of Babraham, to the said Henry John Adeane whose lands adjoin thereto, if he shall be willing to purchase the same, if not, to some other person or persons, for the full value thereof. Given under our hands and seals, the day and year and at the place first above written.”

(Signed and sealed by the three justices.)

The order of the quarter sessions (holden 17th October, 1834) recited the order of special sessions, and stated that appeal was entered against it by Thomas Mortlock, Esquire, which appeal was heard at the said quarter sessions, and that the justices there confirmed the order, and directed it to be enrolled.

In support of the rule for a certiorari, the following objections were insisted upon:—First, as to the form of the order of sessions. That the recited order was bad. 1. Because it did not show that the justices who signed that order acted upon their own view, or, if they did, that the several justices took the view at one time; or at what time it was taken. 2. Because it directed the land of the discontinued highway to be sold to H. J. Adeane, not saying “for the full value.” 3. Because *no certificate of the sale of such land was written under the order. Secondly, upon the merits, the following ob- [*113] jections to the recited order were raised by affidavit. 1. That the old highway was “diverted, turned, and stopped up,” in 1825, by Mr. Adeane of his own authority, and without any application to justices; that Mr. Adeane at that time made a way for the use of the public, in lieu of the old Walden way, over land then in his occupation, or that of his tenants, without any order of

justices to sanction the diverting, turning and stopping up the old way, or making the new; and that the old road could not nor would have been adjudged unnecessary, but for the existence of the new. And it was suggested, on this part of the case, that the proceedings taken as to these roads were an attempt irregularly to divert the old highway, under the pretext of stopping it. 2. That Mr. Adeane, to whom the surveyors of highways of the parish of Babraham were directed to sell the soil of the old road, if he should be willing to purchase, was himself, when the order of special sessions was made, and from thence hitherto, one of the surveyors of Babraham.

It was also stated, on affidavit, that the road which Mr. Adeane had made, as a substitute for that which was stopped, lay over land in which he had not an exclusive interest, and, consequently, that he could not give a legal right of way by this road: that the order of special sessions was not legally signed by more than two of six justices who were present: and that Mr. Adeane was chairman of the quarter sessions at which the confirmatory order was made.¹ But these objections were answered by affidavits of Mr. Adeane and [*114] *others; and, with respect to the stopping up of the Walden way, Mr. Adeane deposed that that was not done till six months had elapsed from the making of the new road, during which time, as he was informed and believed, no person used the Walden way.

Sir *W. W. Follett*, *B. Andrews*, and *Byles*, now showed cause. The statute 55 G. 3, c. 68, s. 2, gives justices the power of stopping up unnecessary highways, "by such ways and means, and subject to such exceptions and conditions in all respects as in the said recited act" (13 G. 3, c. 78) "is mentioned, in regard to highways to be widened and diverted," only with a variation as to the disposal of the money to be raised by selling the land. Then, as to the first objection. The section of 13 G. 3, c. 78, which directs the view to be taken by justices before ordering a highway to be diverted, is s. 16; the words of which are, "that where it shall appear, upon the view of any two or more of the said justices," &c., "such justices shall, and they are hereby empowered," &c.: and the schedule, No. xvi., to this act, which relates to the subject matter of that clause, begins, "We, —, two of his majesty's justices of the peace," &c., "having upon view, found that a certain part of the highway," &c.: the words used in the present order. In *Rex v. The Justices of Worcestershire*, 8 B. & C. 254, an order, under 55 G. 3, c. 68, beginning "We, the undersigned," &c., "having upon view found, or it having appeared to us," &c., was held bad: probably the objection now made has arisen from a misconception of that case. [Lord DENMAN, C. J. We need not trouble you far [*115] ther *on this point. *PATSON J.* An order, irregularly made, under stat. 13 G. c. 78, was not removable by certiorari; *Rex v. Casson*, 3 D. & R. 36. It seems the certiorari is not taken away by the present act.] That may be a question: but orders have been brought up by certiorari under this act, *Rex v. Horner*, 2 B. & Ad. 150. As to the second objection, stat. 13 G. 3, c. 78, s. 17, directs that the soil of the old highway, when stopped, shall be sold "to some person or persons whose lands adjoin thereto, if he, she, or they shall be willing to purchase the same, if not, to some other person or persons, for the full value thereof:" and the present order follows the words of this clause. It is true that the form in the schedule, No. xviii., introduces the words "for the full value thereof," after the words "purchase the same," as well as in the subsequent part of the sentence; but there is no substantial difference in the order, as here drawn: the words "for the full value," though inserted at the end, override the whole sentence: and, by sect. 70, although the forms of proceedings are to be those set forth in the schedule, yet no objection is to be made for want of form. Sect. 80 provides, generally, that "no proceedings to be had or taken in pursuance of this act shall be quashed or vacated for want of form:" that provision must extend to an order like the present, made under

¹ It was stated in answer, that he did not act on this occasion.

necessary to a settlement: and for this they cite *Rex v. Kenilworth*, 2 T. R. 598. But the ground upon which that case was decided prevents it from being any authority here; namely, that the order of removal effected a dissolution of the contract of hiring. If then a decision on that ground be not inconsistent with the view which we take here, is the dictum which appears in the judgment inconsistent with that view? The dictum must be construed with reference to the subject matter. Then is the effect of the order of removal inconsistent with our view of this case? The order of removal proves only the state of facts existing at the time. Supposing that there are ten requisites, of which only nine are performed, the settlement is incomplete: but when the tenth is performed, why is the settlement not to take effect unless the performance be at a particular time? No such limitation is imposed here, either by the statutes, or by the case of *Rex v. Kenilworth*, 2 T. R. 598.

Order of sessions confirmed.

**The KING v. The Inhabitants of HATFIELD. Nov. 11. [*156]*

By an act for inclosing lands in several parishes and townships, it was directed that the allotments to be made in respect of certain messuages, &c., should be deemed part and parcel of the townships respectively in which the messuages, &c., were situate. And the commissioners under the act were directed, in their award, to make such orders as they should think necessary and proper concerning all public roads, "and in what township and parish the same are respectively situate," and by whom they ought to be repaired.

The commissioners by their award directed that there should be certain roads. One of these, called the Sandtoft road, passed between new allotments. The road was ancient. The part of the common over which it ran, before the award, was in the township of H., and the road was still in that township unless its situation was changed by the local act and the award. The new allotments on each side were declared by the award to be in other townships than H. The award did not say in what townships the road was situate, nor by whom it was repairable.

Held, that the act, by changing the local situation of the allotments, did not, as a consequence, change that of the adjoining portions of the road, and therefore that the road in question continued to be in H.

Held, by Lord DENMAN, C. J., that, where the herbage of a road becomes vested, by the General Inclosure Act (41 G. 3, c. 109), sect. 11, in the proprietors of allotments on each side, no presumption arises that the soil itself belongs to such proprietors.

Held, further, by the whole Court, that, under sect. 9, of the General Inclosure Act, a road continued, as well as a road newly made, under the award of commissioners of inclosure, must be declared by justices in special sessions to be fully completed and repaired, before the inhabitants of the district can be indicted for not repairing it.

INDICTMENT against a township for non-repair of a highway. Plea, as to part of the road, Guilty: as to the residue, Not Guilty. On the trial before Lord DENMAN, C. J., at the Yorkshire summer assizes, 1883, a verdict was given for the Crown, subject to the opinion of this Court upon the following case:—

The road in question is the road described and defined in the award herein-after mentioned, in the following terms: "One other public road of the breadth of forty feet, branching out of the said Bawtry and Selby Road, near Bearswood Green aforesaid, and proceeding, in an easterly direction, over a certain common called Ferne Carr, to Stoopers Gate, leading to Sandtoft; and which road we call Sandtoft Road." The boundary, on one side, of the road so described, formed, before the inclosure, the boundary of an ancient highway passing over the said common called Ferne Carr, in *the same direction as the road [*157] above described, and the part of the common over which the road passed was then within the township of Hatfield. The ancient highway on the other side was open to the common without any defined boundary. By an act, 51 G. 3, c. xxx. (private), entitled "An act for inclosing lands in the parishes of Hatfield, Thorne, and Fishlake, in the manor of Hatfield, in the West Riding of the county of York," after certain recitals, it was enacted, s. 39, that, after common wastes in the act before mentioned should have been well and

would have been bad for want of jurisdiction, *Rex v. Winter*, 8 B. & C. 785. *Welch v. Nash*, 8 East, 394, shows that they cannot give themselves jurisdiction by omitting to notice the substitution of a new road, where that is really contemplated. In that case the justices stated that they had ordered the old highway to be diverted, and were satisfied that the new highway, described in a plan referred to, had been properly made; and they then ordered the old highway to be stopped. The orders were confirmed by the sessions, on appeal. Yet the defendant in an action of trespass was allowed to offer evidence that in fact no new road had been made. [COLERIDGE, J. That was in an action. Can we try such a question on affidavits?] Objections to jurisdiction have often been so tried: *Rex v. Great Marlow*, 2 East, 244; *Rex v. Standard Hill*, 4 M. & S. 378. There is no reason that a party should be permitted by his own unauthorized act, and by lapse of time, to divert a road without having recourse [*119] to an order of justices for the express purpose; and great inconvenience would result from such a practice. The remaining objection is, that Mr. Adeane is himself the surveyor. An order that a surveyor shall sell to himself is like an order that a man shall adjudge in his own cause, and is against the rule of equity, that a trustee shall not be a purchaser.

Lord DENMAN, C. J. The first objection would be well founded, if the order of special sessions bore the construction which has been put upon it. I wish it to be distinctly understood that, to ground an order of this kind, the view by justices is not sufficient, unless it be a joint view, nor unless their finding be come to immediately upon it. The justices are to make the order on consulting together, and they cannot proceed upon a separate view. But here it does not appear, from the words of the order, that the view has been improperly taken; for the schedule, No. xvi., to 13 G. 3, c. 78, is in the same language: the legislature therefore has shown that the terms used in the present order sufficiently express its meaning in the clause referred by stat. 55 G. 3, c. 68, s. 2, upon which the order is framed. The second objection, that the words "for the full value thereof" are not twice repeated, appears to me of no weight; because I think that these words, occurring at the end of the sentence, override the whole, as they do in the corresponding clause, stat. 13 G. 3, c. 78, s. 17. As to the third objection, that no certificate of sale is written under the order; upon reference to stat. 55 G. 3, c. 68, it appears that the part of stat. 13 G. 3, c. 78, [*120] which rendered that form necessary, is repealed by the later act.¹ Then, as to the questions raised by affidavit. It is contended that evidence may be now offered to the Court, for the purpose of showing want of jurisdiction to make an order; and with that view circumstances are adduced, which, it is said, prevented the justices from viewing the old road in the state in which it was when the stoppage was first made. But I do not think that a just mode of presenting the case. The only question with reference to such an order is, whether the road, as it exists at the particular time when the view is taken, be necessary or not. By whatever circumstances it may be rendered unnecessary, the justices are only to say whether in fact it be so or otherwise. It is wisest to pursue the words of the act strictly. But, independently of this, I think if the fact be that a party has stopped the old road, giving a new in its stead, which has been adopted and not complained of, and he then applies to the justice to grant an order for the stopping, there is nothing to prevent them from finding that the old road is unnecessary. It is said that, at the time of this order, the old highway was no longer in a condition to be viewed as a road: and it is that, in the enactments relating to the view by justices, the word "highway" is used. That, however, is equivocal; the word may mean a way capable of being travelled, or a place, merely, over which there is a right of way: and here I think the last only is meant. Then it is said that the order directs a surveyor to sell to himself. It would be better that the surveyor should not be a purchaser in his own year; but there is nothing to prevent such an officer, when he is a proprietor of

¹ Sects. 1, 2. Compare stat. 13 G. 3, c. 78, s. 17.

adjoining land, *from buying the soil of the old highway. I do not say that, even on *certiorari*, the Court would not set aside an order if manifest fraud were shown. That may be so. In *Rex v. The Justices of Somersetshire*, 1 D. & R. 443, where a *certiorari* was applied for to remove an appointment of overseers, on a suggestion of corrupt motives in the appointing magistrates, the Court refused a rule, saying that the parties complaining might appeal to the sessions or move for a criminal information. Notwithstanding that refusal, however, I do not say that if corruption were clearly made out the Court would not, upon an application like this, declare the order invalidated by the fraud. But here there is not slightest foundation for any imputation on Mr. Adeane as a magistrate or a gentleman, nor any fact shown to vitiate the proceedings. The rule must therefore be discharged.

PATTESON, J. The schedule to stat. 55 G. 3, c. 68, does not give any form of an order for stopping up an unnecessary highway; but the act, sect. 2, says that it shall be done "by such ways and means, and subject to such exceptions and conditions in all respects," as is mentioned in 13 G. 3, c. 78, "in regard to highways to be widened and diverted:" and this order of justices appears to be drawn from the forms xvi. and xviii. in the schedule to the statute of 18 G. 3, taking from each what seemed fit for the purpose. As to the words "having upon view found;" upon reference to sect. 16 of stat. 13 G. 3, c. 78, and sect. 2 of stat. 55 G. 3, c. 68, in both of which the words are "upon the view of any two or *more of the said justices," I do not doubt that a view by two together is intended, and that if they view separately they act indiscreetly, and their order should be set aside. But, in the form here used (his Lordship here read the beginning of the order), the words "We, —, having upon view found," evidently mean "having upon our joint view found." We are bound to think that they intended so, and the words they have used import it. Then it is said that the words "for the full value," ought to have been introduced twice; as in the schedule, No. xviii., to stat. 13 G. 3, c. 78, where it is supposed that they are repeated for greater caution. That may be, but I do not believe it to be the case; for, if it were so, they should have been repeated also in the body of the act. If more is meant by the form in the schedule, where the words occur twice, than in the seventeenth section of the act, the schedule contains something which is not enacted in the body of the statute. Section 69 directs that the precedents in the schedule shall be used on all occasions, but it also cures want of form. It is also said that the order does not show how the money, arising from the sale of the old road, is to be applied; but that is not shown by No. xvi. or xviii. of the schedule to stat. 13 G. 3, c. 78; only the form, No. xviii., has a certificate of sale added to it; which, however, is not required under the later act. With regard to the objections in point of jurisdiction, raised by affidavit, I protest against its being understood that we can, on every occasion, look into extrinsic matter, on motion to bring up orders by *certiorari*. There may be such an occasion; but the general rule is otherwise. Here, at all events, there has been an appeal to the sessions, and the points should have been raised there. But, even if *we could look at extrinsic matter, no valid objection is raised. It is said that the old road was [*123] disused ten years ago: and that when the justices went to it, previously to making their order, there was no road for them to view. It is true that there may not have been a road to be seen, in length and breadth, as when the public were using it; but they could judge whether a road was necessary in that direction. The public had still a right to go over it; and it existed as a road in point of law. And the justices, in their order, say that they have viewed it. It is contended that this was not a stopping but a diverting; and it is true that, if they had gone to the road for the purpose of diverting it, they ought to have set out, in their order, the particulars applicable to such a case. But I see no objection to a man's setting out a new way over his own land, where there is an old one already, allowing the public to use the new or the old, at their pleasure;

and, after a little time, applying to the magistrates to stop the old road as unnecessary: though magistrates should be cautious in complying with such an application, because they ought, before doing so, to be sure that the public have a new right of way given to them. If, however, anything wrong is done in this respect, the remedy is by appeal to the sessions. The objection, that Mr. Adeane was surveyor, raises no question upon the form of the order, or upon the authority to make it; it relates only to the honesty of the proceeding before the justices, and that was matter for inquiry at the quarter sessions. We cannot enter into the question, whether the justices were right or wrong in making the order; but I must say that there appears to me to be no ground for any imputation.

[*124] *WILLIAMS, J. It is a most important point, how far an order of justices may be questioned in this Court on account of matter dehors. I do not say that it might not be so if a case were strongly made out, showing that the magistrates had no jurisdiction at all; but that state of things does not arise here. With respect to the opportunity which the justices had of viewing in this case, I think, referring to the language of the statutes, that the justices, when they saw the place where the old road had been, had enough to found their jurisdiction upon. And, as to this and other objections which have been made respecting the jurisdiction, it is satisfactory to find that, if there has been a defect of jurisdiction, a party who is affected may still open the question, in an action of trespass, according to *Welsh v. Nash*, 8 East, 394. As to the statement of the view, in the order of justices; reading that document as one would read any other composition, and adopting no violent construction, I should say that, when three justices begin their order with the words "We," &c., (naming themselves), and proceed to say that they have "upon view found," &c., the view must, in all fair acceptation, be taken to be that of the justices mentioned *nominatim* immediately before. So the words "for the full value," if read with fair attention to the context, and not with a set purpose to overturn the meaning, must be understood as referring to the whole matter that precedes. The point as to Mr. Adeane being surveyor does not arise before us at all on this order.

COLERIDGE, J. The most important class of objections raised here, consists [*125] of those which do not appear on the face of the order. I have always understood the rule to be clear that, on an application of this kind, objections raised merely by affidavit are not admissible. I do not say that there is no case in which, on application for a certiorari, the Court may inquire into the facts on affidavit: in some instances the Court here is a court of appeal from inferior jurisdictions; and, where it does look into the merits of proceedings below, it can do so only on affidavit. But we must be cautious not to exceed our jurisdiction: and when we find that there is a court of appeal below, to which the matter brought before us on affidavit might have been carried, I think we are confined to objections appearing on the face of the order. Here the objections raised may be of three kinds. First, that the order is on the face of it defective. Secondly, that it is made inconveniently and unjustly. Thirdly, that it is made without jurisdiction. In the second case the answer is, that there might have been an appeal to the sessions; and the stronger the argument of inconvenience, the more reason there is that the case should have been carried there. In the third case the order is a nullity, and may be contested in an action of trespass. In the first case the order may be brought before us, but there is no ground for the admission of affidavits. Then as to the objections of this class. I was at first struck with the suggestion that, if the schedule of stat. 13 G. 3, c. 78, was resorted to, the form, No. xviii. should have been pursued, and not No. xvi. But that could not be; for the form No. xviii. relates to the stopping of an old highway under the statute of 13 G. 3, which is repealed, as to this proceeding, by 55 G. 3, c. 68, s. 2, and that section limits [*126] the justices, in the stopping of roads under the new act, to the ways and means pointed out by the former one, in regard to highways "to be

widened and diverted." As to the words "We, —, having upon view found;" can any lawyer have a doubt of their meaning? The view mentioned clearly means a view taken by them together, at the time of making the order, and a view of some fact they were competent to judge of. With respect to the words "for the full value," the answer has already been given; the words occur in stat. 13 G. 3, c. 78, s. 17, as in this order; and if they override the preceding parts of the sentence in the one case, they do so in the other. It has also been said, that by this order no direction appears to have been given as to the disposal of the money to arise from the sale; but that is unnecessary under stat. 55 G. 3, c. 68, which provides specifically that the proceeds shall be paid to the surveyor, in aid of the general highway fund. A certificate of sale is not necessary to the validity of the order: indeed an order for stopping and selling could not be concurrent with the sale; and therefore a certificate of sale could not possibly be subjoined at the time of making the order. The objection, that the surveyor, who is the party to sell, is also the purchaser, does not arise on the face of the order itself.

Rule discharged.

*HOLMES v. MENTZE. Nov. 19.

[*127]

Under s. 6 of the Interpleader Act, 1 & 2 W. 4, c. 58, the Court will not make a rule for the protection of a sheriff who has levied under a fi. fa., merely because a partner of the debtor has given notice to the sheriff to quit possession on the ground that the goods are partnership property and that the debtor has no beneficial interest in them, being indebted to the firm beyond the amount of his share in the effects.

The sheriff's duty is to sell the share, though he may not be able to ascertain the amount of actual interest.

But the Court will, in the above case, interfere under the act for the sheriff's protection, if the creditor disputes the partnership.

And where the creditor, having appeared under the interpleader rule and not contested the partnership, whereupon the rule was dismissed, afterwards refused to admit it, and ruled the sheriff to return the writ, the Court enlarged the latter rule till the creditor should indemnify the sheriff.

A RULE was obtained in Easter term last, under the Interpleader Act, 1 & 2 W. 4, c. 58, on behalf of the sheriff of Lancashire, calling on the plaintiff and John Heap to appear and state their respective claims to certain wine and spirits, seized by the sheriff under a fi. fa. in this cause, or else relinquish the same, &c. The goods were taken in execution, February 17th, 1835, upon a judgment entered up against the defendant on a warrant of attorney given by him to the plaintiff, and bearing date November 17th, 1834. The defendant was a wine merchant. His name, and no other, appeared over the premises (vaults and cellars in Manchester) on which the seizure was made. The officer who seized was served, the day after, with a notice addressed to the plaintiff, his attorneys, &c., the sheriff, and the officer, signed by John Heap, and stating that all the goods taken in execution were the property of a partnership between Heap and the defendant, carried on under the firm of Mentze & Co.; that the defendant had not any property, part, or share in the said goods, but was considerably indebted to Heap on the balance of the partnership accounts; and that Heap was alone beneficially entitled to and interested in all the goods, property and effects of the said partnership. He therefore required the parties addressed by the notice to quit possession; and stated *that, if this were not done, [*128] he should commence against them respectively such actions, suits, and other proceedings as might be advised.

In answer to the present rule, Heap filed an affidavit, repeating the statements in the notice, and adding more particular ones; and alleging, further, that the defendant, in 1831, became his partner in the wine and spirit business, carried on in Manchester: that, on a balance of account taken in June, 1834, the defendant was found to owe the partnership 2557*l.*, which debt had not been reduced but increased: and that the damages recovered in this suit were

due from the defendant on his own account solely, the plaintiff being unknown to Heap, and having no demand against the partnership.

Sir *J. Campbell*, Attorney-General, and *M. Chambers*, for the plaintiff. This is not a case within stat. 1 & 2 W. 4, c. 58, s. 6. No issue could be directed under the statute. The sheriff is not "exposed to the hazard" of an action. Heap, by his own statement, admits that the defendant is interested in the goods as his partner. The seizure, therefore, could not be a trespass. The sheriff had a right to take the goods, and to sell the defendant's interest in them. As to the quantity of interest, the Court will not hear equitable claims discussed on an application under this act: *Sturgess v. Claude*, 1 Dowl. P. C. 505.

Sir *W. W. Follett* and *Knowles*, for the sheriff. It is true that the right to

[*129] seize is not disputed; but the *question is, whether the sheriff can sell, Heap claiming the entire property in the goods. The sheriff is threatened with an action by the notice, and is, therefore, entitled to protection under the statute. If he is to sell, must he sell the goods as the defendant's property, or as that of the partnership? In the one case, Heap threatens to proceed against him; in the other, the execution creditor will hold him liable for not having sold at the best price that might have been obtained. [COLERIDGE, J. Have you had any communication on the subject with the execution creditor? Must not there be an actual dispute to entitle the sheriff to assistance? See *Isaac v. Spilbury*, 10 Bing. 3.] The creditor appears under this rule, and requires the sheriff to sell the goods as the defendant's. [PATTESON, J. For the amount of his interest in them.] It is disputed whether he has any interest in them, as partner, at all. The plaintiff causes a warrant to issue, commanding the sheriff's officer to levy on goods stated to be the defendant's. Then notice is given to the officer by Heap, that the defendant has no property in the goods, but that Heap alone is beneficially interested in all the partnership effects. To put the goods up for sale, giving special notice of the circumstances, would not be a proper course. If it were so, it might be adopted in every case where the assistance of this Court is now sought for. The sheriff (but for the statute) is bound to decide, at his peril, whether the goods are liable to be sold, or are the property of the adverse claimant, and must act upon his discretion. In a case under this act, before TAUNTON, J., and in which he consulted the

[*130] rest of the *Judges,¹ the third party claimed in respect, not of the entire property, but of a lien. There it might have been said that the property could be offered for sale, with notice of the alleged claim to which it was subject; but the case was held to be within the protection of sect. 6. The material inquiry, in this case, will be whether the defendant is entitled to the whole property, or only to an interest, with other persons. [COLERIDGE, J. *Quidcunque viâ*, the sheriff may sell.] The question is, whether he shall sell the property as the defendant's, or as that of the defendant and others. If the Court directed an issue, it would be, whether the goods were partnership property or not; and, if they were, what was the defendant's interest. The power which, it is said, the sheriff may exercise, of selling subject to an alleged partnership interest, is not clear. In *Burton v. Green*, 3 Car. & P. 306, where a *f. fa.* had issued against one of three partners, and it was contended that the sheriff ought to have levied on the partnership property to the extent of one-third, Lord TENTERDEN said, "I am not quite satisfied as to the interest which the sheriff might have sold under the execution. There is great difficulty in making the sheriff a tenant in common with the partners."

Sir *F. Pollock* and *Tomlinson*, on behalf of Heap, referred to *Harvey v. Crickett*, 5 M. & S. 336, in answer to the above dictum; and they requested that the Court would not discharge the rule without putting the case in a course of investigation.

[*131] *Lord DENMAN, C. J. The sheriff, in this case, is called upon to seize goods of the defendant, at the plaintiff's suit, but a third party,

¹ Probably *Ford v. Boynton*, 1 Dowl. P. C. 367.

Spitalfields v. Bromley, 18 Vin. Ab. 468 ; Removal (H), pl. 5 ; Rex v. Kirkby Stephen, Burr. S. C. 664.¹ It is no answer, in this case, that, at the time of the former removal, Oldbury was, for the purpose of maintaining the poor, a part of Hales Owen, and is now no longer so. A township may separate itself, for this purpose, from *the parish of which it has formed a part ; and [*170] districts which have been so separated may reunite : Lane v. Cobham, 7 East, 1 ; Rex v. Palmer, 8 East, 416 ; but it would be unjust if these alterations, made for the convenience of the inhabitants, could alter the liabilities contracted by such districts with respect to other parties. The rights and liabilities of the districts, relatively to each other, may be arranged among themselves. [Lord DENMAN, C. J. You might have contended so here, if the order had been made upon Hales Owen, which was the name of the district formerly including Oldbury ; but you select Oldbury, which is one portion of what formerly composed that district.] No case exactly like this has occurred, but Rex v. Oakmere, 5 B. & Ald. 775, has some resemblance to it. [Lord DENMAN, C. J. There a district newly formed into a township maintaining its own poor, was held not liable for the maintenance of a bastard born in it before the alteration ; but ABBOTT, C. J., relied upon the fact that the district was not situated in any parish or township before. Here you treat Oldbury as having been so situated. Why are you not bound to show that the pauper's settlement, at that time, was within Oldbury?] As between third parties and the particular district, it is not necessary. [PATTESON, J. The result of the case, as you put it, seems to be that, since the separation, a third district may, at its pleasure, fix the pauper upon either Oldbury or Hales Owen.] The respondents contend only that the separated districts are not, by their division, to get rid of the liability altogether. [COLERIDGE, J. Even as you put the case, if the appellants prevail, you only lose the benefit of an estoppel.] A great difficulty in proof is thrown upon the *respondents, the former removal having taken place [*171] so long ago.

Whately, contra. The former order, if conclusive at all, is so against Hales Owen. There is no instance of a district being concluded by an order in which it is not even named. And an order upon the parish of Hales Owen, generally, cannot have been good, since the parish at large never maintained its own poor ; but was, at the time of the order, separated into two divisions for the purpose of the poor laws, one in Worcestershire and the other in Shropshire. There could not be a removal to Hales Owen as a parish maintaining its own poor. Rex v. Bishop Wearmouth, 5 B. & Ad. 942, shows that an order for such removal could not be valid. On this point, Spitalfields v. Bromley, 18 Vin. Abr. 468, Removal (H), pl. 5 ; and Rex v. Kirkby Stephen, Burr. S. C. 664, differ from the present case. The Worcestershire division would be like a separate parish as to the relief of the poor ; Case of St. Botolph without Aldgate, Sir T. Ray, 476 : and Oldbury formed no part of that division. If the order upon the parish of Hales Owen had been delivered to the overseers of one of the Worcestershire townships, Oldbury would never have heard of it. At all events, the appellants here should have been permitted to give evidence that the settlement was not, in point of fact, with them, since the order of removal was directed to them as the township of Oldbury : they could not, as the township, be concluded by an order on the parish of Hales Owen. [COLERIDGE, J. Suppose the question here had been between two parishes unconnected with these districts, and one parish had put in the *original order ; would not that order, unappealed against, have been conclusive ? And why should [*172] Oldbury be in a better situation than a distinct parish would be, because it once formed part of Hales Owen ? In the case put, the parish concluded by the order would have been a stranger to it, as you say Oldbury would have been to

¹ The sessions may amend such erroneous order, on appeal : and in Rex v. Bingley, 4 B. & Ad. 567, note (a), this Court sent back such an order to the sessions for that purpose. See Rex v. Cartmel, 2 A. & E. 562.

an order served upon the Worcestershire division of Hales Owen.] At any rate, the objection that the original order, being upon Hales Owen generally, was invalid, would have prevented its being conclusive, even in the case of an independent parish. And if such an order as this is conclusive, after a separation, upon each of the separated districts, it rests with those who procure a subsequent order of removal, founded on the original one, to settle the pauper in one place or another, according to their caprice.

Lord DENMAN, C. J. I feel great difficulty in this case, and the more, on account of doubts entertained on the Bench. When first I read the case, I thought that the original order, unappealed against, was conclusive upon every part of the parish to which it then applied; but, on consideration, I think it does not create an estoppel upon Oldbury. A difficulty arises as to the description of the parish in the former order. The case states that the removal, under that order, was to the parish of Hales Owen, in the county of Salop. Supposing that we should be justified in concluding that, by that description, the Shropshire division of Hales Owen was sufficiently identified, I think that Oldbury, having since become a separate township, is not estopped by that order; if it were so, persons removing a pauper under circumstances like the present, [*173] might settle him *in whichever district they chose to select. When the former order was made, the parish was the party charged; now it is the township of Oldbury; and, as those who remove say, that it is the township of Oldbury to which they remove the pauper, as settled there, I think they were bound to prove a settlement in that township. In *Rex v. Oakmere*, 5 B. & Ald. 777, ABBOTT, C. J. said, "The question is, whether the district newly created into a township under this statute," (for inclosing the forest of Delamere,) "which before was neither in any parish nor township, is to be considered as if it had formerly been a parish or township with regard to settlements; or, only as becoming so from the time of its creation under the act, and as if it had formerly been wholly uninhabited." And (adopting the latter construction), he drew a distinction which appears to me applicable here. "This is not like the case of a modern appointment of overseers to places that formerly had no such officers; because all such places must have been vills from time immemorial, and consequently under a legal obligation to maintain their poor, and possessing a legal right to the appointment of officers, and by such appointment to remove persons under the same circumstances as other townships or parishes might do." P. 779. It seems to me, therefore, that, if this township is an ancient division which might formerly have maintained its own poor, then, when it obtained the right to have officers of its own, and to provide for its poor separately, it became liable to maintain those paupers whom it would have supported if it had been a separate division at an earlier period. We must, I think, [*174] take it, upon the *whole, that the township is not bound by the order upon Hales Owen. There are many difficulties in the case; the Court must deal with them as it can, if they arise; but I am of opinion that there is no estoppel.

PATTESON, J. I feel great difficulty in this case: I doubted, at first, whether the township was not estopped, and I still have doubts; but the rest of the Court is of opinion that no estoppel arose, and my doubts are not so strong as to lead me to say that I entirely differ. I take the order unappealed against to have been made upon the division of the parish in Shropshire. I think that was a good order. Oldbury was within the Shropshire division, and, if the pauper was settled in that district, he was as much settled in Oldbury as in any other part of it. The evidence which it was proposed to offer would not show that the pauper was not settled in Oldbury, as regards any question between that township and a third township or parish, though its effect might be different as between Oldbury and the parts from which it has separated. But, if Oldbury could be so discharged, as to a third parish, any parish, by dividing itself, could get rid of the liability to maintain paupers which had been removed to it. On the other hand, if an estoppel arose here as to one district, it would

as to more; and, if a parish separated itself into a number of divisions, any one of those, under circumstances like the present, might conclude any other. The case presents difficulties on both sides.

WILLIAMS, J. There is certainly a difficulty in the case of the appellants, which my brother PATTESON has pointed out; and there is, on the other hand, this *considerable difficulty, that, if we hold the pauper to be settled in each of the separated divisions alike, a party removing might, if there [*175] were twenty such divisions, fix on any he thought proper for the settlement. It comes to the question, whether or not the precise ground taken by the sessions, that is, the ground of estoppel, be maintainable. And, without calling in aid any doubtful argument, I think that the township and the parish here being now as distinct from each other as Cumberland from Cornwall, a decision that the pauper was settled in the one is not a decision that she was settled in the other. There is no estoppel, because the party whom it is sought to estop is not the party on whom the former order was made.

COLERIDGE, J. The case is certainly difficult. I think it is not fairly to be decided on the ground of estoppel. The order formerly acquiesced in was a judgment in rem, and, as such, conclusive against all the world, and not upon a particular district by way of estoppel. But my ground of decision is this. The respondents were to prove a settlement in Oldbury; for that purpose they put in the former order. But that appears to be made upon a different party. Then they were to show that, at the time when the order was made, Hales Owen and Oldbury were identical. The sessions excluded that inquiry prematurely; and upon that ground I think their order is bad. Difficulties may arise hereafter as to other parts of the case: but at the present step I think the sessions are wrong.

Order of sessions quashed. The case to go back to the sessions.

BLANCHARD *v.* CAROLINE BRIDGES. Nov. 13th. [*176]

E., being owner of a house, enlarged it, and inserted a window, at one end, in the part added, and, at another end, carried out the side walls, between which two windows formerly stood in a straight line, five feet, converting this end into a bow, and inserting two bow windows, in the same direction, but not in the same situation, as the two former. Held, that, whatever privilege against the obstruction of light the windows of the original house possessed, this privilege did not apply to the three new windows. Before E.'s house was built, the land on which it was built, together with some adjoining land, belonged to R., who conveyed the land on which the house was afterwards built to C., and C. agreed to sell to E., who entered and built the house. Afterwards, and before the enlargement above mentioned, R. joined in a conveyance with C. (each as to his own estate), by which the house, with all lights and easements appertaining, and an additional part of R.'s land, were granted to E. E. having afterwards enlarged (as above described): Held, that neither R., nor his assignees, were precluded from obstructing the three new windows by building on the land adjoining.

After the enlargement, E. assigned to O., and R. afterwards assigned an additional piece of the land adjoining to O.; this piece lay to the north of O.'s house, and, in the conveyance, its southern boundary was described to be "the dwelling-house of O." Held, that this did not operate as a recognition of the house in its then state, so as to preclude R., or his assignees, from obstructing the new windows by building on other part of the adjoining land south of O.'s house.

In the case stated for the Court, by which it was agreed that the Court might draw conclusions of fact as a jury, it was stated that R., at the time of his original conveyance to C., was desirous of selling his land in building lots: The Court refused to take this into consideration, in interpreting the effect of the conveyance, which did not mention this, but called the land conveyed "arable land:" and they held that R. was not precluded by this conveyance from obstructing the lights of the house afterwards built.

After the conveyance by R. and C. to E., R. was told, by E.'s architect, that alterations were going on, but R. did not know the precise alterations intended to be made as to the windows. R. was told of the precise nature of other alterations, to which he assented, reserving to himself leave to build on his own ground, up to the wall of the

house, in a part which did not contain the new windows. The Court refused to infer, as a fact, such a legal instrument as might be necessary to convert O.'s house into a dominant, and B.'s land into a servient, tenement with respect to the lights.

THIS was an action for building a wall, and thereby darkening certain windows, and otherwise injuring the house of the plaintiff.

On the trial before BOSANQUET, J., at the Winchester Spring assizes, 1834, a verdict was taken for the plaintiff, subject to the opinion of this Court on the following case:—

William Rolph, being seised in fee of a field called The Seven Acres, and wishing to sell it in building lots, by indenture, or deed of feoffment, with livery [*177] of seisin endorsed, dated 15th May, 1816, between William *Rolph of the first part, John Primer of the second part, Richard Close of the third part, and Charles Martill of the fourth part, for the considerations therein mentioned, conveyed to the said Richard Close, in fee, all that piece of arable land lying on the west side of a field called The Seven Acres, situate, &c.,—and which piece of land, admeasuring from north to south twenty-two feet, and from east to west one hundred feet, is bounded on the north by land of the said William Rolph, occupied by Charles Martill, on the east by land also of the said William Rolph, occupied by Edward Rodgers, and on the west by a road twelve feet wide next Southampton Common,—as the same piece of land is now set out, and occupied by the said R. Close; together with all ways, paths, passages, waters, watercourses, commons, common of pasture feedings, timber and other trees, fences, easements, profits, advantages, emoluments, hereditaments, and appurtenances whatsoever, to the said piece of land belonging or appertaining, and the reversions and yearly and other rents, issues, and profits, &c., and all the estate, right, &c., of the said William Rolph and John Primer, or either of them, of, in, to, or out of, such last-mentioned lands, &c., *habendum* to the use of the said R. Close in fee. The above conveyance contained only the usual covenants for title.

Close occupied this land for the first two or three years as a garden: Rolph continued to occupy the remainder of the field, and marked it out, and offered it for sale in lots for building; but only sold a lot to Elderfield, as after mentioned. Three or four years ago he put a board up, announcing that the land was on sale for building; the house not to be built in any particular form or plan.

[*178] *At the end of two or three years, Close contracted to sell his portion to one Snelgrove, who put up a cottage on the land. No conveyance was ever made to Snelgrove. The cottage so built was about fourteen feet from north to south, being built to the extremity of the land conveyed by Rolph to Close on the north side, and leaving a space of about eight feet on the south side, which was used as a passage, and was fenced off from the land in Rolph's occupation. There were two small windows at the east end of the cottage, and one at the west end.

Subsequently Snelgrove contracted with one Elderfield to sell him the property in question.

Elderfield, wishing to enlarge his cottage, applied to Rolph to grant him more land on the south side, which Rolph refused to do. But afterwards, by indentures of lease and release, dated respectively 11th and 12th of September, 1822, between Close and Martill of the first part, Snelgrove of the second part, Rolph of the third part, Elderfield of the fourth part, and William Wade of the fifth part, reciting the feoffment of 15th May, 1816, and that Snelgrove afterwards purchased the said piece of land, and had since erected thereon a cottage, and had then agreed to sell the said piece of land and cottage to Elderfield, and that Close, Martill, and Rolph, at the request of Snelgrove, had agreed to join in conveying the same to Elderfield as thereafter mentioned; it was witnessed that, for the considerations therein mentioned, Close, Martill, and Rolph, at the instance of Snelgrove, did, and each of them did, as to all their estates in the premises, grant, bargain, sell, alien, release, and confirm, and Snelgrove did

ratify and confirm, to Elderfield, in fee, all that piece of land on the west side of The *Seven Acres, situate, &c., and also the cottage lately built thereon, which piece of land admeasures from north to south twenty-two feet, and from east to west one hundred and twelve feet, and was bounded on the north, east, and south by land of Rolph, and on the west by Southampton Common, and lately occupied by the said Snelgrove, together with all ways, paths, passages, waters, watercourses, lights, easements, profits, and appurtenances to the said piece of land, cottage, hereditaments and premises belonging; and the reversion, &c., *habendum* to Elderfield in fee, to the uses and upon the trusts therein declared: covenants for title.

Elderfield immediately commenced certain alterations in the cottage; and Kent, his architect, told Rolph what he was going to do. Rolph was often there while they were at work, and saw the alterations going on, but knew nothing of the plan. He knew they were going to build a wall adjoining the land to enlarge the house. The following alterations were made:—The land, formerly used as a passage on the south side, was taken in, and the cottage enlarged to the extremity of Elderfield's land on this side. One small window was inserted on the west side of the newly built part; and, on the east side, a projection, terminated by bow windows, was carried out about five feet and a half. The bow windows do not occupy the place of the old windows. (The relative positions of the old and new windows and walls were delineated in a plan, to be taken as part of the case. It appeared that the bow windows were in the direction of the former windows at the east end, but not in the same place: and, in the judgment (pp. 190, 191, post), the Court assumed that the only change made in the east end was carrying out the side walls five feet, and *converting the termination into a bow.) Part of the footings of the [*180] exterior of the new south side were built on Rolph's land. Kent spoke to Rolph about the footings after the wall was built: Rolph consented to their remaining, on condition that if he built, he should be at liberty to build up to the south wall of the cottage. Two new windows were put in on the western side, one on the old part, another on the new: the old windows were altered by putting in new mouldings. After this was done, Kent applied to Rolph for leave to put up a cornice spout, projecting over his land from the southern wall, which Rolph consented to, on condition that he should be at liberty to remove it when he liked, and build home to the wall.

Elderfield occupied the cottage in its altered state, without any interruption, until 1828, when he let it to one Cobb. Rolph continued to occupy the adjoining land: and, on the application of Cobb, who then occupied the cottage as altered by Elderfield, and who wished to make a further addition to it on the north side, Rolph, by indenture of 1st of June, 1828, between himself and Cobb, for the considerations therein mentioned, demised to Cobb, his executors, &c., all that piece of land, situate, &c., adjoining the dwelling-house of the said Cobb on the north, and containing in depth from west to east, fifty-five feet four inches, and in breadth from north to south, fourteen feet nine inches, bounded on the west by the public road leading from Southampton over the common to Portswood, on the south by Cobb's dwelling-house, and on the north and east by the land of Rolph, and on which said piece of land the said Cobb had begun to erect a chaise-house and stable; together with all and singular the easements, [*181] *privileges, and appurtenances, to the said piece of land belonging, or in any wise appertaining, for the term of twenty-one years.

By indenture of 28th November, 1828, Cobb assigned the last-mentioned premises to one Burden; who, by indenture of 30th August, 1831, assigned the same to the plaintiff, who occupied the remainder of the premises as tenant from year to year, under Elderfield.

In 1829 Rolph built a new house on that part of his land which adjoined the south side of the cottage and premises occupied by the plaintiff. Up to that time the field had been used principally for arable land; a wall, belonging to the plaintiff, about four feet high, dividing the two properties.

By indentures of lease and release, dated respectively 14th and 15th February, 1832, between John Knowlys of the first part, Mary Jefferies of the second part, the said W. Rolph of the third part, and the defendant, Caroline Bridges, of the fourth part,—(reciting, inter alia, certain indentures of lease and release, of 7th and 8th December, 1812, between William Slade Wakeford of the first part, Joseph Tompkins of the second part, the said W. Rolph of the third part, and John Primer of the fourth part; and reciting certain other indentures of lease and release of 11th and 12th March, 1825, between James Jarvis and Edward Stow of the first part, the said W. Rolph of the second part, and Nicholas Jardin of the third part; and reciting also a certain other indenture of 24th June, 1829, between the said W. Rolph of the one part, and the said M. Jefferies of the other part),—for the considerations therein mentioned, the said [*182] J. Knowlys and M. Jefferies, at the request and *by the appointment of the said W. Rolph, and the said W. Rolph, did, and each of them did, according to their several and respective interests and estates in the premises thereby conveyed, grant, bargain, sell, alien, release, and confirm, unto the said Caroline Bridges, in her actual possession, &c., all that newly-erected messuage or dwelling-house, with the stables and ground in front, and the garden behind the same; the boundaries of such garden being in a straight line, from the south or adjoining wall of premises belonging to Mr. Blanchard, to, &c. (here the situation and admeasurements of the land granted were set out), bounded, in part, on the north by premises belonging to Mr. Blanchard, and on the remaining part by land belonging to the said W. Rolph, on the east, &c.—(the conveyance also mentioned that the site of the said dwelling-house, &c., and the ground thereby conveyed, were taken out, and lately formed part, of the said piece of land lately called or known by the name of The Seven Acres, comprised and conveyed by the thereinbefore recited indentures of lease and release of 7th and 8th of December, 1812);—together with all houses, &c., trees, &c., ditches, &c., ways, &c., waters, watercourses, lights, easements, commons, &c., and other commonable rights, &c., and the reversion, &c., and all the estate, &c., and all the deeds, &c.; habendum to the said Caroline Bridges, in fee.

In 1832, there being some disagreement between the plaintiff and defendant, the latter erected, first a wooden fence, and afterwards a brick wall, parallel and close to the plaintiff's house, of the length of thirty-one feet, varying in height from fourteen feet six inches to eight feet eleven: it extends the whole length [*183] of the plaintiff's *premises, and its height, in the highest part, is within two feet of the eaves of the cottage.¹ By the erection of this wall, the light coming to the rooms at the east side of the cottage is materially diminished, and the rooms are becoming damp.

The question stated was, whether the plaintiff was entitled to recover in this action. The Court was to be at liberty to draw conclusions, as a jury, from the facts stated.

(It was also added that the injury complained of related to the window inserted by Elderfield on the west side, after the conveyance of September, 1823, and to the bow windows on the east side; and the injury to these windows was, for the purpose of the case, admitted.) This case was now argued² by

Sir W. W. Follett for the plaintiff. The defendant could not erect this wall unless Rolph could do so; and, although the windows were not twenty years old, Rolph, being the vendor, could not derogate from his own grant. In *Palmer v. Fletcher*, 1 Lev. 122, a man built a house on his own land, and then sold the house to one party and the adjoining land to another; and it was held that the vendee of the land could not, any more than the vendor, obstruct the lights of the house by putting piles of timber on the land, “for the lights are a

¹ It appeared by the plan that the wall extended east and west, along all the south side of the plaintiff's cottage, and some feet beyond, at each end.

² Before PATTESON, WILLIAMS, and COLERIDGE, Js. Lord DENMAN, C. J., was absent, being indisposed.

necessary and essential part of the house." *Cox v. Matthews*, 1 Vent. 237, 239, is to the same effect, both as to the vendor *of the house, and his assignee of the adjoining land; and so are *Compton v. Richards*, 1 Price, [*184] 27, *Swansborough v. Coventry*, 9 Bing. 305, and *Coutts v. Gorham*, M. & M. 396. In *Riviere v. Bower*, R. & M. 24, the owner of a house divided it into two tenements, let one, and occupied the other; and it was held that the lessee could not obstruct the lights of the tenement in the landlord's occupation. It is true that, in the present case, the cottage was not built till after the conveyance, made in 1816, of the land on which it stood. But it appears by the case that Rolph sold the land for the purpose of its being built upon. Besides, in the conveyance of 1822, Rolph granted the cottage in fee to Elderfield, with all lights and easements appertaining. Then it will be said that the window at the west end was not made till after the conveyance of 1822, and that the bow windows at the east end did not then exist. But, the land being granted in order to be built upon, the alterations made while the adjoining land was in the vendor's possession are protected. Here, too, the window at the west end was made on the additional twelve feet granted for the purpose of the building; for it appears by the case that the grant in 1822, conveyed one hundred and twelve feet, from east to west, and the grant in 1816, was of one hundred feet only in that direction; and, in the conveyance of 1816, the western boundary is described as a road twelve feet wide, next to Southampton Common; but, in that of 1822, the western boundary is Southampton Common. Again, in 1828, after the alterations had taken place, Rolph conveys adjoining land on the north to Cobb, the then occupier of the *cottage so altered; and, in the conveyance, he describes Cobb's cottage as the southern boundary of the parcel then [*185] conveyed, thus recognising the cottage in its then state as enjoyed by Cobb. This is tantamount to a license; and such a license cannot be revoked; *Liggins v. Inge*, 7 Bing. 682, and the judgment of TAUNTON, J., in *Bridges v. Blanchard*, 1 A. & E. 551. This is not an easement requiring a grant, for the enjoyment takes place on the land of the vendee: but it is in the nature of an agreement that the grantee shall enjoy, according to the distinction taken by LITTLEDALE, J., in *Moore v. Rawson*, 3 B. & C. 340, explained in *Bridges v. Blanchard*, 1 A. & E. 546. Again, as to the bow windows on the eastern side, the defendant is at any rate liable for obstructing so much of the light as was enjoyed by the original windows; *Chandler v. Thompson*, 3 Campb. 80. And Rolph sees the alterations already made without objecting. The Court, in the place of a jury, would here infer a license, which may be shown by circumstances, as well as an abandonment of the privilege, as in *Moore v. Rawson*, 3 B. & C. 332. [COLERIDGE, J. The vendor might perhaps be supposed here to have said, you may have your window till it is inconvenient to me.] That supposition cannot be adopted, where there is nothing to determine the particular plan of the house, but only a general assent to alterations.

Smirke, contra. The cottage has been built since the conveyance by Rolph. This prevents the applicability of *Palmer v. Fletcher*, 1 Lev. 122; *Cox v. Matthews*, 1 Vent. 237, 239; *Compton v. Richards*, 1 Price, 27; and [*186] *Swansborough v. Coventry*, 9 Bing. 305; and *Coutts v. Gorham*, M. & M. 396. In these cases, the grant was of the houses with the windows then existing, or apparently in the progress of being built. *Riviere v. Bower*, R. & M. 24, merely shows that a tenant cannot add to his house a projection obstructing his landlord's lights. But then it is said, that the land here was sold in order that it might be built upon. The case rather shows that such purpose was abandoned. And, supposing the fact were so, it is impossible to sustain the argument on the other side, which amounts to this:—that, if a party sell land to be built upon, retaining the adjoining land, whatever erections or alterations the vendee at any time chooses to make, the vendor may not build so as to obstruct them. If this were so, the vendor must abstain from building on the adjoining land, not merely till the vendee has built the houses, but for ever.

Even if it were admitted that the defendant could not so have built on his own land as to make the plaintiff's land unfit to be built upon, this would be very different from admitting that he could erect nothing which could, in the slightest degree, obstruct any windows that might be built. In *Swansborough v. Coventry*, 9 Bing. 305, it was contended that the vendor, by describing, in the conveyance, the boundary of the land conveyed as his own "building ground," had conveyed, subject, generally, to the erection of buildings by himself on such ground: but the Court would not attribute such an effect to the expression. As to the conveyance in 1822, it is true that Rolph is a party; but that is only to [*187] the extent of the twelve feet then *added to the land. Each party grants to the extent of his own interest: it cannot be said that Rolph would be estopped from disputing that he had title to the cottage; for there is no estoppel, the whole truth being disclosed by the recital, *Right dem. Jefferys v. Bucknell*,¹ and an interest passing. Co. Lit. 45, a. "Although the words of a grant be general, yet, where it appears by the deed that the grantor had a limited interest, the grant will be construed as co-extensive with and limited by the right of the grantor," per BAYLEY, J. in *The Earl of Portmore v. Bunn*, 1 B. & C. 700. But, moreover, the windows to which the complaint applies have all been made since this deed was executed. It does not appear by the case that the window at the west end was on the part granted in 1822: the coincidence in the number of feet is accidental; the new part could not be the road in the common; and the plan shows that this was not so.² And the bow windows at the east end are not even in the position of the windows which existed in 1822. They have not, therefore, the privilege of the former windows; *Cherrington v. Abney*, 2 Vern. 646. See note (2) to the 3d edition. See *Garritt v. Sharp*, 3 A. & E. 325; cited in *Comyn's Digest*, Action upon the Case for a Nuisance (C). There is no pretence for inferring a license by Rolph; he merely abstained from interfering. In *Bridges v. Blanchard*, 1 A. & E. 536, it was held a much stronger act fell short of a license. If such conduct were construed to amount [*188] to a license, *the rule requiring twenty years' enjoyment to give an indefeasible right to windows would be unmeaning; and so would stat. 2 & 3 W. 4, c. 71, s. 3. Rolph had no power to prevent the construction of the windows. That which passed between Kent and Rolph shows the reverse of an irrevocable license. But, again, this would be a grant of an easement, not a license. A license is an authority to commit a trespass. But here the windows are erected on the land of the grantee; and then the plaintiff has to make out a grant by the owner of the adjoining land, that the light and air shall pass unobstructed, so far as regards the land of the grantor, to the house of the grantee. That is an easement, as much as the passage of water; and therefore a grant under seal is requisite. For this, it is sufficient to refer to the authorities cited in *Bridges v. Blanchard*, 1 A. & E. 540-543. This privilege is called an easement in *Aldred's Case*, 9 Rep. 58 b; *Barker v. Richardson*, 4 B. & Ald. 582; *Canham v. Fisk*, 2 C. & J. 128, 2 Tyrwh. 157; *Bracton*, Lib. 4, c. 37, fol. 220 b. &c., treats easements as answering to the servitudes of the civil law. Now among the *prædiorum urbendorum servitutes* are, "*ne altius quis tollat sedes suas, ne luminibus vicini officiat*," Inst. II. tit. 3, s. 1; Dig. VIII. tit. 2, s. 2; *Pothier's Pand. Just.* vol. 1, p. 364, 365.

Sir W. W. Follett in reply. The license is insisted on, as a matter, not of grant, but of contract, which may be by parol. It is true that, if a house be granted, nothing is privileged against the grantor but the house in its then state. But, if ground be let for building generally, there is an implied contract [*189] not to disturb the *enjoyment of the building to be erected; and the Court, here made judges of the fact, will infer that the land was so

¹ 2 B. & Ald. 281. And see the authorities in *The Earl of Scarborough v. Doe* dem. Seville, 8 A. & E. 918.

² It appeared by the plan that the additional part did not extend over the road described in the deed of 1816.

application to this board, to grant you a retired allowance of 166*l.* per annum, to commence from the 5th of April, 1826, and I am to inform you that that allowance, with any arrears which may be due upon it, will, like any other retired allowance, be paid to you on application to the paymasters of exchequer bills."

In May, 1835, Mr. Smyth applied to Mr. Nevinson, one of the then paymasters of exchequer bills, for payment of his retired allowance, but was informed by him that the paymasters had no fund from which to pay it. Mr. Smyth thereupon wrote to Lord Melbourne, then first lord of the Treasury, as follows:—

"My Lord,—In 1827, I received a written communication from the then secretary to the Treasury, informing me that a pension of 166*l.* a year had been voted to me by parliament from the 5th of April preceding, and that the same would be paid to me upon application to the paymasters of exchequer bills. Circumstances unnecessary here to explain induced me to *refrain from making that application until this day." He then stated his [*288] application to Mr. Nevinson, and the answer, and requested to know where he was to apply for payment. He received an answer from Mr. Anson, Lord Melbourne's private secretary, dated 5th June, 1835, as follows:—

"Sir,—I am directed by Viscount Melbourne to acknowledge the receipt of your letter of the 28th instant, and in reply to acquaint you that you may receive your pension on application to the paymaster of civil services at the Treasury. I remain," &c.

On application to the paymaster of civil services, Mr. Smyth was informed that he had received no authority to issue the pension. Mr. Smyth communicated this to Mr. Anson, who promised to speak again to Lord Melbourne on the subject; and, on the 19th of June, Mr. Anson wrote to Mr. Smyth as follows: "Sir,—On inquiry I find it will be necessary for you to obtain authority for receiving your pension from the commissioners of the Treasury."

Mr. Smyth thereupon wrote to Mr. E. J. Stanley, then one of the joint secretaries of the Treasury, stating what had passed, and requesting him to forward the requisite instructions for issuing the pension. No answer was returned; but, on further application at the Treasury, Mr. Smyth was informed that he might learn from the solicitor of the Treasury on what condition his allowance would be paid. He afterwards received a letter from Mr. Bouchier, one of the joint solicitors of the Treasury, beginning as follows:—

"Sir,—I beg leave to acquaint you that I have been directed by the Lords of the Treasury to prepare an *instrument to be signed by you previous to your receiving the arrears of your retired allowance, to secure your [*289] instituting no further legal proceedings in respect of your late office, or your late colleagues in that office." Mr. Bouchier then suggested a bond, and requested to know if Mr. Smyth would execute one, with a surety. Mr. Smyth inquired if the undertaking on his part was to include criminal as well as civil proceedings against his late colleagues, and received for answer, that it was intended to comprehend all. Mr. Smyth then inquired whether, on his executing the bond, with a surety, the Lords Commissioners would make him a pecuniary compensation for the losses occasioned to him by his late colleagues. The answer was, that they had no such intention. In reply, by letter dated September 11th, 1835, Mr. Smyth refused to execute a bond, and threatened legal proceedings if his arrears were not paid. He also sent copies of the last two letters to Lord Melbourne, requesting his interference, and referring to Lord Melbourne's communication of June 5th. He received in answer a letter from Mr. Anson saying, "I am directed by Viscount Melbourne, to acquaint you that his Lordship has instituted inquiries at the Treasury, from which it appears that your letter of the 11th instant, addressed to the solicitor of the Treasury, is considered as having terminated the present communication with you on the subject of the retired allowance alluded to in your note." The

time when such consent is supposed to have been given. It appears to us that convenience and justice both require this limitation; if it were at once admitted that a new window, varying in size, elevation, or position, might be substituted for an old one, without the consent of the owner of the adjoining land, it would be necessary to submit to juries questions of degree, often of a very uncertain nature, and upon very unsatisfactory evidence. And, in the same case, a party, who had acquiesced in the existence of a window of a given size, elevation, or position, because it was felt to be no annoyance to him, might be thereby concluded as to some other window, to which he might have the greatest objection, and to which he would never have assented if it had come in question in the first instance. [*192] *The case of *Chandler v. Thompson*, 3 Campb. 80, is not at all inconsistent with this reasoning. There an ancient window had been enlarged; in the same place the original aperture remained: and the case only decided that that aperture remained privileged as before the enlargement. We do not forget that the windows in the present case, whatever their privilege may be, do not claim it as ancient windows in the ordinary way from an acquiescence of twenty years; but this circumstance furnishes no ground for any distinctions as to the point now under consideration.

The inquiry, therefore, as to the first ground on which the plaintiff's case is rested, is limited to the effect of the lease of 1828; in considering which, we are not at liberty to attach any weight to the facts, that the conveyances of 1816 and 1822 proceeded from the same grantor. Now it seems a strong thing to contend that a lease for years of some feet of land on the north side of an existing dwelling-house, for the purpose of erecting a chaise-house and stables, will, in itself, prevent the lessor from making erections on the south side, by which the eastern and western windows may be darkened. Admitting, as we are disposed to do to the fullest extent, the principle that no man shall be allowed to derogate from his own grant, the only grant here is the lease; and it would be extending the principle to very indirect and remote consequences to consider the act in question as derogating from that grant.

But it is said, secondly, that the several grants by Rolph, coupled with his acts and declarations, amount [*193] *to a license or covenant, that the light and air shall have free access to the house through the present as well as the former windows. In considering these, it is proper to go back to the commencement; but we are not at liberty to attach any weight to the statement that Rolph desired to sell his building lots, by which it is sought to give a character to the grant of 1816, which, on its face, it will not bear. Unless we are allowed to alter the terms of the contract by the introduction of previous wishes or intentions, we must regard it as a mere conveyance of arable land; and there is no doubt that, at any time previous to the erection of the cottage by Snelgrove, Rolph was at liberty to erect any buildings or walls on the residue of the field, which were not prejudicial to the occupation of the parcel granted away as arable land. Nor would the erection of the cottage make any difference in his rights; because, as to this cottage, Snelgrove did not claim under him; the land not having been granted for building purposes, the parties were, as to the cottage, strangers to each other; and no mere acquiescence for a shorter period than twenty years would have precluded him from obstructing the windows.

It was contended, however, that the grant of 1822 altered the position of the parties, and confirmed the building use which had been previously made of the land. By the grant itself, nothing passed from Rolph but twelve feet of land, although, in the same deed, the cottage itself, with all its existing lights, is conveyed by Close. Subsequently to the grant, the alterations now in question were made; and it appears that, although Rolph was ignorant of the precise plan intended to be adopted, yet he was often on the spot during the progress [*194] *of the work, and had a general knowledge of the nature of the alterations: he appears to have made no objections, but, at the same time,

to have specifically reserved to himself on two occasions the right to build close up to the southern wall.

Upon the evidence of these facts, the Court, which, by the agreement of the parties, is to draw any conclusion which a jury ought to have drawn, is desired to infer that the windows now in existence were placed in their present position with such an acquiescence or consent on the part of Rolph, as warrants the presumption of whatever legal instrument may be necessary to convert the plaintiff's parcel into a dominant, the defendant's into a servient tenement, in respect of these lights. Before, however, the Court will feel warranted in such a presumption, it must consider what right or power Rolph had to prevent the throwing out of these windows. The fullest knowledge, with entire but mere acquiescence, cannot bind a party who has no means of resistance. There may appear to be some hardship in holding that the owner of a close who has stood by, without notice or remonstrance, while his neighbor has incurred great expense in building upon his own adjoining land, should be at liberty, by subsequent erections, to darken the windows, and so destroy the comfort of such buildings. Yet there can be no doubt of his right to do so at any time before the expiration of twenty years from their erection; and this with good reason; for it is far more just and convenient that the party, who seeks to add to the enjoyment of his own land by anything in the nature of an easement upon his neighbor's land, should first secure the right to it by some unambiguous and well understood grant of it *from the owner of that land, who thereby [*195] knows the nature and extent of his grant, and has a power to withhold it, or to grant it on such terms as he may think fit to impose, than that such right should be acquired gradually as it were, and almost without the cognizance of the grantor, in so uncertain a manner as to create infinite and puzzling questions of fact, to be decided, as we daily see, by litigation.

If a party, who has neglected to secure to himself rights so important by previous express license or covenant, relies for his title to them upon anything short of an acquiescence for twenty years, we think the onus lies upon him of producing such evidence as leads clearly and conclusively to the inference of a license or covenant. It is difficult, perhaps impossible, to define the necessary amount of such evidence; but we are of opinion that the amount in the present case is clearly insufficient.

This disposes of the action as regards the windows.

With respect to the injury alleged to be occasioned by the building of the wall to the body of the house, it is sufficient to say that, when that part of the house was built, and encroached on Rolph's land, it was stipulated that he should be at liberty at any future time to build close up to the wall in question.

Upon the whole, therefore, there must be judgment for the defendant.

Judgment for the defendant.

***The KING v. The Inhabitants of MILE END, OLD TOWN.**

Nov. 14.

[*196]

A pauper, born in M., in England, not having done any act to gain a settlement in her own right, and being the daughter of Irish parents who had gained no settlement in England, was, at the age of eighteen, delivered of a bastard, in her father's house in S., in England, where she resided as part of his family. The mother of the pauper having applied to S. for relief for the pauper and her bastard only:

Held, that under stat. 8 & 4 W. 4, c. 40, s. 2, the pauper was removable to Ireland, and not to M.; and that stat. 4 & 5 W. 4, c. 76 (assuming that it defines the age of emancipation to be sixteen, and prevents the head of a family from becoming chargeable by relief given to a child after that age), was not applicable, inasmuch as it extends only to English and Welsh poor.

ON appeal against an order of two justices, dated 21st August, 1834, whereby Ann Cotteral, single woman, and her male bastard child, born on the 20th

August, 1834, were removed from the parish of St. Leonard's, Shoreditch, to the hamlet of Mile End, Old Town (both in the county of Middlesex), the Sessions confirmed the order, subject to the following case.

The pauper, Ann Cotteral, aged eighteen years, who has never done any act to gain a settlement in her own right, was born in wedlock in the hamlet of Mile End, Old Town, of Irish parents, who have not gained any settlement in England. On the 20th of August, 1834, the said Ann Cotteral was delivered of a male bastard child in her father's house, in Shoreditch parish, with whom she continued to reside as part of his family, occasionally going out charing; and, on the 21st August, 1834, application was made by her mother to the overseers of Shoreditch, for relief for the said Ann Cotteral and her bastard child only: on which, and after examining the mother of the pauper upon oath, an order was made by two justices, directing the said pauper, and her said male bastard child, to be removed to the hamlet of Mile End, Old Town, the place of her birth and alleged legal settlement.

The question for the decision of the Court was, whether, reference being had to 3 & 4 W. 4, c. 40, s. 2, *and stat. 4 & 5 W. 4, c. 76, s. 71, the pauper and her bastard child were settled in the hamlet of Mile End, Old Town. The case was now argued¹ by

Prendergast in support of the order of Sessions. In *Rex v. Whitehaven*, 5 B. & Ald. 720, a pauper who was born in England, but had not otherwise any settlement there, and whose parents were Irish, having no settlement in England, was removed to her birth-parish; and, the Sessions having quashed the order, this Court quashed the order of Sessions. It is true that this was done on the ground that the pauper was not chargeable under stat. 59 G. 3, c. 12, s. 33; but the case shows that the removal to the birth-parish was proper. The enactment in stat. 3 & 4 W. 4, c. 40, s. 2, is to the same effect as that in stat. 59 G. 3, c. 12, s. 33. But, even if *Rex v. Whitehaven*, 5 B. & Ald. 720, were not to govern the case, the order must be supported. The objection, on the other side, is that the chargeability of an unemancipated female is chargeability of the parents, and that they and she must therefore be removed under stat. 3 & 4 W. 4, c. 40, s. 2. But Ann Cotteral was not relieved until she was eighteen years old; and now, by stat. 4 & 5 W. 4, c. 76, the age of emancipation is sixteen. Section 56 directs that relief on account of a child under the age of sixteen, shall be considered as given to the father: sect. 57 makes a man, who marries a woman having children, liable to maintain them till they attain the age of sixteen, or till the woman's death: sect. 71 makes illegitimate children [*198] follow the settlement of the mother till the age *of sixteen, or the acquisition of settlement in their own right, and binds the mother, while she is unmarried or a widow, to maintain them so long (or till the child's marriage, if a female), and makes relief to them relief to the mother. Throughout the statute, sixteen is considered the age at which the child is to maintain itself. The enacting statute here, as elsewhere, has the effect of repealing previous enactments on the same subject. Thus sect. 56 provides that nothing therein contained shall discharge the father, grandfather, mother, and grandmother, from their liability under stat. 43 Eliz. c. 2, s. 7, which shows that, but for that proviso, the last-mentioned section would have been repealed by the enacting words of stat. 4 & 5 W. 4, c. 76, s. 56; and it is, therefore, repealed, except so far as the proviso continues it. The Court will be averse to any construction extending the power of removal under stat. 3 & 4 W. 4, c. 40, s. 2. In *Rex v. Benett*, 2 B. & Ad. 712, a very strict construction of the previous stat. 59 G. 3, c. 12, s. 33, was adopted; the Court holding that an Irishwoman, having no settlement here, might be removed, but not her illegitimate child, though within the age of nurture. So where an Irishwoman had, since the birth of a legitimate child in England, acquired a settlement in England by

¹ Before PATTERSON, WILLIAMS, and COLERIDGE, Js. Lord DENMAN, C. J., was absent, on account of indisposition.

a second marriage, this Court held that the child was not removable within stat. 59 G. 3, c. 12, s. 33: *Rex v. Great Clacton*, 3 B. & Ald. 410.

Thesiger and *Adolphus*, *contra*. The question, independently of stat. 4 & 5 W. 4, c. 76, is, whether the pauper had any settlement in England. Now, *under stat. 59 G. 3, c. 12, s. 33, it was held that a woman, whose maiden settlement was in England, and who married a Scotchman not settled in England, must be removed with him and with their children, who had gained no settlement in their own right, to Scotland, and not to her own maiden settlement; *Rex v. Leeds*, 4 B. & Ald. 498; where *HOLROYD, J.*, said, "It seems to me, that it is altogether immaterial, provided the head of the family be born in Scotland, whether the children be born in England or not. The only exception is as to those children who have gained settlements in England in their own right." That case was not cited in *Rex v. Whitehaven*, 5 B. & Ald. 720, where, indeed, the attention of the Court was principally directed to the nature of the chargeability, and not to the question of the child's settlement in England. *Rex v. Great Clacton*, 3 B. & Ald. 410, was decided before *Rex v. Leeds*, 4 B. & Ald. 498; and the decision turned on the mother not being removable, so that the child was said not to be brought within the act at all; and the question whether the child had acquired a settlement was not noticed. As to *Rex v. Benett*, 2 B. & Ad. 712, as the law then stood, an illegitimate child made no part of the family, and was therefore not removable with the mother. Then as to stat. 4 & 5 W. 4, c. 76, that act applies only to "the poor in England and Wales." Again, before that act, there was at all events much doubt how far relief to the grandchild was relief to the grandfather. In *Waltham v. Sparkes*, *Skin.* 556, it seems to have been held that it was so; in *Rex v. St. Mary Westport*, 3 T. R. 44 (a certificate case), that it was not; and *Rex v. Framlingham*, *Burr. S. C.* 748, is a similar case to the last; see *Rex v. Cornish*, 2 B. & Ad. 498. Then *the intent of stat. 4 & 5 W. 4, c. 76, was, in this respect, not to determine how long a child should be part of a family, but to fix an age up to which the liability of the head of the family should continue, wherever and however the child was relieved. This is plainly the effect of the sections referred to on the other side. So, by sect. 58, relief given, under the rules, &c., of the commissioners, to a pauper above twenty-one, or any part of his family under sixteen, is a loan to the pauper; and sect. 59 provides for the attachment of the pauper's wages in the case of a loan. The intention seems rather to provide for reimbursing the parish, than to define the age of emancipation. After the age of sixteen, stat. 43 Eliz. c. 2, operates as before. [COLERIDGE, J. You say the intention of the legislature was, first, to clear up all doubts whether relief to the child, while under the age of sixteen, made the head of the family liable; secondly, to enforce the liability up to that age by special provisions: and you cite cases to show that the doubt existed before the act. But afterwards you have to insist that the head of the family is liable, independently of the act.] An Irishman or Scotchman is so liable, because the previous act makes him removable, with his family. It is not necessary, for the purpose of the present argument, to inquire what the effect of stat. 4 & 5 W. 4, c. 76, is with respect to children of English parents above the age of sixteen; though it rather seems that relief to them is not necessarily relief to the head of the family. [COLERIDGE, J. Do you say that the relief to the child has a different effect, according as the parent is English or Irish? The statutes 59 G. 3, c. 12, s. 33, and 3 & 4 W. 4, c. 40, s. 2, did not in terms enact that relief to a child should make the parent chargeable; they only authorized the removal if the person became chargeable "by himself or herself, or his or her family." That shows, at all events, that a Scotchman or Irishman was chargeable through his children, and without limitation as to age. If stat. 4 & 5 W. 4, c. 76, should be held applicable, the illegitimate child of Ann Cotteral must follow the mother's settlement till sixteen: but the mother had no settlement at all, according to *Rex v. Leeds*, 4 B. & Ald. 498.

PATTERSON, J., afterwards in this term (November 25th) delivered the judgment of the Court.

The question in this case is, whether the removal of the pauper with her infant bastard child to the appellant hamlet can be sustained; and that depends upon this further (and principal) question, whether she ought not to have been removed with her father to Ireland, under the provisions of 3 & 4 W. 4, c. 40, s. 2.

The case states that the pauper was born in the appellant hamlet, of Irish parents, who have gained no settlement in England. They, therefore, are directly within the section of the act above referred to, if, at the time of this order made, the father had become chargeable to the parish of St. Leonard's, Shoreditch, provided the effect of it has not been altered by the subsequent statute of 4 & 5 W. 4, c. 76. And it seems to us, that the pauper's father was so chargeable at the time in question.

The language of the second section of the first-mentioned act, with reference [*202] to this subject, is, "hath *actually become chargeable," "by himself or herself, or his or her *family*." Now the pauper was, at the time of her removal, living with her father as a part of his family, having done no act nor contracted any relation inconsistent with that character. Relief, therefore, to the pauper, under her father's roof, in the manner stated in the case, did render the father removable to Ireland, and, as a consequence, the daughter also.

It is now to be considered how far the former act is affected by the latter, of 4 & 5 W. 4, c. 76. And it is, at once, observable that the object of the two statutes is perfectly distinct. The former is confined merely to making provisions for the removal of certain persons born in Ireland, Scotland, &c., who have gained no settlements in this country. No question, affecting the removal or settlement of persons born in England, is touched or alluded to, whereas the objects and provisions of the latter statute are purely and exclusively English. Various and important alterations are made in the law, respecting the giving of settlements, the duty of overseers, and the management of the poor, all of which are, of necessity, applicable and confined to England. It is observable, also, that the title of the act itself purports to concern England and Wales, and them only; nor do we perceive any regulation which has the slightest relation to Ireland, Scotland, &c., the places enumerated in the first-mentioned statute. We think, therefore, that the sound construction and interpretation of the two statutes is, to hold them to be, in effect and operation, as they are in object, wholly separate and distinct. This being so, we are of opinion that the provi- [*203] sion in the fifty-sixth section of 4 & 5 W. 4, c. 76, *as to the age up to which the parent is to be deemed answerable for relief given to a child, viz., sixteen (whatever might have been its effect upon relief given to a child above that age, as to the chargeability of the parent, if the parties had been English, on which we give no opinion), does not apply to the present case, depending, as it has been already stated it does, on stat. 3 & 4 W. 4, c. 40, s. 2.

We think, therefore, that the character of the daughter's residence with the father, and his liability to maintain her, and to be considered chargeable by relief given to her, are to be considered as they would have been if the latter act had not passed.

It is true that, in the case of *Rex v. Whitehaven*, 5 B. & Ald. 720, the sessions had quashed an order of justices removing an Irishwoman, pregnant, and living with her parents unemancipated, to her birth settlement, upon the ground (as appears by the case) that she ought to have been sent with her parents by a pass to Ireland, under stat. 59 G. 3, c. 12, s. 33, which has the same expressions, as to the chargeability of the father, as stat. 3 & 4 W. 4, c. 40, s. 2; viz., "become chargeable," "by himself or herself, or his or her family." And this Court quashed the order of sessions upon, as it seems, but little discussion, and with not very much consideration. Upon that case two things are to be observed: first, that the question, how far the woman, circum-

stanced as she was, could gain a settlement by birth, was not noticed *at all*; whereas in the case of *Rex v. Leeds*¹ that question was considered, and it was held that birth, in such case, gave no *settlement; next, that the decision proceeds expressly upon the ground that, under stat. 59 G. 3, c. [*204] 12, s. 33, the chargeability, contemplated by the statute, "was the actual asking for parish relief, and not the constructive chargeability" (of pregnancy) "created by 35 G. 3, c. 101, s. 6;" upon which it may be sufficient to observe that the defect, upon which the Court held the decision of the sessions wrong, does not exist here. Relief in this case was actually asked for and given, before the order of removal was made.

It remains to add that, according to the authority of *Rex v. Benett*, 2 B. & Ad. 712, the bastard in this case cannot be removed with the mother to Ireland. This, however, is not necessary for our decision, which is, that the removal of the pauper (which should have been to Ireland) to the appellant hamlet is wrong; and that, therefore, the order of removal, and the order of sessions confirming the same, must be quashed. Order of sessions quashed.

*The KING v. The Inhabitants of WOOLPIT. Nov. 14. [*205]

On a case sent up by sessions, it was stated that the pauper, not being resident at the parish of W., was charged by a woman living there with having gotten her with child, and was committed to the county jail at B. for want of sureties; that the woman's father became his surety, and took lodgings for him at W., to which the pauper removed, and after residing there a week married the woman, became chargeable in about a week after his marriage, and was removed from W. to H. The lodgings were paid for by the woman's father. The case then stated that, on the hearing of the appeal against the order of removal, the respondents offered to prove that the pauper was settled in H., but that "the sessions quashed the order, on the ground that the pauper had not come to inhabit in W. within the meaning of stat. 18 & 14 Car. 2."

Held, by PATTISON and WILLIAMS, Js., that, upon this statement, it sufficiently appeared to this Court that the pauper was removable; and the order of sessions was quashed, and the case sent back to be reheard:

Absente Lord DENMAN, C. J., and dissentiente COLERIDGE, J., on the ground that the sessions had negatived the existence of an intention within the statute, and were not necessarily wrong as to the fact.

ON appeal against an order of two justices, whereby Dennis Brown and Mary Ann his wife were removed from the parish of Woolpit to the parish of Haughly (both in the county of Suffolk), the sessions quashed the order, subject to the opinion of this Court, upon the following case:

The pauper's present wife, whose maiden name was Mary Ann Pilbrow, was pregnant by him before marriage. M. A. Pilbrow at that time lived at Woolpit, and the pauper in the workhouse of the incorporated hundred of Stow: the parish of Haughly is in the hundred of Stow, but the parish of Woolpit is not. M. A. Pilbrow charged the pauper with having gotten her with child; and, on the 21st of October, 1833, he was apprehended by a constable of Woolpit, and on the 22d, was taken by him before a magistrate, who on the same day committed him, for want of sureties, to the county gaol at Bury St. Edmund's. About the beginning of November, Pilbrow, the father of M. A. Pilbrow, became surety for the pauper, and the pauper returned immediately from Bury to Woolpit. On the pauper's coming to Woolpit, Pilbrow took lodgings for him at Woolpit with one George Howe, at terms agreed *upon between [*206] Howe and Pilbrow, and Pilbrow subsequently paid Howe's charge for the lodgings. The pauper, having resided about a week in the lodgings so procured for him, married the said M. A. Pilbrow, his present wife, on the 12th of November, at Woolpit. He continued to reside in the same lodgings, until he was removed, on the 20th of November following, by the order of two

¹ 4 B. & Ald. 498. It was said in argument there, but not stated in the case, that the children had birth-settlements in England.

justices, to Haughly. The pauper was relieved by the parish of Woolpit after his marriage; but there was no evidence that the parish had been put to any expense, either by his lodging or his marriage. The respondents offered to prove the pauper's settlement in Haughly; but the appellants insisted on resting their case upon the irremovability of the pauper, on the ground that he had not come to inhabit in Woolpit. The sessions quashed the order, on the ground that the pauper had not come to inhabit in Woolpit within the meaning of stat. 13 & 14 Car. 2, c. 12.

B. Andrews and Austin, in support of the order of sessions. The case was not drawn by counsel: but the substantial question raised is, whether the justices were entitled to remove the paupers from Woolpit. If Brown did not come thither to settle or inhabit, he could not be removed (whether settled there or not), because the case is not within the words of stat. 13 & 14 C. 2, c. 12, s. 1, "coming so to settle," and "come to inhabit." Stat. 35, G. 3, c. 101 gave no new power of removal; per Lord TENTERDEN in *Rex v. St. Lawrence, Ludlow*.¹ There it was held that a person, who, having met with an accident, was taken to a parish and remained there to be cured, was not removable [*207] thence within stat. 13 & 14 C. 2, c. 12, s. 1, though chargeable. The same point had been ruled in *Rex v. St. James in Bury St. Edmunds*, 10 East, 25, where the pauper met with the accident in the parish, Lord ELLENBOROUGH saying that he had not come *animo morandi*. [PATTESON, J. This case is more like *Rex v. Chediston*, 4 B. & C. 230.] There the question was one, not simply of irremovability, but of actual settlement, by occupation of a tenement as tenant at will: there is nothing of the kind here. Brown merely goes to a house provided by his surety, who is also the father of the woman whom he is going to marry. [COLERIDGE, J. Is it not a question of fact, for what purpose Brown came to Woolpit?] It is so; and the sessions have expressly decided it in the negative, which constitutes another distinction from *Rex v. Chediston*, 4 B. & C. 230. And their decision appears to be right: the object was probably to keep out of the parish of Haughly; and the facts are something like those in *Rex v. Ashton-under-Lyne*, 4 M. & S. 357, where Lord ELLENBOROUGH said that the attempt was to establish "a new head of settlement *latitando*."

Byles and J. W. Smith, contra. The case confines the decision of the sessions to the point of law: the order is quashed on the ground, not that the pauper had not come to inhabit in fact, but that he had not come to inhabit "within the meaning of the statute 13 & 14 C. 2, c. 12." The sessions find the facts which constitute the inhabitancy, expressly; and, even if they were supposed to have meant to negative the intention to settle or inhabit, that would be [*208] inconsistent with the facts actually found. For they find an actual coming, and an actual inhabitancy. On stated cases raising questions of settlement by hiring and service, the Court, although the sessions have sustained the settlement, examine whether the facts legally constitute it, the question becoming a mixed one of law and fact. The finding of sessions was not considered to preclude discussion in *Rex v. Birmingham*, 14 East, 251, *Rex v. St. Lawrence Ludlow*, 4 B. & Ald. 660, or *Rex v. St. James in Bury St. Edmunds*, 10 East, 25. The only question here is, whether the sessions were right in the conclusion of law which they profess to have drawn from the facts stated by them. Now the meaning of "settled," in stat. 13 & 14 C. 2, c. 12, s. 1, may be explained by the directions, in the same section, as to removal: the pauper is to be removed to the parish where he was last legally settled, "either as a native, householder, *sojourner*, apprentice or servant." A sojourning is a temporary residence: the word was inserted in opposition to final residence. This was a sojourning, supposing it to have been only with the temporary purpose of marrying in Woolpit. In *Rex v. Helsham*, 2 B. & Ad. 625,

¹ 4 B. & Ald. 663. And see Lord ELLENBOROUGH's judgment in *Rex v. Alveley*, 8 East, 566.

LORD TENTERDEN said, "There is no authority to show that the original intent of the party must be absolute and unqualified to continue for forty days." As to the suggestion, that this was a contrivance to keep out of Haughly, such a fact must be expressly found; per LORD KENYON, in *Rex v. Fillongley*, 2 T. R. 711. The cases cited on the other side are distinguishable by the circumstance that in none of them the pauper came with any *animus morandi*, even for the shortest time.

*PATTESON, J.¹ We are not agreed on the question whether the Court is here concluded as to the fact. If we are, we have nothing to do with the case, and then it was absurd to send it to us. No doubt, however, such cases are sometimes sent. Yet, if we see that the finding in the case is perfectly contradictory, and if in reality the facts proved show that Brown did come to Woolpit to settle, but the sessions mean to find that he did not in law so come, and wrongly refer it to us as a matter of law, then I think the Court can take cognizance of the question, especially if the order of sessions be contrary to the tenor of the authorities. They find, in words, that Brown was resident in the workhouse of the hundred of Stow, in which the appellant parish is situated; he is then taken before a magistrate and committed for want of sureties; he gets a surety, who is the father of the woman upon whose charge he was committed. Then the sessions find that he returned to Woolpit. Brown did not, in the proper sense of the word, *return* to Woolpit, for he had not been there before: he therefore *came* to Woolpit, and that of his own accord. The lodgings, it is true, were taken for him without his own interference: still he comes and resides. If so, what did he come to do, except to reside? I cannot see a doubt. In *Rex v. Helsham*, 2 B. & Ad. 625, LORD TENTERDEN said that it was not necessary that there should be "a permanent intent," under stat. 13 & 14 C. 2, c. 12, s. 1, the recital contemplating quite the contrary. The statute therefore applies to temporary residence. I go the length of saying that, as it strikes me at present, if any man come for the purpose *of inhabiting at all (provided it be not under such circumstances as those in *Rex v. St. James in Bury St. Edmunds*, 10 East. 25, and *Rex v. St. Lawrence, Ludlow*, 4 B. & Ald. 660, where the persons were detained by accidents), it is sufficient. The act says "come to inhabit." I do not say that that is sufficient to give a settlement, which depends on other requisites, such as renting a tenement, hiring and service, and so on. There must indeed be *animus morandi*: I do not say that merely coming as a guest will bring the case within stat. 14 & 15 C. 2, c. 12, s. 1. The sessions might have found that to be the fact here; but they have not, and nothing which is found shows that it was so; on the contrary, they have stated what distinctly shows to my mind a purpose of residing. *Rex v. St. James in Bury St. Edmunds*, 10 East, 25, has nothing to do with this case; the remaining was not voluntary there. *Rex v. Birmingham*, 14 East, 251, is remarked upon by ABBOTT, C. J., in *Rex v. St. Lawrence, Ludlow*, 4 B. & Ald. 660, where he says that, if that case were at variance with *Rex v. St. James in Bury St. Edmunds*, 10 East, 25, he should adhere to the latter. But without entering into the question of the authority of *Rex v. Birmingham*, 14 East, 251, the present case differs from it; there the pauper had been sent from one parish to another, and was deterred, against her will, from quitting that in which she was; yet she was held removable from it. The present case is certainly stronger, for the pauper came of his own accord. Now, without saying that I would go the whole length of the decision in *Rex v. Birmingham*, 14 East, 251, it is a strong authority for saying that here the pauper came to settle. Therefore, the only question is, whether we are concluded *as to the fact. I think not. I say that it is actually found that the pauper came to settle; and that the sessions, in afterwards finding that he did not, meant to raise the point of law. [*209] [*210] [*211]

WILLIAMS, J. I am of the same opinion. Of what utility it might have

¹ LORD DENMAN, C. J., was absent, owing to indisposition.

been, if this Court had always required that facts should be found for them, I do not say : it is infinitely too late to do so now. The books are full of cases in which this Court has examined facts. What is more a fact than fraud? Yet the sessions have found fraud, and this Court has reversed the finding. What more than occupation, with reference to rating? Yet that has been examined by this Court. What more than questions of dispensation and dissolution in cases of hiring and service? Those have been over and over again examined by this Court, and the finding of the sessions corrected. So long ago as the time of Lord HARDWICKE, in a question as to circumstantial proof of fraud, he said, *Rex v. Telford*, Bur. Set. C. 60, "the justices are judges of the fact : and they may judge of the fraud arising from the facts : but we are judges of the law upon the facts, though not of the facts themselves. If they had generally found the fraud, we might have been bound by such a general finding : but when they state the facts particularly, the matter is as much open for our determination upon it, as it was for theirs." And, accordingly, the Court there entered into the question of fraud, and found contrary to the finding of the sessions. Cases are abundant in which this Court has decided on *the fact of occupation.

[*212] Thus, in *Rex v. St. Mary the Less*, Durham, 4 T. R. 477,¹ the facts were ambiguous, and the sessions found that there was no occupation, and LAW and CHAMBERLAIN relied on this as conclusive ; but, as the sessions had stated the facts upon which their decision was grounded, Lord KENYON answered, "that is the very question which they have left for the decision of this Court." Here, also, it is plain what the question is which the sessions have submitted to us. It is merely whether, upon the facts stated by them, the pauper was removable in law. They might have acted on their own impression ; they were not compelled to state a case : but they have done so. We therefore are bound to come to a decision. As to that decision, I can entertain no doubt. The meaning of stat. 13 & 14 C. 2, c. 12, s. 1, is, not that a party must come to settle under circumstances which would constitute a settlement if the time were long enough, but that he must come to inhabit. Then what is the limit? Is it to be a week or a fortnight? There can be none. Here there is nothing to restrict the intended residence. It is not stated that it was for a limited time, or that a removal to any other place was contemplated. The residence, therefore, was absolutely unrestrained ; a circumstance which was negative in the cases cited in support of the order of sessions. Thus, in *Rex v. St. Lawrence*, Ludlow, 4 B. & Ald. 660, the pauper never came to the parish : in *Rex v. Ashton-under-Lyne*, 4 M. & S. 357, the deserter never came to reside, but merely to escape [*213] pursuit, without any purpose *of staying. On the whole facts here, the statement of the sessions leads inevitably to the conclusion, that the pauper came for a time not limited, and to settle within the meaning of the statute. As, therefore, they have made that statement, to show the grounds of their decision, we are bound to say that we differ from it.

COLERIDGE, J. It is with great regret that I dissent from the judgments which have been given. I am very probably wrong : but I am bound to express my opinion. We do not differ in principle. No doubt this Court has in many instances entered into matter of fact brought before it by settlement cases. Most lawyers regret this : I do not defend it : though the object of it has been to do justice. The Court, however, has taken upon it jurisdiction as to matters of fact ; but as this is never done quite correctly, no one would wish to increase the number of instances. Therefore, on the question of fact, if distinct, the finding is not to be disturbed, except (and it is an exception founded on good sense) that the Court will always interfere with the finding of a jury, which is either unsupported by evidence or contrary to it. Facts are for the jury ; yet it has now become the inveterate practice of the Court to interfere in such cases ; and I hope that it will always be so. Then, in this particular case, is the

¹ And see Lord KENYON's judgments in *Rex v. Field*, 5 T. R. 591, and *Rex v. Whittlebury*, 6 T. R. 466.

question one of fact or law? I will not ask the meaning of the phrase "coming so to settle;" but clearly it has always been treated as a matter of fact. We may set out with this, then, that the question is one of fact: that is not controverted either at the bar or by my learned brothers. Then the only questions are, have the sessions decided on the fact? If so, have they submitted that conclusion of fact to us? *Or, if they did not intend so to submit it, is it clearly wrong? When I look at the case, I cannot doubt (were [*214] it not that one of my learned brothers thinks otherwise) that, right or wrong, the sessions have found the fact. Although they state facts, and desire us to determine, yet I find the point taken, and the sessions saying that they act on the ground that the pauper had not come to inhabit within the meaning of the statute. The sessions, therefore have drawn a conclusion. Then, is it without any foundation? A man living out of the parish, and being the putative father of a child with which a woman is pregnant, and the father of the woman having become surety for him, *comes* to the parish. That is ambiguous; he might come with any intention. He takes no house; but he lives in the house provided for him by the woman's father, marries in a week, and is relieved by the parish in about a week after. Then is it a necessary conclusion, that he came to settle or inhabit? It is said that, if he did not, something should be stated by way of negative. That I deny. The respondents are to justify the order; it is an affirmative fact that the pauper was removable. They must prove the facts of chargeability and of the *animus residendi*. Then is the conclusion that he came to settle or inhabit necessary? I think many others might be drawn: I do not say that others should be drawn, though my own, perhaps, would be different from that of the sessions: but, compatibly with these facts, I might say that he did not come to settle or inhabit. The justices, therefore, are not necessarily wrong.

Now, as to one or two cases, *Rex v. Chediston*, 4 B. & C. 280, seems *to me no authority here. When you once have a question of fact, the variety in the circumstances makes it unnecessary that the conclusion [*215] should be the same. The question there was, whether the party was an occupier, and it was held that he was so; and, no doubt, any sensible person must have drawn the same inference from the length of time. The question in the present case was never at issue there. As to *Rex v. Birmingham*, 14 East, 251, I fairly say that I think it is not an authority by which the Court ought to be governed. I think the intention there was too clear; and it seems, besides, that Lord ELLENBOROUGH's attention was drawn to another point: he assumes that the pauper was removable from either parish, and asks how the oscillation between the two parishes could affect the order of removal to her proper parish. I was much struck with Mr. Smith's very able argument on the words of the statute. But I say that whoever reads the whole of the statute must see that a party is not removable, unless he has come to do that by which he would obtain a legal right to some part of the stock of the parish. It is not enough that he should have been there eight or ten days, turning in his mind whether he should stay or not. The ground of my opinion is, that I think it most desirable that we should keep to our own jurisdiction, and compel the sessions to find the facts. I think they intended to do so here, and I cannot see that they are necessarily wrong.

PATTESON, J. This order must be quashed; but the case must go down again to the sessions, the respondents *not having been heard. If [*216] the sessions choose to go into the facts, they are not precluded.

COLERIDGE, J. It is much to be regretted that it so often happens that sessions cases are not drawn by barristers.

Order of sessions quashed, and the case sent back to be reheard.

The KING v. The Inhabitants of GREAT WISHFORD.

Nov. 14-16.

Pauper's mother applied to W., a carpet-weaver, to take him into his employment. W. agreed with her to take pauper for two years on trial, after which, if W. and pauper agreed, he was to be apprenticed to W. He was to have board, lodging, and washing, but no stated wages, and he was "to draw." Every carpet-weaver is at first taught "drawing." Pauper served above a year under this contract, in the borough of K. These facts being proved on appeal against an order removing pauper to K., the chairman put it to the sessions, whether there had been a hiring and service, or a service under an imperfect contract of apprenticeship. They found the latter, but sent a case for the opinion of this Court, stating the facts as above:

Held, that this Court might, under these circumstances, review the judgment of the sessions.

But that the judgment was not to be disturbed, there being grounds for the finding. And *semble*, that the finding was right, inasmuch as it might be collected from the case that the object of the parties was learning and teaching.

ON appeal against an order for removing Thomas Harman and his wife from the borough of Kidderminster in Worcestershire, to the parish of Great Wishford in Wiltshire, the sessions confirmed the order, subject to the opinion of this Court, upon the following case:

The pauper's father, being settled in Great Wishford, died in 1818; and in 1823 the pauper's mother applied to Samuel West, a carpet-weaver at Kidderminster, to take her son, the pauper, into his employment. West agreed with the mother to take the pauper for two years on trial, after which, if the pauper and master agreed, the pauper was to be apprenticed to West. The pauper [217] *was to be found in board and lodging and washing, by West, but was to have no wages, except what West pleased to give him as pocket money. The pauper was to draw. The pauper went to West as agreed, and worked for him about a year and a half, living in West's house in the borough of Kidderminster during that period. The pauper then ran away from Easter to wheat harvest, when he returned and worked for West for a short time at weekly wages, when he again ran away and they parted. It was stated by a magistrate on the bench, and assented to, "that every carpet-weaver is first taught the art of drawing as a draw-boy." The chairman took the opinion of the Court, whether the service was an imperfect contract of apprenticeship, or a hiring and service, and the Court found that it was an imperfect contract of apprenticeship.¹

F. V. Lee (with whom was *M. Turner*), in support of the order of sessions. It may be admitted that the finding of the sessions is not conclusive, if the Court perceive, upon their statement, that the decision could not have been arrived at consistently with the facts. But the Court will not reverse the judgment of the sessions, if supported by circumstances, however slight. To contend that this case is analogous to that of a conditional hiring, would be begging the question, because in every such case the hiring has distinctly taken place; here, the question is, whether there was any hiring or not. In *Rex v. Helsham*, 2 B. & Ad. 620, where the pauper entered upon a tenement, to live [218] upon it a month on trial for nothing, *and, if he liked it on that trial, to take it at the rent of 14*l.* a year at Martinmas, the residence on trial was held to incorporate with the subsequent residence at a rent, for the purpose of giving a settlement: but there the taking on trial was in the first instance distinct; it was only on the event of the premises being liked, that the first holding and the holding at a rent became incorporated under one and the same contract. But in the present case there was never any distinct contract of hiring. The case finds that it is usual for every carpet-weaver to be first taught the art of drawing as a draw-boy. The contract therefore was, that the pauper should go on trial as a draw-boy for two years, and afterwards, if approved of

¹ It was stated, during the argument, that this case was not drawn by counsel.

by the master, be bound apprentice. It is true that one fact is wanting here, which has influenced the Court in deciding such cases; no expression is used in the contract which directly implies teaching or learning. But the intention of the parties may be collected from other circumstances. In *Rex v. Edingale*, 10 B. & C. 739, the master had refused to take the pauper as an apprentice; but, as it had been agreed that the pauper was to go to him to learn his trade, Lord TENTERDEN said, "that being the object of the parties, expressed at the time of making the agreement, I cannot distinguish this from the case of *Rex v. Combe*, 8 B. & C. 82." There the contract was held to be an imperfect contract of apprenticeship, and the object contemplated by the parties when making it was admitted to be a proper test of its nature. And in *Rex v. Edingale*, 10 B. & C. 739, Lord TENTERDEN, speaking of the question whether the contract then before the Court was one of apprenticeship or of hiring and service, said, "if *that was a question of fact, as it may be, the sessions have decided it." [PATTERSON, J. If the sessions have negatived a [*219] contract of hiring and service, it is sufficient for you, if that can be a right conclusion from the facts.]

W. J. Alexander and *Whitmore* were then called upon by the Court. This is a case in which, upon the facts stated, it is clear that the judgment of the sessions ought not to be held conclusive, according to the doctrine laid down in *Rex v. Woolpit*, *antè*, p. 209-216, even by COLERIDGE, J., who differed, as to the particular case, from the rest of the Court. The Justices at sessions had the alternative put to them, whether (as it is stated) "the service was an imperfect contract of apprenticeship, or a hiring and service." They have found the first, a conclusion which cannot be supported, but they have not expressly negatived the last; they have not, therefore, found that, if their opinion was wrong as to the contract of apprenticeship, there was not a hiring and service. On the contrary, as no third proposition appears to have been before them, they may be taken to have found that, if that part of the alternative to which they inclined was not true, the other was. They have at any rate left the matter in doubt: the whole is referred to the Court, and may be dealt with by them according to the facts, if those are clear, as was done in *Rex v. Tedford*, Burr. S. C. 57, *Rex v. St. Margaret's*, King's Lynn, 6 B. & C. 97, and *Rex v. Newtown*, 1 A. & E. 238. Then, as to the question itself. *Rex v. Helsham*, 2 B. & Ad. 620, is not in point, because there the trial proved *satisfactory, the residence went on uninterruptedly, and one part of it [*220] became incorporated with the other. Here, in the first place, the contract was not an imperfect contract of apprenticeship. The criterion upon this subject is, whether the object of the parties, in their agreement, was teaching and learning, or service; *Rex v. Edingale*, 10 B. & C. 739, *Rex v. Crediton*, 2 B. & Ad. 493, *Rex v. Newtown*, 1 A. & E. 238. Here the object was, not that the boy should learn, but that it should be ascertained whether or not he was capable of learning. There was no premium, no written instrument, and nothing expressly said of teaching and learning. The terms used were such as exclude the possibility of a present contract of apprenticeship being created. The arrangement for a future apprenticeship contradicts the supposition of a present one. That being so, the finding of the sessions on this point does not bind the Court; unless it can be contended that the finding would have been conclusive if the parties had actually drawn an agreement reciting that an apprenticeship was not contemplated. Secondly, there was a contract of hiring, and a service. Quoad service for two years, the contract was absolute; the apprenticeship was to depend on what took place during that period. The immediate intention is plain; the ulterior views are not to be looked at. [COLERIDGE, J. Do you mean that, if at the end of a month he had been found unfit to learn carpet-weaving, he was still to be a servant for two years?] The contract, by its terms, would subsist for two years. Even if the hiring was conditional, it continued for a year undefeated. The statement by a magistrate, that every

[*221] carpet-weaver is first taught drawing, does not *alter the case. Perhaps the boy had learned drawing already, when the agreement was made; or the learning might be incidental to the service. But there was an absolute contract to serve, and the boy worked under it for a year.

PATTESON, J.¹ The chairman put it to the Court of Quarter Sessions, whether there was in this case an imperfect contract of apprenticeship, or a hiring and service. The sessions found the one, and I think that in doing so they negatived the other. It is now contended, first, that we are not at liberty to enter into the question, the sessions having decided on it; and, secondly, that, if we do enter into it, the judgment of the sessions is right. The line of demarcation is not plain between cases in which this Court is and is not bound by the finding of the sessions; but there is clearly no instance in which this Court has reversed their decision, unless they have manifestly come to a conclusion which was wrong, either as being unsupported by the facts, or as being contradictory to them. We have been pressed, in this case, with the decision in *Rex v. Woolpit*, antè, p. 205, but there my brother WILLIAMS and I thought the finding of the sessions contradictory to the facts appearing on the case: my brother COLERIDGE was of a different opinion. Here, we all think that the sessions came to a conclusion warranted by the facts. The contract might have received either of the two constructions submitted to the sessions, more especially as it was by word

[*222] of mouth. In *Rex v. St. Margaret's *King's Lynn*, 6 B. & C. 99, BAYLEY, J., said "Every case of this description must depend upon its own particular circumstances. If from all that passed between the parties at the time when the contract was made, they appeared to have contemplated the relation of master and apprentice, then the contract must be considered to be one of apprenticeship; and, if it be an imperfect apprenticeship, no settlement can be gained by serving under it. If, on the other hand, it appears that the parties contemplated the relation of master and servant, then it must be deemed a contract of hiring, and a settlement will be gained by serving under it." The sessions are to determine upon a view of all the circumstances, as BAYLEY, J., truly says, if the contract itself be ambiguous. In subsequent cases the criterion has been stated in different terms from those used by BAYLEY, J., in *Rex v. St. Margaret's King's Lynn*, 6 B. & C. 99. The test as latterly stated, and as put in *Rex v. Crediton*, 2 B. & Ad. 493, and *Rex v. Newtown*, 1 A. & E. 238, is, whether or not the contract is for learning and teaching. Here it might have been inferred from the circumstances of the contract, either that the master was to take the pauper for two years, to see whether he was a teachable boy, and likely to learn the business; or that he was to take him for two years to do all kinds of work, and that, if liked at the end of that time, he was to be received as an apprentice. The sessions have adopted the first construction, and have found an imperfect contract of apprenticeship. My own inclination is towards the same conclusion, but I think the circumstances will admit of a contrary one.

[*223] It is suggested that the sessions must *have doubted the justness of their own decision, or they would not have referred the matter to the Court as they have; but this is an argument which may always arise, if the sessions are to send cases at all. Upon the whole, I think that enough appears in this case to justify the order of sessions.

WILLIAMS, J. I am also of opinion that there is, in this case, enough to support the order of sessions. The supposed difference of opinion in *Rex v. Woolpit*, antè p. 205, arose merely from the different views taken of the facts of that case. Here, without saying whether I should or should not have decided as the sessions have, I think they had ground for finding that there was a contract to teach and learn (as I presume they mean to say), and not a contract of hiring. And if the case shows any ground for their decision, we ought to support it. The word "employment" might apply to either description of contract. It is true the agreement here was not, in terms, that the boy should go

¹ Lord DENMAN, C. J., was absent on account of illness.

to be taught; but it might be inferred that he was to go for that purpose: he was "to draw;" and that most probably was to prepare him for a particular business. One expression in the case, therefore, with respect to the contract, is ambiguous, and the others are in favor of the finding. I should have been sorry if the facts had proved so conclusive against the order of sessions, that we could not have maintained it; for the sessions appear to have acted upon the case of *Rex v. Crediton*, 2 B. & Ad. 493, where this Court overruled a multitude of former cases (such as *Rex v. Little Bolton*, Cald. 367; and *Rex v. Eccleston*, 2 East, 298), which had created great confusion *by establishing, that a contract in which a servant was not expressly retained as an apprentice [*224] might not be a contract of apprenticeship, although there was no doubt that the intention of the parties was teaching and learning. Now, a more plain and intelligible ground has been laid upon which to decide such cases, namely, the object contemplated by the parties; and I am glad that the sessions in this instance appear to have proceeded on that ground.

COLERIDGE, J. In *Rex v. Woolpit*, ante, p. 205, there was no difference on the Bench as to principle. Every one will agree that the jurisdiction, upon matters of fact, is in the sessions: this Court has it only when a matter of fact is referred to the sessions, or where they have decided on the fact without any evidence, or against evidence. The first question here is, whether the sessions have found a matter of fact. I think that, in effect, they have. Then, is their conclusion necessarily wrong? I think it is right, therefore I cannot say that their decision ought to be interfered with. An imperfect contract of apprenticeship exists, where the parties have had a perfect contract of apprenticeship in view, but it has not been thoroughly carried into execution. The object of such a contract is, that the master shall teach and the boy learn. That was contemplated here. The parties would not go to the expense of an indenture, but they said that they would try for two years whether the boy could learn and the master teach him; and, if it proved so, the boy was to be apprenticed. Then there was, in effect, an imperfect contract of apprenticeship. It is said that no express words signifying instruction *were used; but I think that is not necessary, if it can be inferred that learning and teaching were contemplated. [*225] It would be a new position to lay down, that an intent cannot be collected in the absence of express terms. Order of sessions confirmed.

PEARCE v. CHESLYN. Nov. 17.

By a paper entitled a memorandum of agreement, signed by plaintiff and defendant, it was recited that defendant and W. had agreed to abandon the annexed contract for taking and letting certain lands; that plaintiff and defendant agreed, the former to take, the latter to let, the lands, upon the conditions contained in the annexed contract; "the said rent to be annually paid by quarterly payments, and to be in amount £220; and we further bind ourselves to the other to execute a similar agreement to the one recited and referred to." This agreement had a £3 stamp. The annexed agreement had no stamp, and was, in effect, a lease from the defendant to W. setting out regularly the terms of the tenancy, &c.

Held, that the stamped agreement incorporated the unstamped one, and that the two together might be given in evidence as a lease on the terms contained in the unstamped one.

REPLEVIN. The defendant avowed for rent arrear; and the plaintiff pleaded in bar non tenuit. On the trial before VAUGHAN, J., at the last Leicester-shire assizes, the defendant, to show the holding, offered in evidence two papers. The first was entitled, "Memorandum of an agreement made and entered into the 29th day of January, 1833, between Richard Cheslyn," [the defendant] "and John Webberley;" but, in effect, it amounted to a lease of the premises on which the distress was taken, at a larger rent than that distrained for, though in other respects on the terms set out in the avowry. The second was

annexed to the preceding, and was as follows:—"Langley Priory, 16th March, 1833. Memorandum of agreement. Whereas the within named John Webberley and Richard Cheslyn, having agreed to abandon the annexed contract for the taking and letting the farm and lands, &c., therein named, called, &c., we, William Pearce, of, &c., and the said Richard Cheslyn, do agree, the former [*226] to take *and become tenant, and the latter to let and to farm set, the therein farm of, &c., upon the conditions, agreements, &c., contained in the same, dated 29th January, 1833, between the said John Webberley and Richard Cheslyn, the said rent to be annually paid by quarterly payments, and to be in amount £220; and we further bind ourselves to the other to execute a similar agreement to the one recited and referred to." (Signed by the plaintiff and defendant.) The former instrument had no stamp; the latter had a stamp of £3. The plaintiff's counsel objected that the former instrument could not be read for want of a stamp; and that the latter instrument did not amount to a demise. The learned Judge overruled the objection, and the defendant had a verdict. In this term (Friday, November 6th),¹

G. T. White moved for a rule to show cause why the verdict should not be set aside, and a new trial had. The agreement between the defendant and Webberley required a lease stamp, and, not having one, could not be read at all; and, if that be left out of the evidence, the second agreement cannot of itself show the terms of the holding. [Lord DENMAN, C. J. Suppose an instrument refer, for the terms of the holding, to the terms contained in a newspaper, or in the "Attorney's Pocket-book." Here, the instrument containing the reference does not make a present demise. The parties are to execute an agreement similar to the original one. In *Poole v. Bentley*, 12 East, 168, an instrument containing such a clause was held to be *a lease; but in that case there [*227] was an additional clause, "This agreement to be considered binding till one fully prepared can be produced." In *Staniforth v. Fox*, 7 Bing. 590, the instrument, which was held to be a lease, contained words from which it was inferred that the relation of landlord and tenant was to commence immediately: here, nothing appears but the intention to create such a relation by a future instrument. In *Doe dem. Pearson v. Ries*, 8 Bing. 178, the Court called in aid the acts of the parties to explain the instrument: but here there was no evidence of the sort. And, besides, in that case, it appeared from the instrument that the party occupying the premises was to make an immediate outlay. [COLERIDGE, J. The cases are collected in Mr. Roscoe's Treatise on the Law of Actions relating to Real Property.]² There will not be found one in which the agreement has been construed as a present demise, where there has been an absolute engagement for a future execution of a lease, and no hardship appeared to be thrown upon one or other of the parties, if the agreement were not so interpreted. *Cur. adv. vult.*

Lord DENMAN, C. J., now delivered the judgment of the Court.

The question here was, whether proper evidence was given of the demise. We think the agreement between the plaintiff and defendant incorporated the earlier one, and, with that incorporation, constituted a perfect lease on the [*228] terms of the earlier agreement. The instrument *drawn up between the plaintiff and defendant had a stamp sufficient for a lease: the objection, therefore, as to the want of stamp on the agreement to which it referred, seems to us unfounded. Rule refused.

¹ Before Lord DENMAN, C. J., PATTESON, WILLIAMS, and COLERIDGE, J.

² Tit. Ejectment, p. 616-628. See *Warman v. Faithfull*, 5 B. & Ad. 1042.

HOLDEN v. RAPHAEL and ILLIDGE, Esquires, Sheriff of MIDDLESEX.
Nov. 17.

To a declaration against the sheriff for an escape on meeme process, defendant pleaded that, before the alleged escape, and before the expiration of eight days from the

arrest, he took a bail bond, duly subscribed with a condition according to the form of the statute, &c., and assigned it to the plaintiff, which the plaintiff took; and the replication traversed that any condition was subscribed according to the form of the statute, &c.

Held, that the defendant did not support his issue, by producing a bail bond, which was regular in all respects except that, in the recital of the condition, the writ, &c., was said to have been delivered "to the said ——" ; and that, in the operative part of the condition, the words were "if the said ——" do cause special bail, &c.;" the prisoner's name being omitted in those two places only.

CASE against the sheriff of Middlesex, for the escape of Thomas Smedley Turner, arrested upon mesne process under a capias at the suit of the plaintiff.

First plea, Not Guilty.

Second plea, that, after the arrest of Turner, and before he was suffered to go, &c., and before the expiration of eight days after the arrest, to wit, on, &c., the defendants had taken from him a bail bond, with two sureties, whereby, &c. (describing the obligatory part of the bond), to which said bond was duly subscribed a certain condition according to the form of the statute in such, &c., for the due putting in of special bail for the said Turner according to the exigency, &c.; and that afterwards, and before the commencement of this suit, to wit, &c., the defendants duly assigned the bail bond to the plaintiff. Verification. Replication, that there was not any condition duly subscribed to the said bond according to the form of the statute, &c., in manner and form, &c. Similiter.

*On the trial before LITLEDALE, J., at the Middlesex sittings in this term, the escape was proved. The bond (which was in printed form) [*229] was produced, and appeared to be complete in the obligatory part containing the names of Turner and his two bail as obligors. The condition in the usual form, recited that the above bounden Thomas Smedley Turner, had been taken by virtue of a writ against the said Thomas Smedley Turner, and that "a copy of the said writ, together with every notice or memorandum subscribed thereto, and all endorsements thereon, was, on execution thereof, duly delivered to the said ——" ; and whereas he is by the said writ required to cause special bail to be put in for him in the said Court to the said action within eight days after execution thereof on him, inclusive of the day of such execution; now the condition of this obligation is such, that if the said ——" do cause special bail to be put in for him to the said action in his Majesty's said Court, as required by the said writ, then, &c." The two blanks were not filled up. The defendants' counsel contended that this bond, notwithstanding the omissions, supported the plea. The learned Judge refused to nonsuit, but gave leave to move for a nonsuit, and a verdict was returned for the plaintiff for 55*l.* 5*s.* 6*d.*, the sum endorsed on the capias for bail.

On the same day (Tuesday, November 3d,)¹

Alexander moved accordingly. This condition was sufficient under the issue on the second plea. The obligatory part gives the full names of the obligors; and the recital, at the commencement of the condition, gives the name [*230] of the party arrested, and shows that the writ was against him by that name: then the condition recites, that a copy of the said writ was, on the execution thereof, duly delivered "to the said ——" . The due delivery could only be made to the party arrested, and the blank must, therefore, be read as if filled up with Turner's name. The recital then continues, "And whereas he is required by the said writ," &c.; the requisition of the writ could only be upon the party arrested. So the word *him*, occurring twice immediately after, must be referred to Turner. Then follows the condition, "that if the said ——" do cause special bail to be put in for *him*:" there can be no doubt that the blank means the same person as the word *him*, which must refer to the person referred to by the word *him* just before; and that clearly identifies the whole with Turner, the defendant named in the writ. The doctrine of intendment was carried

¹ Before Lord DENMAN, C. J., PATTERSON, WILLIAMS, and COLLIERIDGE, Js.

quite as far as this in *Coles v. Hulme*, 8 B. & C. 568, where, in an action on a bond for 7700*l.*, issue being joined on *non est factum* the bond produced had in the obligatory part merely 7700, without anything to designate pounds. By the condition, it appeared that the bond was given to secure various sums of money composed of pounds; and Lord TENTERDEN, at Nisi Prius, held, that from this the word "pounds" might be intended in the obligatory part: and the Court refused a rule for a nonsuit. Lord TENTERDEN, in bank, said, "In every deed there must be such a degree of moral certainty as to leave in the mind of a reasonable man no doubt of the intent of the parties. The question [*231] in this case is, Whether there is *in this bond that degree of moral certainty as to the species of money in which the party intended to become bound?" And BAYLEY, J., said, "It has been decided, that in furtherance of the obvious intent of the parties, even a blank may be supplied in a deed." The reporters suggest in a note, that the decision alluded to was Lord Say and Seal's Case, 10 Mod. 45, where this Court supplied the name of the bargainor, in the operative part of a bargain and sale to make a tenant to the *præcipe*, the other parts of the deed enabling them to do so; and the decision was affirmed in the House of Lords: Lord Say and Seale v. Lloyd, 4 Bro. P. C. 73 (2d edit.). In the same note, other cases are cited to a similar effect; and among others, Langdon v. Goole, 3 Lev. 21, which strongly resembles the present case. The nature of the instrument here is in favor of the desired intendment; for, by stat. 23 H. 6, c. 10, s. 7, the form of the condition is prescribed, "that the said prisoners shall appear," &c.; and stat. 2 W. 4, c. 39, s. 4, directs that the copy shall be "delivered to every person upon whom such process shall be executed;" and the act last mentioned supplies the form of the *capias* (sched. No. 4), "safely keep" the party to be arrested "until he shall have given you bail." Now, here the name of the person who is prisoner, and upon whom the process is executed, clearly appears by the recital in the condition; and, as the Court must know judicially to whom the writ was to be delivered, and who was to be put in bail, they will, from this knowledge, and to avoid presuming a violation of duty, supply the two blanks. In *Flight v. Lord Lake*, 2 New Ca. 72, the column in the memorial of an annuity, which, by stat. [*232] 53 G. 3, c. 141, s. 2, should have *been headed, "Person or persons for whose life or lives the annuity or rent charge is granted," was headed thus, "Person for whose the annuity is granted;" and the Court supplied the word "life," TINDAL, C. J., saying, "The only question is, whether any person applying an ordinary understanding to this memorial could misapprehend what was intended." That is the fair criterion in the present instance.

The Court took time to speak to LITLEDAL, J.

Cur. adv. vult.

Lord DENMAN, C. J., on this day said: We are of opinion that there is no ground for granting a rule. Rule refused.

The KING v. The Marchioness Dowager of DOWNSHIRE. Nov. 18.

An indictment for obstruction of a public way, describing it as from A. towards and unto B., is satisfied by proof of a public way leading from A. to B., though turning backwards between A. and B. at an acute angle; and though the part from A. to the angle be an immemorial way, and the part from the angle to B. be recently dedicated. B. was a church: the path from A., after passing the point at which the obstruction took place, reached the churchyard, but not the church, before reaching the angle: Held by Lord DENMAN, C. J., and semble, per COLERIDGE, J., that this proof would not have supported an indictment describing the whole as an immemorial way.

INDICTMENT for obstructing "a certain common and public footpath, leading from the turnpike road from the parish of Ombersley to the parish of Holt, in the county, &c., towards and unto the parish church of the said parish of Ombersley." Plea, Not Guilty. On the trial before WILLIAMS, J., at the Worcester Summer Assizes, 1834, the obstruction was proved; but a question

arose whether the path, shown to be obstructed, answered the description in the indictment. The path *commenced at a point in the turnpike road from Ombersley to Holt, and thence was continued to a gate opening into [233] an enclosure, on the western side of that enclosure. The obstruction was between this gate and the point before mentioned. The enclosure contained the site of the old parish church of Ombersley, which had been pulled down, and the new parish church, which had been erected, and was made the parish church, under an act of parliament (54 G. 3, c. cxxviii., local and personal, public). From the gate on the western side, a path passed through the enclosure between the two sites, leaving the site of the old church on the right, and the new church on the left, to a gate on the eastern side of the enclosure, and so to the village of Ombersley. Persons entering by the western gate, going to the old church, turned off to their right from this path, after entering the enclosure, and went to the old church by a path in a southeastern direction, forming an obtuse angle with their previous course. Persons entering at the western gate, and going to the new church, followed the easterly direction further on, and then turned off to their left, by a gravelled path, in a northwestern direction, forming an acute angle with their previous course, and coming up to the new church itself. Sometimes, however, persons going to the new church, almost immediately after entering the western gate, quitted the path running through the enclosure from west to east, and, turning to the left, crossed the churchyard to the new church in a northeastern direction, forming an obtuse angle with their previous course, and some evidence was given to show that the grass, on the part of the churchyard traversed by this last-mentioned route, was kept mown for the convenience of persons frequenting *the new church; but this [234] was not fully established. The spaces round the sites of the old church and the new church, on the right and left respectively of the path from the western to the eastern gate of the enclosure, were called respectively the old and new churchyards, but they were open to each other, and both within the one enclosure. The path, from the point in the road from Ombersley to Holt to the western gate of the enclosure, was an immemorial public path, and so was the path leading from west to east through the enclosure, and that connecting the last-mentioned path with the old church; but the public paths, if any, connecting the path from west to east with the new church, did not exist before the new church was built. The defendant's counsel objected that the parish church, mentioned in the indictment, must be considered to be the new parish church; and that the evidence did not show that this was a terminus. His Lordship took a note of the objection, and permitted the case to proceed: and he finally left it to the jury, whether the path up to the new church had been dedicated to the public. Verdict, Guilty. In Michaelmas term, 1834, Jervis obtained a rule to show cause why the verdict should not be set aside, and a verdict be entered for the defendant, or a new trial be had, on the ground of misdirection.

Talfourd, Serjt., *Godson*, and *W. J. Alexander*, now showed cause. First, the terminus is correctly described. Even if the path do not actually come up to the edifice of the church, it does, undisputably, come to the churchyard, and that sufficiently answers the description "towards and unto the church." Such a description *cannot possibly mislead; and the obstruction itself was [235] at an earlier part of the path; so that there is no necessity to construe this part of the description very strictly. Thus in *Clerke v. Cheney*, 1 Vent. 13, it is laid down that, if a justification in trespass be made out in virtue of a road over the locus in quo, it is not material, after verdict, whither the road leads. Even in the case of a private way it is not necessary to describe the intervening closes; *Simpson v. Lewthwaite*, 3 B. & Ad. 226. *Rouse v. Bardin*, 1 H. Bl. 351, shows the same of a public highway of which the termini are set out. Lord LOUGHBOROUGH there differed from the majority of the Court; but the opinion of the majority was upheld in *Simpson v. Lewthwaite*, 3 B. &

Ad. 226. It is true that, in *Wright v. Rattray*, 1 East, 377, a way, described in the declaration as leading from A. over a close of the defendant, to B., was held not to be established by proof of a way passing from A., over the defendant's close, towards B., but intercepted, between the defendant's close and B., by a close over which there was no way: that was because the easement was described to be where it could not be. The party could not get *by that way* to B. And Lord KENYON suggested that, if the way had been described as *towards* B., it would have been good. That is so here. In *Allen v. Ormond*, 8 East, 4, it was held that a private right of way, laid as unto and into a public highway, was proved by evidence of a private way leading to a public *footway*, though perhaps the declaration might have been specially demurred to for want of certainty. Secondly, the path does in fact lead, by a route which deviates [*236] from a direct line only *by an obtuse angle, up to the edifice of the church, by the first turning to the left, over the mown grass. [WILLIAMS, J. You can hardly carry that evidence so far as to make out a path over the grass.] Thirdly, the path actually reaches to the edifice of the church, by the gravelled path in the northwestern direction. It is certainly reflected back at an acute angle; but this is immaterial. It is not necessary that the path should be straight; nor are there any rules limiting the degree in which it may deviate from straightness. It would be different if the path, as described, could not lead to the terminus without actually retracing some part backwards. That was the case of *Rex v. Great Canfield*, 6 Esp. 136.

Jervis, Whately, and Talbot, contra. It is laid down by TAUNTON, J., in *Simpson v. Lewthwaite*, 3 B. & Ad. 233, that in pleading a public highway it is not necessary to set out the termini, but in pleading a private highway both termini must be set out with certainty. But, if the termini of a public highway be professedly set out as here, they must be proved as laid. Here they are not so proved. The path should be shown to reach actually up to the terminus, the church. One test of this is, that, if this indictment be supported, the defendant will be charged with the repair of all up to the church; therefore nothing less ought to be proved. Again, if she were hereafter indicted for the same obstruction, and the indictment were to describe the path properly as terminating at the western gate, this record would not support a plea of *auterfois acquit*; [*237] for it would be said that the previous acquittal might have been for an *obstruction between the western gate and the church. *Simpson v. Lewthwaite*, 3 B. & Ad. 226, and *Rouse v. Bardin*, 1 H. Bl. 351, show merely that the mention of the closes between the termini is not necessary. Here the objection is, that the termini themselves are falsely laid, and the path is described as extending farther than it actually does extend. *Jackson v. Shillito*, cited in *Wright v. Rattray*, 1 East, 381, is distinguishable on the same ground: there the party was entitled to go from one terminus to the other, as he claimed, although part of the intermediate road was not an easement, but his own close. But, where the party had actually claimed a right of way over a close, which close was not his own, and over which there was no way, it was held that, as he could not reach the terminus named by the described way, the variance was fatal; *Wright v. Rattray*, 1 East, 377. That case is precisely in point; for here the path does not reach the terminus named: the language of DODDERIDGE, J., in *Slowman v. West*, Palm. 387, cited in *Wright v. Rattray*, 1 East, 377, goes still further. It is said that the terminus is referred to only by the word "towards." But the expression is "towards and unto:" "unto" means more than "towards." In *Lempriere v. Humphrey*, 8 A. & E. 181, this Court held that, where an abuttal was referred to in pleading by the word "towards," and the other side did not complain of the uncertainty, but pleaded over, the party, setting out the abuttal might apply the description to a place not contiguous to the abuttal, though the word "towards" was improperly used. That shows that the word [*238] "unto" restricts the description *much more closely than the word "towards." Then, if it be necessary to show that the path reaches the

terminus named, does this path do so? It is attempted to establish this in two ways. The first is by the passage said to take place over the grass in the church-yard, which has no requisite of a path. The other is by resorting to the path which turns back towards the church, at an acute angle with the line of path previously gone over. If that were sufficient, any route, however circuitous and indirect, by which it was possible to get from one point to another, might be described as a path from the one to the other. It must be understood that the path should lead, in the common sense of the words, from terminus to terminus; *Rex v. Great Canfield*, 6 Esp. 136. Besides, if this indirect path be resorted to, the objection arises, that what is called a path is in fact two paths; one being ancient and immemorial, and the other recently dedicated. Had the indictment described the whole path as immemorial, it must have failed, on proof that part of the path was recent. Here the evidence of user showed the intention of the prosecutor to treat the path as ancient throughout; and the indictment so explained is void for misdescription.

LORD DENMAN, C. J. It appears to me that there has been no misdirection. There is a path answering to the description in the indictment, by which you may reach Ombersley church. It is true that in doing so you must describe an acute angle; but that does not make a variance. *Rex v. Great Canfield*, 6 Esp. 136, is the only case which *appears to raise the question of misdirection. But there, in order to reach the terminus by the path described, [*239] it was necessary to return back over the ground already passed. Here, no part is passed over twice; but the objection is merely that, having reached a certain point, it is necessary to turn at an acute angle, and go on to the church by a different path. But this latter part of the path, though new, is as much a public path as the rest; so that no difficulty arises in that respect. If the whole path were described as immemorial, there would certainly be a variance. As to the suggestion respecting a second indictment, and plea of *auterfois acquit*, I do not feel the difficulty: it would always be necessary to show where the obstruction complained of in the former indictment took place.

PATERSON, J. I think there is no misdirection. I was struck with the argument, that part of the footpath in question was an ancient way, and part a way newly dedicated. But, upon consideration, I think that creates no difficulty. If it make up one entire road, it is immaterial at what time the several parts became public. If, as in *Rex v. Great Canfield*, 6 Esp. 136, the description could have been satisfied only by going to a certain point, and then returning back by the same route, it would have been a different case: but here you go along an ancient highway, and make an angle backwards, but do not retrace any part.

COLERIDGE, J. I am of the same opinion. If the path were claimed as an immemorial highway, I should *feel a difficulty; but that is not so. The user sufficiently makes them one, for the purpose of the indictment, [*240] provided the jury find that all is a public highway to the church, though a circuitous one. Perhaps it is rather in favor of the prosecution, that the attempt to show a way over the grass failed; for the inference is stronger that the other route is the path.

WILLIAMS, J. I thought the evidence sustained the allegations, and that there was no variance. The question comes shortly to this: do the words "towards and unto" imply any degree of directness? There is no rule which lays down that, because a road forms an acute angle in order to reach a terminus, it does not lead "towards and unto" the terminus. Rule discharged.

*BROWN and Others v. TAYLEUR. Nov. 19. [*241]

Insurance on a ship "at and from her port of lading in North America to Liverpool."
She took in part of her cargo at K., in New Brunswick, and then sailed from thence

to B., in the same province, seven miles distant, on the same bay of the sea. She there completed her cargo, and then returned to K., to receive provisions, &c., after which she sailed for England, and was lost on the voyage. B. was not in the way from K. to Liverpool. B. and K. were situate on creeks opening into the bay, and were spoken of by some persons as ports, but neither of them had a custom-house. They had custom-house officers, and were under the jurisdiction of the custom-house of St. John, New Brunswick.

Held that, after the ship had begun to load at K., that was her port of lading; that the term "port of lading" in the policy did not allow of her afterwards going to B., and that her doing so was a deviation.

ASSUMPSIT on a policy of insurance. On the trial before Lord DENMAN, C. J., at the sittings in London after Trinity term, 1834, it appeared that the insurance was upon goods and merchandise, and also upon the body, tackle, &c., of and in the ship Penrith, "lost or not lost, at and from her port of lading in North America, to Liverpool;" beginning the adventure upon the goods from the loading thereof on board, &c. A total loss was proved; but, upon the case for the plaintiffs, Sir James Scarlett, for the defendant, contended that there had been a deviation. The evidence on this point was as follows:—

The Penrith was launched at Cocagne, in the province of New Brunswick, at the end of June, 1828. Her burden was 510 tons. A few days after she was afloat, she began to take in a cargo of timber at Cocagne, and she continued to do so for three weeks. The lower hold, which would contain from 400 to 500 tons, was loaded at Cocagne. During this time the vessel was described in evidence, as lying "in the stream, inside of the Cocagne bar." On the 1st of August, she sailed from thence to Buktonche, described by different witnesses as five, and seven, miles distant, to complete her loading. She arrived there in a few hours. Cocagne and Buktonche are situate on different creeks of the same bay. Buktonche is not in the line of voyage from Cocagne to Liverpool.

[*242] *The Penrith lay off Buktonche three weeks to take in the residue of her cargo, and returned to Cocagne on the 22d of August to receive provisions, water and wood, and to get the ship ready for sea; but she took no additional cargo, unless (which was mentioned as doubtful) a few pieces of timber on the deck. She sailed for England on the 31st of August, and was lost on the voyage. Cocagne was spoken of by witnesses as a "harbor," and a "port," and Buktonche as a "port," but neither had a custom-house, though there were officers of customs at both places, and it appeared that both were within the jurisdiction of the custom-house of St. John, New Brunswick. The Penrith, though built at Cocagne, was registered at the port of St John.¹ The letter ordering the insurance was dated August 25th, 1828.

The Lord Chief Justice gave leave to move to enter a nonsuit on the objection taken, and the plaintiffs had a verdict. In the following term a rule nisi was obtained for entering a nonsuit, or for a new trial upon grounds which it is unnecessary to notice, as the decision of the Court did not turn upon them.

Sir J. Campbell, Attorney-General, Wightman and Crompton now showed cause. At all events there is no ground for a nonsuit, because there was some evidence, at least, upon which the jury might be asked whether Cocagne and Buktonche were not parts of the *same port of lading, within the [*243] meaning of this policy. It is not questioned the ship was *bonâ fide* employed, at both places, in taking in her homeward cargo, and that, if the word "port" in the policy had been "ports," she would have been protected. The intention clearly was that the vessel should be covered by the policy, while fairly employed in taking in her cargo in North America. For the purposes of

¹ It appears on reference to a map, that St. John is on one side, Cocagne and Buktonche on the other, of the neck of land which joins New Brunswick to Nova Scotia. St. John is on the bay of Fundy. Cocagne and Buktonche are in the gulf of St. Lawrence, each at the mouth of a river. The distance from St. John to Cocagne by land appears to be about 100 miles, in a direct line.

the insurance, Cocagne and Buktouche might both be considered as the port of lading. It is as if they were different parts of the cove of Cork, or any similar harbor. In point of fact it is well understood that, on coasts where wood is taken in, ships go from creek to creek for the purpose; and the present policy may have been framed as it is with a view to that practice. There is no reason for restricting the term "port" to the first place to which a vessel loads a piece of timber. Suppose this insurance had been "at and from her port of lading in Jamaica;" *Cruikshank v. Janson*, 2 Taunt. 301; and *Warre v. Miller*, 4 B. & C. 538, show that, in that case, going from one part of the island to another, in any direction, for a legitimate purpose would not have vitiated the policy. *Bond v. Nutt*, 2 Cowp. 601, is to the same effect. In *Constable v. Noble*, 2 Taunt. 403, which may be cited for the defendant, it was held that a policy at and from Lyme did not protect a voyage from Bridport Harbor, which is within the port of Lyme; but there a place was named in the policy, and the voyage was commenced in a different place. So in *Payne v. Hutchinson*, 2 Taunt. 405 note (a), a ship insured from Caermarthen sailed from Llanelly, which is a member of the port of Caermarthen, and the voyage was *held not to be protected: but there also, the place named in the policy was different from that at which the voyage commenced; and the policy was "at and from Caermarthen" (not the port of Caermarthen), which evidently could not mean, at and from Llanelly. And the two places had distinct custom-houses. The vessel cleared out from Llanelly, not Caermarthen. To make the present case at all similar to that, the Penrith should have cleared out from Buktouche. Cocagne and Buktouche may be distinct harbors, but they are not distinct ports. They are inconsiderable places on the coast, not having their own custom-houses, but subordinate to that of St. John. A ship built at Cocagne is registered at St. John. In *Warre v. Miller*, 4 B. & C. 545, *Abbott, C. J.*, observed that it did not appear whether there was any port, properly so called, in Grenada; but he relied on the fact that there was only one custom-house for the whole island, and adopted the proposition, there urged in argument, that Grenada must be considered as all one place. It is also to be observed here, that the letter ordering the insurance was dated August 25th: at that time the Penrith had returned to Cocagne, and there was nothing that could be called a deviation afterwards.

Maule and *Sir W. W. Follett* contra. First, as to the nonsuit. The Lord Chief Justice, when he overruled the objection and reserved leave to move, must be considered as having directed the jury that, if the particular facts relied upon by the defendant were proved, they could, legally, make no difference as to the verdict. The distinction between "port" and "ports," in such *a case as this, is practically important. If the ship might sail to several places to take in her cargo, the risk was greater, especially [*245] where the vessel was to sail late in the year. The Penrith, when at Cocagne, was lying in a river, which was a harbor, and she went into the open sea to reach Buktouche. According to the argument for the plaintiffs, she might have gone in the same manner to any place in North America, without deviating; and the policy must be read as if the words "her port of lading in" were omitted. The usual form, where it is intended that a vessel shall go to different places, is to say "port or ports;" to give liberty to touch at different ports; and to specify "port or ports of discharge." Here the words are "port of lading." If Cocagne and Buktouche are not one port within the meaning of those words, the plaintiff's case fails, unless "port" can be shown to mean the same as "port or ports." The word "port" must be taken in the common acceptance, as signifying a harbor or haven. If a vessel were lying within a place which in the common acceptance is a port, and merely shifted from one quay to another, it could not be said that she deviated within the meaning of this policy: but removing from Cocagne and Buktouche is going to a place entirely different. And if more than distinctness of situation is insisted upon, to constitute different ports, here it appeared that both places had custom-house

officers, and that the necessary custom-house regulations for taking out a cargo might be fulfilled at either. If this does not make them distinct ports for the purpose of the policy, it must be contended that the vessel might have gone to [246] St. John, where the custom-house *was, without a deviation. In *Cruickshank v. Janson*, 2 Taunt. 301, and *Warre v. Miller*, 4 B. & C. 538, the policies were "at and from Jamaica," and "at and from Grenada." If the policy here had been at and from "North America," and not "her port of lading in North America," the case would, so far, resemble those; but if the words in those cases had been "her port of lading in" Jamaica, or Grenada, it probably would not have been held that the vessel might go to different parts of the island. *Constable v. Noble*, 2 Taunt. 403, and *Payne v. Hutchinson*, 2 Taunt. 405, note *a*, have not been distinguished from the present case. It is true that, in those instances, the voyage was at and from a place named; but the reasoning upon such cases is this. Either the parties intend that there shall be a coasting voyage, preliminary to the voyage home, in which case they use the words "port or ports," or some equivalent expression, and a higher premium is given; or they intend that the insurance shall be at and from a single port of lading, and use the appropriate words. In the latter case, when a port is expressly named, it is not sufficient that the voyage be commenced from some place which is merely a member of that port, if it be actually a distinct point: at all events such a policy will be taken to include only some one place which in common understanding is considered a port. *Cocagne and Buktouché* no more constituted one port, in this point of view, than London and Gravesend. If the places are distinct, their distance from each other is immaterial. In *Constable v. Noble*, 2 Taunt. 403, the place in the port of Lyme [247] from which the vessel sailed (Bridport *harbour) was only nine miles from Lyme, at and from which she was insured. The observation upon the date of the letter does not alter the case: the risk was to begin at and from the port of lading, whatever that was, and might commence before the writing of the letter. [PATTESON, J. In the absence of fraud.] If the insurers had known of a deviation before writing the letter, that would be a circumstance of fraud; but that is not suggested. [PATTESON, J. Might not it be put that *Buktouché* was the port of lading, and that the ship called at *Cocagne* in her way to England?] That could not be, because she loaded between 400 and 500 tons of her cargo at *Cocagne*, before going to *Buktouché*.

LORD DENMAN, C. J. I think that the rule for a nonsuit must be absolute. It was clear, on the close of the evidence for the plaintiffs, that *Cocagne* and *Buktouché* were two distinct places, and two places at each of which there might be a lading. There was no technical meaning to be attached to the words "port of lading." If it could have been shown that the two places were in reality one, the plaintiffs should have produced evidence to that effect. My only doubt was, whether there should have been a nonsuit, or whether the defendant should have been called upon to give evidence on the subject: but, as the plaintiffs themselves have made out a *prima facie* case of distinctness, I think the defendant is entitled to a nonsuit.

PATTESON, J. I am of the same opinion. We cannot construe the words "at and from her port of lading," as if they were "at and from her ports;" [248] the expression used points out one single place. Nor can we adopt the *technical meaning which may be ascribed to "port," as signifying all that is subject to one custom-house, or one port jurisdiction; the result of which would be that a ship, under such a policy as this, might sail to every part of a district so situated. The cases which explain the meaning of the word "port," as here used, are not many. There is one (*The Sea Insurance Company of Scotland v. Gavin*, 4 Bligh, N. S. 578; S. C. 2 Dow & Clark, 125), where a brigantine was insured to Barcelona, and at and from thence, and two other ports in Spain, to a port in Great Britain; and she put into a place situate in the recess of a bay, having a custom-house and port captain, and

having also warehouses, and a jetty, with accommodation for small vessels only, there being, however, convenient anchorage for larger ones in the roadstead; and, the ship having been lost in the roadstead, this was held to be a port within the meaning of the policy. Here, I think that "port" means the same as place, and that the vessel's place of loading must be one place. When she had once begun to take her cargo at Cocagne, that was her place of lading, and her removal afterwards to Buktouche was a deviation. The cases of insurance at and from Jamaica, and Grenada, do not apply. There the words used would comprehend all places in the island. If the policies in those cases had said "at and from her port of lading in Jamaica" or Grenada, the commencement of the voyage would have been restricted to one particular place. That the two places here are within the jurisdiction of a single custom-house, makes no difference. If that entitled the ship to go from one to the other, she might also have gone to St. John. In construing the word "port" as the place of lading, *I [*249] do not mean to say that, if a ship were at a particular quay on a river, as at Liverpool, and merely removed to another quay a mile or two off, that would be a deviation, because the vessel there would be all the time in one port and place; but it is a deviation if she removes to a different town, a different place of habitation, and a point which might itself be her place of lading. As to the date of the letter, the policy would attach when the vessel began to load; and, if an unknown loss had happened before the writing of the letter, it would be covered by the policy. I think that there ought to be a nonsuit, because further evidence could not have altered the state of facts, or, if it could, the plaintiffs should have offered it when a nonsuit was applied for.

WILLIAMS, J. The word used in the policy is "port" of lading, in the singular number: we cannot construe that as ports. And the moment the taking in of the cargo was begun at Cocagne, that was to be considered as the port of lading designated. Had evidence been given that, for purposes of this kind, Cocagne and Buktouche formed in fact only one place, the case would have been different. But if, by means of the construction attempted, places at a distance from each other can be included under the term "port of lading," what rule of restriction can be laid down? May the places be fifty, or a hundred miles apart? "Jamaica," and "Grenada," in the cases which have been referred to, signified the whole of those islands. It would have been a violence there to limit the meaning of the policy to a single port. Here, nothing warrants the extension insisted upon.

*COLEBRIDGE, J. There must be a nonsuit in this case, unless we are prepared to say that "port" is equivalent to "ports," or to "port or [*250] ports." The plaintiffs must contend that it is an aggregate term, comprehending every member of a port, together with the chief port itself. But I think we are not at liberty here to construe the word with reference to custom-house regulations, but must consider it merely as indicating a place. Looking at it in this way, can we regard "port" as an aggregate term, comprehending a number of neighboring places? I think not, and for this reason among others, that it makes a difference in the risk whether a ship stays at one place to load, or goes on a roving voyage to pick up a cargo. It is important in these matters that parties should come to a plain understanding; and if it is meant that a vessel should have the liberty of going to a number of places, though near each other, the party insuring had better express it so, than run a risk, at least, of deceiving the underwriters.

Rule absolute for a nonsuit.¹

¹ See, as to the construction of the word "port," *The Hull Dock Company v. Browne*, 2 B. & Ad. 48.

In a declaration for infringing a patent which granted that the plaintiff, and no others, should "*make, use, exercise, and vend*" his invention, and forbade all persons to "*make,*

use, or put in practice" the same, or to counterfeit or imitate it, without the plaintiff's license, the plaintiff alleged that the defendant without his license *exposed to sale* articles intended to imitate, and which did imitate, his invention: Held, on general demurrer, that the count was bad, as not stating anything which was necessarily an infringement of the patent.

CASE for infringing the plaintiff's patent for a reclining chair. The first count of the declaration set out the patent, by which his Majesty granted to the plaintiff, his executors, &c., full power, sole privilege, &c., that he, they, and every of them, and no others, at all times thereafter during the term of fourteen years, "should and lawfully might make, use, exercise, and vend his said invention," within England, &c., and should have the whole profit, benefit, &c., of the said invention during the term. And, to the end that he and they might have the full benefit and sole use, &c., his Majesty, by a subsequent clause, commanded all persons in England, &c., that neither they nor any of them during the term, either directly or indirectly should make, use, or put in practice, the said invention or any part of the same, or in anywise counterfeit, imitate, or resemble the same, nor should make or cause to be made any addition thereunto or subtraction from the same, whereby to pretend himself or themselves the inventor or inventors thereof, without the license, consent, or agreement of the plaintiff, his executors, &c. The count went on to state that the defendant, contriving to injure the plaintiff, and to deprive him of the profits, &c., which he might and would otherwise have derived from the sole making, using, exercising and vending of the said invention, after the making of the letters patent and enrolling of the specification, and within the term of years, &c., unlawfully and unjustly, [*252] without any such license as by the letters *patent was made requisite, did make, use, and put in practice the invention, viz., by making and vending divers, to wit, one hundred chairs in imitation of the said invention. The fourth count, incorporating by reference all the introductory statement of the first, alleged that the defendant did wrongfully and without license *expose to sale* divers, viz., one hundred, other chairs which were intended to imitate and resemble, and did imitate and resemble, the said invention of the plaintiff, in breach of the said letters patent, and in violation of the privilege so granted to him as aforesaid. General demurrer to the fourth count. Joinder.

Channell in support of the demurrer. Exposing to sale, merely, is no violation of the patent. The king grants to the plaintiff, and his representatives, that they alone, shall "make, use, exercise, and vend" the invention, and that they shall have the whole profit and benefit of it; and the letters patent forbid any other person to "make, use, or put in practice" the invention, or to counterfeit or imitate it. Exposing to sale is not vending, nor does it come within any of the other words of the granting or the prohibiting clause. In statutes, where it is intended to make the exposing to sale a specific offence, express words are used for the purpose, as in the acts respecting the copyrights of books, 8 Ann, c. 19, 12 G. 2, c. 36, 15 G. 3, c. 53, and the acts for protecting property in prints and other works of art, as 8 G. 2, c. 13, and 38 G. 3, c. 71. So, by the game laws, exposing to sale has been made a distinct offence. There is no ground therefore for contending that an exposure to sale is contemplated in a patent which makes no specific mention of it. The Court will not deviate from [*253] plain rules of construction to extend prohibitions *of this kind. *Coleman v. Wathen*, 5 T. R. 245, and *Murray v. Elliston*, 5 B. & Ald. 657, show that such has been the principle of decision in analogous cases. (He was then stopped by the Court.)

John Evans, contra. The count sufficiently shows a violation of the patent. [PATTERSON, J. The precedents in such cases always charge a selling. Can you say that an exposing to sale is equivalent?] The word "sell" does not occur in this patent. "Vend" is the term used. Exposing to sale is vending. In Johnson's Dictionary, the explanation of "to vend," is "to sell; to offer to sale." In the Dictionary of the French Academy, some of the interpreta-

tions of "vendeur" apply to an offering for sale. In Ainsworth's Dictionary, "vendo" is derived from "venum" and "do," and is explained "to sell, or set to sale." This question, therefore, cannot receive any illustration from statutes in which the word "vend" is not used. And taking the word, as it is joined with others in this patent ("make, use, exercise, and vend his said invention"), the natural and ordinary construction of it would be, sell, or offer for sale. As to the construction of patents generally, in *Harmar v. Payne*, 11 East, 106, HOLBOYD, J., then at the bar, says in argument: "Patents were formerly considered as injurious monopolies, and were therefore construed by the courts with great strictness; but now when a more liberal and just view of the subject prevails, they are properly considered as highly advantageous to the public, by holding out an encouragement to ingenious men to disclose their inventions;" and Lord ELDON, when presiding in C. B., said, in a case of *Cartwright v. Arnott*,¹ in Easter term, 1800, that they were to be considered as bargains between the inventors and the public, to be judged [*254] of on the principle of keeping good faith by making a fair disclosure of the invention, and to be construed as other bargains. But further, an exposing to sale may come within the words "use" and "exercise." One use which a party makes, and advantage which he derives from an invention, is the reputation which he gains in his trade by offering the article for sale. According to the argument for the defendant, a man might exhibit the article in question for sale with impunity, if he only did it as an agent for some other person; or at least so long as no actual sale could be proved. In *Jones v. Pearce*, Godson on Patents, Supplement, pp. 10, 65, merely making the wheels which were the subject of the patent was held by PATTESON, J., at nisi prius, to be an infringement.

PATTESON, J.* There no contest arose on that point. The declaration contained a count for making; and making, without leave or license of the patentee, was prohibited by the patent. Here, the prohibitory part of the patent does not even mention vending. It has hitherto been the practice of special pleaders, in declarations of this kind, to pursue the language of the patent in its granting or its prohibitory part. The word, indeed, generally used has been, not "vend," but "sell." It cannot be doubted, notwithstanding the authorities referred to, that there is a great distinction between vending and exposing to sale. And if a new *term is introduced in this patent, it is no injury to the patentee to say that he should follow the language so introduced, and use [*255] the word "vend" in his declaration. If he will adopt a different expression, and then come to the Court and maintain that it is an equivalent one, I think we ought not to encourage a speculation of that kind.

WILLIAMS, J. Concurred.

COLERIDGE, J. The granting part of the patent authorizes the plaintiff exclusively to "make, use, exercise, and vend" his invention. The prohibitory part forbids all persons to "make, use, or put in practice the said invention," or "counterfeit, imitate, or resemble the same," or to make "any addition therunto, or subtraction from the same, whereby to pretend himself or themselves the inventor or inventors," without license from the plaintiff. Then the count alleges that the defendant, without the plaintiff's license, exposed to sale divers chairs intended to imitate and resemble, and which did imitate and resemble, his invention. Do those words necessarily import the vending, spoken of in the granting part of the patent? I certainly think not; because, even assuming that to vend may mean both a selling and an exposing to sale (though I rather think that it means the habit of selling and offering for sale), still those two meanings are not co-extensive; the former may include the latter, but a mere exposure to sale, i. e. with intent to sell, or for the purpose of sell-

¹ See *Harmar v. Plane*, 14 Ves. 181, 186, where the dictum is referred to, and the case is cited as *Cartwright v. Eamer*.

* Lord DUNMAN, C. J., was absent.

ing, is not only not equivalent to a sale, but, as regards the patentee, may be attended with wholly different consequences. If we read the word "vend" as [*256] expressly inserted in the prohibitory part of the patent, we ought *only to give it there the meaning which would effectuate the purpose of the patent, the prevention of acts injurious to the patentee, with as little restraint on the public as possible. It must be taken here that the defendant has only exposed to sale; that whatever may have been his original purpose in so doing, or whatever motive has supervened, he has abstained from selling. Now I cannot say that such a mere exposure to sale is necessarily injurious to the patentee; it may on the contrary be very beneficial; it is not therefore necessarily the vending, which is exclusively granted to him. As to "using and exercising," those words cannot be fairly resorted to, when we find with them the word "vending," and that is passed by. But, if they could, the argument would be the same; this might be an innocent using and exercising, and so not prohibited.

Judgment for the defendant.

BAYLIS v. HAYWARD. Nov. 20.

To scire facias upon a judgment in assumpsit, by the original plaintiff, defendant pleaded plaintiff's bankruptcy, assignment, &c.; and that the causes of action in the original suit accrued before plaintiff became bankrupt. On special demurrer, for that the plea did not show whether the judgment was recovered before or after the bankruptcy: Held, that the plea was bad, inasmuch as it did not appear but that the bankruptcy might have been pleaded in bar of the original action.

SCIRE facias upon a judgment in this Court, recovered, by the plaintiff in the scire facias, for 56*l.* 10*s.* for the damages which the plaintiff "had sustained, as well by occasion of the not performing certain promises and undertakings made by" the defendant to the plaintiff, as for the plaintiff's costs, &c. The scire facias was returnable 12th November, 1834.

First plea, nul tiel record; issue thereon, averring a judgment of Michaelmas term, 2 W. 4.

[*257] *Second plea, that the said Henry Baylis, before and on 20th December, 1831, and from thence continually until the issuing of the commission hereinafter mentioned, was a printer, &c. (averment of his trading); and the said H. B., so using the trade, &c., afterwards, to wit on the day and year aforesaid, became and was indebted, &c. (averment of debt of 100*l.* to Charles Martyr, and other debts to other persons); and the said H. B., being so indebted, &c., afterwards, on the day and year last aforesaid, and the said debt to the said C. M. and the said other debts being then wholly due, &c., became and was a bankrupt, &c.; and thereupon, afterwards, to wit, 3d January, 1832, a commission of bankruptcy under the great seal, &c., bearing date at Westminster the day and year last aforesaid, upon the petition of the said C. M., was duly awarded, &c., against the said H. B., directed, &c. The plea then set out the commission, and that the commissioners afterwards, to wit, 7th January, 1832, found that Baylis had become a bankrupt before the date of the commission, and adjudged him a bankrupt; and that afterwards, and after stat. 1 & 2 W. 4, c. 56, and before the issuing of the scire facias, and before the commencement of the proceedings in scire facias, to wit, 16th January, 1832, the commission being still in force, C. M. and others were chosen assignees; and thereby, and by force of the said statutes, all the personal estate and effects of H. B., as such bankrupt, became and are now vested in the said C. M., &c., as such assignees; by virtue of which premises, and by force of the statutes, the said C. M., &c., as such assignees, became and were entitled to the said damages, execution whereof is prayed as aforesaid: and the defendant [*258] averred that *the causes of action, upon which the said damages were recovered, arose before the plaintiff became bankrupt as aforesaid.

Verification.

afterwards demanded of Nickels, and refused: whereupon the churchwarden, under 53 G. 3, c. 127, s. 7, summoned Nickels to appear, and he did accordingly appear, before two justices of the county, one of whom was Mr. Sillifant. The churchwarden made oath, before the justices, of the rate having been demanded, upon which Nickels objected that it was not a fair rate; and Mr. Sillifant then said that the rate was not lawful, because the money was expended first, and at the end of the year the rate had been made; instead of which the churchwarden ought to have had an estimate and called a vestry at the beginning of the year, and then made a rate. The affidavit proceeded:—"And thereupon this deponent's complaint was dismissed, and no order made by the said justices. And this deponent saith that the said John Sillifant refused to make any order for the payment of the said rate by the said George Nickels for the reasons and in manner aforesaid." The validity of the rate and Nickels' liability, were not otherwise disputed before the justices. The affidavit further stated that, in March, 1834, 130*l.* was borrowed on the credit of the church rates, pursuant to stat. 59 G. 3, c. 134, s. 14, for new seating the parish church, with the consent of the rector and ordinary, to *be repaid by annual instalments, with 5*l.* per cent. interest. That on the 29th of March, [*356] 1835, 6*l.* 10*s.* became due for interest, and 13*l.* for the first instalment. That the resolution of the parishioners in vestry for making the rate was passed upon an account, laid before the vestry by the churchwarden, of disbursements by him in that capacity, between Lady-day, 1834, and Lady-day, 1835, including the above sum of 19*l.* 10*s.*; and that the said rate was applied for and granted for the raising of money to be placed in the churchwarden's hands to pay the said interest and instalment, and to meet his other disbursements as churchwarden during the year ending at Lady-day, 1831.

Mr. Sillifant made an affidavit in opposition to the rule, by which it appeared that, on the summons, Nickels objected to the rate as illegal, inasmuch as certain lands had not been included. That the fact of the rate having been made in part for bygone expenses had not been stated in the ecclesiastical court. And that the two justices concurred in dismissing the churchwarden's complaint, believing that the rate had been illegally made, and that they had no jurisdiction to enforce payment.

Crowder now showed cause. It is true that the objection upon which the magistrates dismissed the complaint was not stated by Nickels himself, but that is not material. Under stat. 53 G. 3, c. 127, s. 7,¹ if the *party summoned makes it appear to the justices that the validity of the rate is [*357]

¹ Stat. 53 G. 3, c. 127, s. 7. "And whereas it is expedient that church rates or chapel rates of limited amount, unduly refused or withheld, should in certain cases be more easily and speedily recovered; be it enacted, that, from and after the passing of this act, if any one duly rated to a church rate or chapel rate, the validity whereof has not been questioned in any ecclesiastical court, shall refuse or neglect to pay the same sum at which he is so rated, it shall and may be lawful for any one justice of the peace of the same county, riding, city, liberty or town corporate, where the church or chapel is situated, in respect whereof such rate shall have been made, upon the complaint of any churchwarden or churchwardens, chapelwarden or chapelwardens, who ought to receive and collect the same, by warrant under the hand and seal of such justice, to convene before any two or more such justices of the peace any person so refusing or neglecting to pay such rate, and to examine upon oath (which oath the said justices are hereby empowered to administer) into the merits of the said complaint, and by order under their hands and seals to direct the payment of what is due and payable in respect to such rate, so as the sum ordered and directed to be paid as aforesaid do not exceed 10*l.*, over and above the reasonable costs and charges, to be ascertained by such justices; and upon refusal or neglect of such party to pay according to such order, it shall and may be lawful for any one of such justices, by warrant under his hand and seal, to levy," &c., (clause of distress; with appeal, by any person finding himself aggrieved, to the general quarter sessions) "Provided also, that nothing herein contained shall extend to alter or interfere with the jurisdiction of the ecclesiastical courts to hear and determine causes touching the validity of any church rate or chapel rate, or from proceeding to enforce the payment of any such rate, if the same shall exceed the sum of 10*l.*, from

the plaintiff became bankrupt. All this may be true, and yet the bankruptcy may have been before the commencement of the original action, and, of course, before the judgment. If it were so, the defendant might have pleaded the facts to the original action; and there is no rule clearer than this, that whatever can be so pleaded cannot be pleaded to the scire facias. Certainly, in the cases cited to establish this rule, in Serjt. Williams's Saunders, note (4) to Underhill v. Devereux, 2 Wms. Saund. 72 *t*, it appeared affirmatively that the facts might

[*261] *have been pleaded to the original action; as where, Allen v. Andrews, Cro. Eliz. 283, an administrator, under letters of administration from the Archbishop of Canterbury, had recovered judgment, and then brought a scire facias, and the defendant pleaded that the intestate died in London, and had not *bona notabilia* in divers dioceses. Here it does not appear whether the matter could have been pleaded or not. But, as the defendant must have pleaded such a defence to the original action if he had the opportunity of so doing, he was bound to show the Court when the judgment was obtained. The plea will be taken most strongly against the party pleading. Therefore the cause assigned in the special demurrer, that the plea does not show certainly when the judgment was recovered, is a good cause of demurrer. How it would be on general demurrer, I do not say. Kinnear v. Tarrant, 15 East, 622, was a case of scire facias on recognizance of bail; and there the matter pleaded could not have been pleaded by the defendants earlier, the scire facias being the first proceeding against them.

WILLIAMS, J. I am entirely of the same opinion, and for the same reasons. The defendant does not show that the bankruptcy might not have been pleaded to the original action.

COLERIDGE, J. I give my judgment on this short ground. The plaintiff having sued and recovered, must, *primâ facie*, be presumed to be entitled to the fruits of the judgment. Then it is said, that something has occurred to [*262] deprive him of this *primâ facie* right, *namely: the assignment under the bankruptcy. That is a defence or not, according to the time; for, if it were pleadable to the original action, it is no bar to the scire facias. But, in order to take away a *primâ facie* right, something must be stated on the record which makes it clear that the right is taken away.

Judgment for the defendant.

MEE and BIGSBY v. TOMLINSON. Nov. 20.

Declaration, that defendant was indebted to plaintiff in 200*l*. for work and labor, 200*l*. for money paid, and 200*l*. on an account stated; in consideration whereof defendant promised to pay the said several moneys; breach, non-payment; damages 200*l*. Plea, as to 20*l*., parcel of 56*l*. 11*s*. 8*d*., parcel of the moneys in the first two counts mentioned, and as to 20*l*. parcel of 56*l*. 11*s*. 8*d*., parcel of the money in the last count mentioned, that the said 20*l*. so found due on an account stated, was the same sum of 20*l*., parcel of the moneys in the first two counts mentioned; and that the said two sums of 20*l*. each were one and the same debt of 20*l*., and not other and different debts of 20*l*.; and that defendant paid, and plaintiff accepted, 20*l*., in satisfaction of the promises, so far as they related to the same debt of 20*l*., and of all damages sustained by reason of the non-performance: Held, on special demurrer,

1. That the identity might be so averred.
2. That the plea was bad, for not showing to how much of the sum in the first count, and to how much of the sum in the second, it was pleaded.¹
- Defendant also pleaded, as to certain portions of the sums named in the different counts, amounting in all, on the face of the plea, to 11*l*. 1*s*. 8*d*., a set-off of 57*l*. 7*s*. 4*d*.; and that that sum equalled the damages sustained by the non-performance of the promises, so far as they related to the sums to which that plea was pleaded: Held, on special demurrer,
3. That the plea was bad for pleading a smaller claim as an answer to a larger.

¹ But see Marshall v. Whiteside, 1 Mee & Welsb. 191. S. C. 1 Tyr. & G. 491, where PARKE, B., states that PATTERSON, J., subsequently to the above decision, expressed himself dissatisfied with it, as far as regarded the plea of payment. See the third exception in Swinburne v. Ogle, 1 Lutw. 241; Morris v. Coles, 1 Lutw. 238.

ASSUMPSIT. The declaration stated that the defendant was indebted to the plaintiffs in £200 for work and labor as attorneys and solicitors, in £200 for money paid, and in £200 on an account stated; in consideration¹ whereof the defendant promised to pay the said several moneys, &c., but that he did not pay, to the plaintiffs' damage of £200, &c.

*First plea. As to the said promises, so far as they relate to the first two sums of £200 in the declaration mentioned, except as to the [*263] sum of 111*l.* 13*s.* 5*d.* parcel of the said two sums; and as to the said promise, so far as it relates to the sum of 200*l.* in the last count mentioned, except as to 111*l.* 13*s.* 5*d.* parcel thereof; non assumpsit. Issue thereon.

Second plea. As to the said promises, so far as the same relate to the sum of 72*l.* 3*s.* 9*d.* parcel of the sum of 111*l.* 13*s.* 5*d.* first above mentioned, the defendant pleaded special matter, which the plaintiffs traversed in their replication; on which traverse the defendant joined issue.

On the third plea an issue arose, which it is not necessary to state here.

Fourth plea. As to the said promise, so far as it relates to the sum of 56*l.* 11*s.* 8*d.* parcel of the said sum of 72*l.* 3*s.* 9*d.*, and as to the said sum of 56*l.* 11*s.* 8*d.* parcel of the said sum of 111*l.* 13*s.* 5*d.* parcel of the said money in the said last count mentioned, the defendant pleaded special matter, which the plaintiffs traversed in their replication; on which traverse the defendants joined issue.

Fifth plea. As to the sum of 20*l.* parcel of the said sum of 56*l.* 11*s.* 8*d.* parcel of the moneys in the first two counts mentioned, and as to the sum of 20*l.* parcel of the said sum of 56*l.* 11*s.* 8*d.* parcel of the said money in the last count mentioned, that the said sum of 20*l.*, so found to be due to the plaintiffs on an account stated, is the same sum of 20*l.*, parcel of the moneys in the two first counts mentioned; and that the said two sums of 20*l.* each are one and the same debt of 20*l.*, and not other and different debts of 20*l.*; and, *fur- [*264] ther, that, after the making of the said promise in the declaration mentioned, so far as it relates to the said debt of 20*l.*, to wit: on, &c., the defendant paid to the plaintiffs the sum of 20*l.*, in full satisfaction and discharge of the said promises so far as the same relate to the same debt of 20*l.*, and of all damages sustained by the plaintiffs by reason of the non-performance thereof, and that the plaintiffs then accepted, &c., in full satisfaction and discharge of the said promises, so far as the same relate to the said debt of 20*l.*, and of the last-mentioned damages, &c. Verification.

To this plea the plaintiffs demurred specially, assigning for cause, that, although the plaintiffs have declared in 200*l.* for work and labor as attorneys, and in 200*l.* for money paid, and in 200*l.* for money due upon an account stated, yet the said defendant hath averred that a sum of 20*l.*, parcel of the moneys in the first two counts mentioned, and a sum of 20*l.*, parcel of the moneys in the said last count mentioned, are one and the same debt of 20*l.*, and not other or different debts, and the defendant hath not in and by his said fifth plea offered to take, or taken, a proper issue upon the said declaration, but hath pleaded and shown other matters, and hath attempted to confine and reduce the said plaintiffs to one cause of action, instead of three separate and distinct causes of action; and for that the plea does not state to how much in particular of the sum in the first count, and to how much of the sum in the second count, the said last-mentioned plea is pleaded. Other causes of demurrer were also assigned, which were not insisted on in argument. Joinder in demurrer.

Sixth plea. As to the sum of 72*l.* 3*s.* 9*d.*, parcel of *the said sum [*265] of 111*l.* 13*s.* 5*d.*, parcel of the money in the last count mentioned, the defendant pleaded special matter, which the plaintiffs traversed in their replication; on which traverse the defendants joined issue.

Seventh plea. As to the sum of 17*l.* 17*s.* 8*d.* (parcel of the said sum of 72*l.* 3*s.* 9*d.*, in the second plea mentioned, parcel of the said moneys in the first and second counts mentioned), and as to the sum of 39*l.* 9*s.* 8*d.* (residue of the said

¹ The three considerations for the promise in this declaration were spoken of as three counts in the pleadings, and in the discussion of the case.

sum of 111*l*. 13*s*. 5*d*. in the first plea firstly mentioned, and to which the second plea is not pleaded), and as to the sum of 17*l*. 17*s*. 8*d*. (part of the said sum of 72*l*. 3*s*. 9*d*. in the sixth plea mentioned, and parcel of the money in the last count mentioned), and as to the sum of 39*l*. 9*s*. 8*d*. (residue of the said sum of 111*l*. 13*s*. 5*d*. in the said first plea secondly above mentioned, to which the said sixth plea is not pleaded), that, before and at the time of the commencement of this suit, the plaintiffs were, and from thence hitherto have been and still are, indebted to the defendant in the sum of 57*l*. 7*s*. 4*d*. for money had and received, and for money due on an account stated, which said money, so due and owing from the plaintiffs to the defendant, equals the damages sustained by the plaintiffs by reason of the non-performance by the defendant of the said promises in the declaration mentioned, so far as they relate to the sums to which this plea is pleaded, as in the introductory part hereof is mentioned, and out of which said money, so due and owing to the defendant as aforesaid, he the defendant is ready and willing, and hereby offers to set off and allow to the plaintiffs the full amount of the said damages; according to the form, &c. And this, &c., (verification).

To this plea the plaintiffs demurred specially, assigning *for cause, [*266] that the defendant, in the introductory part of the seventh plea, the same being a plea of set off, hath pleaded as to the sum of 17*l*. 17*s*. 8*d*. parcel, &c., as therein mentioned, and as to the sum of 39*l*. 9*s*. 8*d*. residue, &c., as therein mentioned, and as to the sum of 17*l*. 17*s*. 8*d*., parcel, &c., as therein mentioned, and as to the sum of 39*l*. 9*s*. 8*d*., residue, &c., as therein mentioned; and then the defendant pleads that the plaintiffs were indebted in the sum of 57*l*. 7*s*. 4*d*. for money had and received, and on an account stated, and offers to set off that sum against the damages in respect of the said several sums in the introductory part of that plea mentioned, whereas that sum is insufficient to be set off against, and to pay and satisfy, the sums in the introductory part of that plea mentioned, or the damages in respect thereof; and that the sum of 57*l*. 7*s*. 4*d*. is pleaded to the whole of the sums in the introductory part of that plea mentioned, and not to a part thereof, and to the damages in respect of those sums, and not to a part thereof; and for that the said sum of 57*l*. 7*s*. 4*d*. does not and could not equal the damages sustained by the plaintiffs by reason of the non-performance of the said promises so far as they relate to the sums to which the seventh plea is pleaded, as in the introductory part thereof is mentioned; and for that the matters in the seventh plea pleaded are pleaded in bar of the said action, and not to a part thereof; and for that the said seventh plea is in other respects, &c. Joinder in demurrer.

John Bayley in support of the demurrer. As to the fifth plea. First, the defendant is not entitled to aver that the sums of 20*l*. are identical; and the [*267] objection is *good on special demurrer. Identity of closes, or of assaults, cannot be pleaded, if the objection be taken on special demurrer. The defendant attempts to confine the plaintiff to one cause of action, whereas three are alleged, each of which should be answered. The plaintiff is entitled to traverse the giving of 20*l*. in satisfaction: but, if this plea be good, he cannot take such a traverse without admitting the identity. Secondly, the defendant ought to have stated to how much of the first and how much of the second count the fifth plea is pleaded. He has not shown how much of each cause of action is answered.

As to the seventh plea. The defendant professes to answer a claim of 114*l*. 14*s*. 8*d*. by a counter claim of 57*l*. 7*s*. 4*d*., and alleges that the latter sum equals the damages sustained by the nonpayment of the former, which is impossible. In *Thomas v. Hawthorne*, 2 B. & C. 477, it was held that a declaration in assumpsit for 1000*l*., laying the damages at 1000*l*., was not answered by a plea that the defendant, on an account stated, was found to be indebted 400*l*., for which he had accepted a bill, and on which acceptance he was still liable.

Joseph Addison, contra. As to the fifth plea. First, one sum may be demanded in several different forms: the defendant alleges that that is so here;

and accord and satisfaction for that one sum is therefore an answer so far. The defendant does not aver that three causes of action are identical; but that they are all, as to 20*l.*, for one identical sum of money. [PATTESON, J. You have averred that two sums of 20*l.* are one debt of 20*l.*: it is not as if you had averred that the account was *stated in respect of the other causes of [*268] action; or as if, to a declaration for goods sold and on a bill of exchange, the plea had been that the bill was given for goods.] Ten pounds might be due on two counts, and 10*l.* on the other. The rules of Hil. 4 W. 4,¹ allow a count for an account stated to be joined to any other count for a money demand, though there be not distinct subject-matters of complaint. An averment of identity of two sums, followed by an averment of satisfaction, as here, was held good in *Sheldon v. Clipsham*, T. Raym. 449;² and the Court there said that, if the sums were distinct, the plaintiff might traverse the averment of identity; which is an answer to the complaint made on the other side of hardship as to the replication. Secondly, the method of pleading suggested on the other side is unprecedented, and would lead to much complexity. A tender is always pleaded generally to all the claims, whatever their number. [COLERIDGE, J. How is the plaintiff to know which claim your plea applies to?] That might be argued also in the case of a plea of tender. It might as well be said that, whenever a defendant admits a sum to be due, he must take it on himself to say on which count it is due.

As to the seventh plea. It is true that the damages are claimed in the declaration in respect (so far as this plea is concerned) of 114*l.* 14*s.* 8*d.*; and that the set-off is only for 57*l.* 7*s.* 4*d.* But the damages, upon these claims, may be no more than 57*l.* 7*s.* 4*d.* And it appears that, in fact, the plea answers as to 57*l.* 7*s.* 4*d.*, part of the claim made as to the first and second counts, and as to 57*l.* 7*s.* 4*d.*, part of the claim made in the third count. If these be [*269] *all for the same sum, as they may be, the damages upon these three claims might be only 57*l.* 7*s.* 4*d.* [PATTESON, J. You might have doubled your set-off: the amount in the set-off is as immaterial as that in the declaration.] That might be a more technical method; but the plaintiff cannot assume that the damages for the non-performance of the promise necessarily amount to the aggregate of the sums for which the promise is charged to be made. The declaration lays only 200*l.* damages for the non-performance of a promise to pay three sums of 200*l.* each. In *Thomas v. Heathorn*, 2 B. & C. 477, the objection, as appears by the judgment of the Court, was that it was not alleged that no more than 400*l.* was due from the defendant: here there is a substantive allegation that the sum tendered equals the damages. [PATTESON, J. Then you put it as a case of unliquidated damages. If so, the plea of set-off is bad. At present we are inclined to think you wrong.] As a test of the correctness of the seventh plea, suppose an amendment were made by laying a larger sum than 114*l.* 14*s.* 8*d.* in the set-off; still it would be necessary to aver that the set-off exceeded or equalled the damages: which shows that the amount named is not material, but that the allegation as to the comparative amounts is the material part.

John Bayley, in reply. As to the fifth plea. *Sheldon v. Clipsham*, T. Raym. 449; S. C. 2 (Thomas) Jones, 158, would not be now supported.

As to the seventh plea; the allegation relied upon as to the amount is contradictory. The applicability of *Thomas v. Heathorn*, 2 B. & C. 477, is disputed: but it appears from a MS. note of BAYLEY, J., who was one of the *Judges by whom that case was decided, that he took the view of it now contended for in behalf of the plaintiff. The note begins thus: "A plea [*270] is bad, if it is a legal bar to part only of what it professes to answer. R. 2 B. & C. 477." The note then gives an abstract of the pleadings in *Thomas v. Heathorn*,

¹ General Rules and Regulations, 5; 5 B. & Ad. iii.

² According to the report in 2 (Thomas) Jones, 158, the Court said that the averment of identity was only surplusage.

2 B. & C. 477, and adds, "The Court held the plea bad, for it professed to answer a claim for 1000*l.*, by stating what was legally an answer to 400*l.* only: the plea should have been confined to the 400*l.* only, and defendant should have pleaded non assumpsit to the residue." [*Addison*. The plea here does cover all the damages as to which it is pleaded.]

PATTERSON, J.¹ With respect to the averment of identity, I at first thought the objection good. Identity of trespasses in different counts cannot, in strictness, be averred; and it struck me that the objection to averring the identity of two debts was valid a fortiori, since in trespass the grievance may be charged to have been committed "on divers other days and times." In actions of assault, where there may be two counts for different assaults, one sees the objection to the averment of identity: and it appeared to me that different debts, were, in this respect, like different assaults. But Mr. *Addison* has satisfied me on this point. The averment is, that the sum of 20*l.* charged to be due on the account stated, is the same sum of 20*l.*, parcel of the moneys mentioned in the first two counts. The new rules² allow an account stated to be joined with any [271] other count for a money demand, although there be *not distinct subject-matters of complaint. Therefore a sum due upon a consideration mentioned in another count may be the same as that claimed in the count upon an account stated. There are other grounds of demurrer, some of which Mr. *Bayley* gives up. The remaining ground of demurrer relied upon as to the fifth plea is, that it does not state to how much of the sum in the first count, and how much of the sum in the second, the payment is pleaded, but only that it is pleaded to 20*l.*, parcel of the moneys in the first two counts mentioned. I think this a good objection, as rules now are. We must take the claim for work and labor to be separate from that of money paid. It is therefore right that the defendant should let the plaintiff know what it is that he is pleading to. My only difficulty arose from the practice referred to, of pleading a tender generally to so much money. That has been the course for many years, and has become inveterate, and is never objected to. Now, however, we have come to a new system, or to the revival of old principles; and it does not follow that we should adopt generally the particular practice allowed in a plea of tender. The defendant should have shown to how much of each count he pleaded; and the plaintiff must have judgment on the fifth plea.

As to the seventh plea, the objection insisted upon is, that a set-off of 57*l.* 7*s.* 4*d.* is pleaded to several sums amounting in the whole to 114*l.* 14*s.* 8*d.*, with an allegation that the 57*l.* 7*s.* 4*d.* equals the damages sustained by reason of the non-performance of the defendant's promises so far as they relate to the sums amounting to 114*l.* 14*s.* 8*d.* The set-off is not pleaded by way of deduction from the larger sum; and, indeed, *I never saw such a thing as a [272] set-off pleaded by way of deduction. The practice is to lay, in the plea of set-off, a larger sum than that claimed in the declaration. We know, in truth, that the object is only to enable the defendant to deduct a smaller sum from a larger. Still the statement on the record should be made consistent, which is effected by naming a sum larger than that claimed in the declaration. I do not know that it is necessary to say that the set-off exceeds the sum claimed; perhaps a sum less than the amount claimed might be pleaded by way of deduction: but the statement is inconsistent now. Mr. *Addison* says that he does not allow that the claim for 114*l.* 14*s.* 8*d.* is good, but only pleads that the defendant has a claim of 57*l.* 7*s.* 4*d.*, which equals the damages sustained by the plaintiff. That, at all events, is a new way of pleading. Hitherto it was always thought that the party pleading the set-off admitted, for the purpose of the plea, the sum claimed in the declaration. That is reasonable; for otherwise he should have confined his plea to a part. Else he treats the damages as unliquidated; and a set-off cannot be pleaded to unliquidated damages. The de-

¹ Lord DENMAN, C. J. was absent.

² Reg. Hil. 4 W. 4, General Rules and Regulations, 5; 5 B. & Ad. iii.

CASES

ARGUED AND DETERMINED

IN THE

COURT OF KING'S BENCH,

AND

UPON WRITS OF ERROR FROM THAT COURT TO THE EXCHEQUER
CHAMBER,

IN

Hilary Term,

IN THE SIXTH YEAR OF THE REIGN OF WILLIAM IV.

The Judges who usually sat in Banc this term were,

LORD DENMAN, C. J.,
LITTLEDALE, J.,

WILLIAMS, J.,
COLERIDGE, J.

TICKLE v. BROWN.

The words "enjoyed by any person claiming right," applied to easements in stat. 2 & 3 W. 4, c. 71, s. 2, and "enjoyment thereof as of right," in s. 5, mean an enjoyment had, not secretly or by stealth, or by tacit sufferance, or by permission asked from time to time, on each occasion, or on many; but an enjoyment had openly, notoriously, without particular leave at the time, by a person claiming to use without danger of being treated as a trespasser, as a matter of right, whether the right so claimed shall be strictly legal, as by prescription and adverse user, or by deed, or shall have been merely lawful so far as to excuse a trespass.

To a plea of forty or twenty years' enjoyment of a way, a license, if it cover the whole time, must be pleaded.

But a parol or other license given and acted on during the forty or twenty years, may be proved under a general traverse of the enjoyment as of right: and this, whether such license be granted for a single time of using, or for a definite period.

Seemle, that where issue is joined on the allegation of an interruption acquiesced in, the party alleging the interruption, having proved a non-user during part of the time, may, in order to show that such non-user was not a voluntary forbearance, give evidence that two years before the non-user commenced, the party claiming the way paid a consideration for being allowed to use it.

TRESPASS. The first count was for assaulting and beating the plaintiff's servant; the second count was for assaulting, beating, and imprisoning the servant; *the third count was for beating, ill-treating, keeping, and detaining the plaintiff's horse; the fourth was for taking and carrying [*370] away goods and chattels of the plaintiff, and converting and disposing thereof to the defendant's use.

First plea, Not Guilty.

Second plea, to the first, second, and third counts, and as to taking and carrying away certain of the goods and chattels, that defendant was possessed of a

close, and that the plaintiff and his servant attempted to pass over it with the horse, which was then carrying the goods and chattels, and had driven and ridden him over a part, against the will of the defendant; and the defendant justified the trespasses in defence of the possession of the close. Replication, that long before, and at the times when, &c., the plaintiff was, and from thence hitherto has been, and still is, occupier of certain land near the said close; and that the plaintiff, while he was such occupier, and the other occupiers, have respectively, for and during the whole period of forty years next before the commencement of this suit,¹ used and actually enjoyed, as of right and without interruption, a certain way, unto, into, through, and over the defendant's close (which way was described in the replication); and the said plaintiff having occasion, &c. (justifying the act of the plaintiff and his servant, mentioned in the second plea, in virtue of the right of way); and thereupon the defendant of his own wrong, &c. Rejoinder, that the plaintiff and divers of the others occupiers of the lands, whilst they were occupiers, and during the said period [*371] of forty years, to wit, on the 1st of January, 1797, and on divers *other days and times between that day and the commencement of this suit, were interrupted in the use and enjoyment as of right of the way in the replication mentioned, and the parties so interrupted submitted to and acquiesced in the interruptions for the space of one year and more after they had notice thereof, and of the persons making the same, and while the parties so interrupted were occupiers, &c. Verification. The surrejoinder traversed the interruption and acquiescence in manner and form, &c. Similiter.

Third plea, to the third count, that the plaintiff and his servant were attempting to drive and ride the horse over a part of the defendant's close, &c.; and the plea justified the trespass in defence of the possession of the close. Replication, as the replication to the second plea, *mutatis mutandis*. Rejoinder, that the plaintiff and his servant were attempting to drive and ride the horse over a certain part of the close in a northeasterly line and direction from, &c. (describing the direction), which are the same trespasses committed by the plaintiff and his servant, mentioned in the second plea; and, further, that the plaintiff and the other occupiers of the said lands have not respectively, for and during the full period of forty years next before the commencement of this suit, used and actually enjoyed, as of right, any such way, &c., in the line and direction hereinbefore mentioned. Verification. Surrejoinder, that the plaintiff and other occupiers have, for and during the full period, &c., used, &c., the said way, &c., over the said close in the line and direction mentioned in the rejoinder. Similiter.

On the trial before Lord DENMAN, C. J., at the Devonshire Summer assizes, 1834, the trespasses were proved, and *prima facie* evidence of the enjoyment of [*372] the way for *forty years was also given. The defendant proved that, about the year 1800, the close was ploughed up for tillage, and that, while it was under tillage, which was for three or four years, the way had not been used; and the plaintiff's counsel having suggested that this was merely an abstinence, by the parties entitled to use it, for the convenience of the owner of the close, the defendant proposed to ask a witness whether *l.d.* a year had not been paid, in 1798, by the occupiers of the land in right of which the way was claimed, for the use of the way. The plaintiff's counsel objected that this evidence could not be given, under stat. 2 & 3 W. 4, c. 71, s. 5.² The Lord

¹ As to this allegation, see *Wright v. Williams*, 1 Mee. & Wel. 77; S. C. 1 Tyr. & G. 376.

² Stat. 2 & 3 W. 4, c. 71, s. 2, enacts, "That no claim which may be lawfully made at the common law, by custom, prescription, or grant, to any way or other easement, or to any watercourse, or the use of any water, to be enjoyed or derived upon, over, or from any land or water of our said Lord the King, his heirs or successors, or being parcel of the duchy of Lancaster or of the duchy of Cornwall, or being the property of any ecclesiastical or lay person, or body corporate, when such way or other matter as herein last before mentioned shall have been actually enjoyed by any person claiming right

Chief Justice rejected the *evidence. Evidence was also offered of declarations made by occupiers of the said land, antecedently to the close [*373] being under tillage, that they were not entitled to use the way except by permission of the owners of the close. This was objected to, and excluded. Verdict for the plaintiff on all the issues. In Michaelmas term, 1834, *Coleridge*, Serjt., obtained a rule to show cause why a new trial should not be had, on the ground of the rejection of evidence of the payment, and also of the rejection of evidence as to the declarations, so far only as the admissibility of such evidence could be shown by virtue of the statute: but the rule was refused, so far as it was applied for on the ground that the declarations of the occupiers, unaccompanied by any act, were evidence independently of the statute.

In Michaelmas term last, on the 18th and 19th of November,*

Sir *W. W. Follett* and *Crowder* showed cause. The evidence rejected was not admissible on either of the last two issues. The first of these two issues is, whether *there was an interruption, acquiesced in by the occupiers. [*374] That issue was upon the defendant, who did give some evidence of an interruption acquiesced in, by showing that the way over the close was not used while it was under tillage. That evidence was not objected to; but the jury, by their verdict, have shown that they considered it insufficient. Then, how could the payment of money, or the declaration of a tenant, affect the question of fact, whether the way was uninterruptedly used? It is said that the payment and declaration are evidence to explain the nature of the abstinence from using the way by the parties claiming right to it. But the abstinence was long after the payment and the declarations; so that the connexion between these facts, as to which evidence was rejected, and the interruption, entirely fails. If the payment had been made after, or during, the time for which the way was not used, it might have been argued that such payment was proof of acquiescence.

On the last issue, the plaintiff was to prove that the occupiers of the land had enjoyed the way, in the direction mentioned in the rejoinder, for forty years: the interruption was not asserted. Then it is attempted to show that this enjoyment was by virtue of an agreement. But the fifth section of the statute expressly provides that a party relying upon the enjoyment having taken place under any contract not inconsistent with the simple fact of enjoyment (which

thereto without interruption for the full period of twenty years, shall be defeated or destroyed by showing only that such way or other matter was first enjoyed at any time prior to such period of twenty years, but nevertheless such claim may be defeated in any other way by which the same is now liable to be defeated; and where such way or other matter as herein last before mentioned shall have been so enjoyed as aforesaid for the full period of forty years, the right thereto shall be deemed absolute and indefeasible, unless it shall appear that the same was enjoyed by some consent or agreement expressly given or made for that purpose by deed or writing."

Sec. 5, enacts, "That in all actions upon the case and other pleadings, wherein the party claiming may now by law allege his right generally, without averring the existence of such right from time immemorial, such general allegation shall still be deemed sufficient, and if the same shall be denied, all and every the matters in this act mentioned and provided, which shall be applicable to the case, shall be admissible in evidence to sustain or rebut such allegation; and that in all pleadings to actions of trespass, and in all other pleadings wherein before the passing of this act it would have been necessary to allege the right to have existed from time immemorial, it shall be sufficient to allege the enjoyment thereof as of right by the occupiers of the tenement in respect whereof the same is claimed for and during such of the periods mentioned in this act as may be applicable to the case, and without claiming in the name or right of the owner of the fee, as is now usually done; and if the other party shall intend to rely on any proviso, exception, incapacity, disability, contract, agreement, or other matter hereinbefore mentioned, or on any cause or matter of fact or of law not inconsistent with the simple fact of enjoyment, the same shall be specially alleged and set forth in answer to the allegation of the party claiming, and shall not be received in evidence on any general traverse or denial of such allegation."

* Before Lord DENMAN, C. J., PATTERSON, and WILLIAMS, JS., COLERIDGE, J., having been counsel in the cause, took no part.

contract, by the second section, would be an answer to the proof of forty years' uninterrupted enjoyment, if it were by deed or in writing), must set it forth specially, and that it shall not be received in evidence on a general traverse of [375] the allegation of enjoyment. The agreement here set up is *consistent with the simple fact of enjoyment. If this evidence were held admissible, the statute would be repealed in two ways; first, by allowing an agreement not under seal, or written, to meet the proof of enjoyment; secondly, by allowing it to be given in evidence on the general traverse. In *The Monmouthshire Canal Company v. Harford*, 1 Cr. M. & R. 614, S. C. 5 Tyrwh. 68; issue was joined on a plea that an easement had been enjoyed twenty years of right and without interruption; and the Court appears, from what passed in the argument (for no express judgment was given on the point), to have held that, on this general traverse, the plaintiff was entitled to show that leave was asked. That, however, is very different from the evidence offered here. By asking leave, the party admits his want of right; but a payment shows only that the enjoyment was under a contract. In the case referred to, the Court seems to have relied on *Bright v. Walker*, 1 Cr. M. & R. 211, S. C. 4 Tyrwh. 502. But it does not appear that the point arose in this latter case. [PATTESON, J. In the other case, the plea was of a twenty years' enjoyment, to which a parol license might have been replied, though not to an allegation of forty years' enjoyment.] In those cases, there would have been the same objection to proving an agreement, whether by word of mouth, or by deed, or writing, if not pleaded specially, as here: besides which, there is here the additional objection that a verbal agreement is no answer, even if pleaded. The Court, in *Bright v. Walker*, 1 Cr. M. & R. 219, 4 Tyrwh. 509, seem by the expression, "if he shall have occasionally [376] asked the permission of the occupier of the *land," to point to some distinction between a contract for the permanent use, and a contract for the time only. At all events, the judgment shows only that cases may occur in which the fact of a permission may prevent the party permitted from claiming the easement as of right. The objection to the proof of a verbal agreement here is, in effect, the same as the objection to the proof of a written agreement would be; namely, that it is an attempt to negative on a general traverse the fact of enjoyment as of right, by showing that the enjoyment has taken place, not as of right, that is not by a right permanent, or adverse to that of the owner of the close, but by virtue of a contract consistent with the fact of simple enjoyment. [PATTESON, J. The words "as of right" cannot mean an adverse right; for the statute provides that, if the enjoyment be under an agreement, the agreement must be pleaded specially: by which plea the allegation of enjoyment "as of right" would be met, not by way of denial, but by way of confession and avoidance.] It would be a right under the agreement, a purchased right in the present case: though a continual necessity of obtaining leave, at each time of user, might show the absence of a right. The mere traverse of the enjoyment does not put in issue the way in which the enjoyment is obtained, any more than, in trover, a traverse of the conversion, by a plea of Not Guilty, puts in issue the rightfulness or wrongfulness of the conversion; see *Frankum v. The Earl of Falmouth*, 2 A. & E. 452. [Lord DENMAN, C. J. That is a very different case. Here the plaintiff undertakes to prove that he has enjoyed as of right.]

**Sir John Campbell*, Attorney-General, and *W. C. Rowe*, contra. [377] The evidence was admissible under both issues. First, as to the issue on the interruption alleged to have been acquiesced in. It is true, as urged on the other side, that the jury, on the evidence admitted, have negatived the interruption: but the complaint is that they had not before them the whole of the evidence properly applicable to the question. The payment of the penny was so applicable; for it showed an interruption in fact, since the owner of the close must be understood to have refused the passage until the payment was promised: it showed also an acquiescence by the party paying: and it showed the

true character of the non-user which afterwards took place. And the declarations were also admissible on this issue. Independently of the statute, if the party had declared, at the time of paying, that he did so by leave, that would have been evidence, as a declaration accompanying an act. Here, the abstaining is accompanied by a declaration, which comes to the same thing. But, further, the statute places the question of right of way on a continuity of user: the declaration may therefore be carried forward to, and connected with the subsequent period of non-user, inasmuch as the statute must have the effect of connecting all that passes relatively to the user or non-user, during the continuous period. Since the statute, therefore, such declarations are on the footing of declarations made at the time of the subsequent non-user. Again, the statute appears to alter the law as to the effect of declarations of a tenant binding the reversioner. *Wood v. Veal*, 5 B. & Ald. 454, shows that before *the statute, they could not so bind him. But the statute has made the acquiescence by [*378] the tenant in an interruption during the period material; and it seems to follow that his declarations during the period must be evidence; for, since he may affect the reversioner by his acts of acquiescence, there is no reason that his declarations of acquiescence should not affect him also. The statute, in effect, substitutes the occupier for the reversioner, so far as the question of user or non-user is concerned. [PATTESON, J. Before the statute, the acts of tenants might be evidence against the reversioners, yet their naked declarations were not so.]

As to the last issue. It has been attempted to treat the question as if the evidence of payments were offered for the purpose of showing the origin of the easement. For that purpose it might be inadmissible. But it is offered to show the nature of the enjoyment, and that it was not an enjoyment by a person claiming as of right. It is a fact inconsistent with the simple fact of such enjoyment. But it could not be pleaded in bar, even if there had been a stipulation in writing for payment; for such a plea would not confess the enjoyment as of right, and avoid it, by showing that it was under an agreement. Such a confession and avoidance could be pleaded only where the agreement would cover and be applicable to the whole period of enjoyment: the statute, therefore, when it directs that a contract or agreement shall be specially pleaded, and also provides that it must be by deed or in writing, refers only to contracts which account for, and are consistent with, the fact of an enjoyment as of right during the whole period; and, consequently, to such contracts only as are antecedent to the beginning of the enjoyment. The *legislature cannot [*379] have intended, by the second section, that an enjoyment for forty years by leave and license is to confer an absolute right, even though the leave and license was given during the term. Yet, if they did not mean that, evidence of the leave and license must be admissible under the general traverse, since, as has been shown, it could not be pleaded in bar. Supposing that, on each occasion of user, the party using had asked leave, or had declared that he did not claim as of right, surely this must have been evidence under the general traverse. But what is the difference between a leave given *toties quoties*, and a leave for a definite period? In *The Monmouthshire Canal Company v. Harford*, 1 Cr. M. & R. 614, S. C. 5 Tyrwh. 68, applications for leave, and the granting of a parol license, were held admissible upon a traverse of a plea of twenty years' enjoyment, although, in that case, the statute does not prevent the pleading of a parol contract in bar, as it does in the case of a forty years' enjoyment. Such evidence in fact shows that neither the enjoyment before, nor that after, the leave given, was of right. The payment of the penny cannot make the case different from that of a gratuitous license. So *PARKE, B.*, in *Bright v. Walker*, 1 Cr. M. & R. 219, S. C. 4 Tyrwh. 509, says that if the claimant "shall have occasionally asked the permission of the occupier of the land—no title would be acquired." [PATTESON, J. Do you say that by replying a deed, when one exists, a party denies the enjoyment as of right, or that he confesses it? If he

deny it, how can it be matter of special replication? if he confess it, is that [*380] reconcilable with your argument, that proof of license *supports the traverse of the enjoyment as of right? It is, perhaps, difficult to construe all the provisions of the statute consistently with the strict rules of pleading, but the true construction seems to be that, if a deed, explaining the whole enjoyment, were specially pleaded, that would be a confession that the enjoyment, during the whole period, had been of right; but it would be an answer to that case of enjoyment as of right which appeared *prima facie* on the other side. But, if a license were proved to have been asked and given during the period, that would show that, till the license was given, and after it had expired, there was no enjoyment at all as of right; and this, even on the supposition that an enjoyment under such a license is, in the statutable sense, an enjoyment as of right. In fact, the argument on the other side must be carried to this length; that, if the party claiming the easement prove by a witness the simple fact of user for forty years, the opposite party cannot cross-examine such witness as to the nature and circumstances of the user. *Cur. adv. vult.*

Lord DENMAN, C. J., in this term, February 1st, delivered the judgment of the Court. After having stated the pleadings, his Lordship proceeded:

At the trial, it was proposed, on the part of the defendant to show that a parol agreement had been made, and consideration paid for passing, in the year 1798. This evidence was offered on the first issue,¹ to negative the enjoyment for forty years *as of right*. And it was also offered on the second issue,² as of itself [*381] *showing an interruption acquiesced in, or at all events as explanatory of the character of a cessation to use the way for four years, commencing in 1800, which cessation was proved, and ascribed by the defendant to interruption, but by the plaintiff to a voluntary abstinence from user, on account of the close being in tillage. The evidence was rejected, and the plaintiff had a verdict. A rule nisi for a new trial on the ground of that rejection having been granted, the case was argued in last Michaelmas term.

The question turns upon the second and fifth sections of stat. 2 & 3 W. 4, c. 71, which the Court is called upon to construe, with reference both to the law and the form of pleading; and, in so doing, we have the assistance of the cases of *Bright v. Walker*, 1 C. M. & R. 211, S. C. 4 Tyrwh. 502, and the *Monmouthshire Canal Company v. Harford*, 1 C. M. & R. 614, S. C. 6 Tyrwh. 68, in which this act of parliament came under the consideration of the Court of Exchequer.

The second section of the act is in the following words (his Lordship here read the second section of the act), and the fifth section in the following (his Lordship here read the fifth section).

The greatest difficulty arises from the language of the concluding paragraph of this section, and more particularly from the words "or any cause or matter of fact or of law not inconsistent with the simple fact of enjoyment." As all these matters are required to be specially pleaded, and forbidden to be given in evidence under a general traverse of the enjoyment as of right, it is plain that they are treated by the legislature as consistent with such an enjoyment; and [*382] *as, by the rules of pleading and of logical reasoning, every allegation by way of answer, which does not deny the matter to which it is proposed as an answer, is taken to confess it, we must conclude that the legislature used the words "as of right" in such a sense, as that a party confessing the enjoyment "as of right," for forty years or twenty, as the case may be, may account for and avoid the effect of it by alleging in the one case a consent or agreement, provided it be by deed or writing (see sect. 2), and in the other any contract, &c., written or parol (see section 5). It follows that the words as of right cannot be confined to an adverse right from all time as far as evidence shows, for, if they were so confined, such enjoyment, once confessed, could not be avoided

¹ The issue on the third plea.

² The issue on the second plea.

by replying that it was held by contract, which is not adverse. Again, as the legal right to a way cannot pass except by a deed, it is plain that the words "enjoyment as of right" cannot be confined to enjoyment under a strict legal right; for then a "consent or agreement" in "writing," *not under seal*, of which the second section speaks, could not account for such enjoyment. The words, therefore, must have a wider sense; and yet they must have the same sense as the words "claiming right thereto" in the second section, otherwise there will be incongruities in the construction of the act. It seems, therefore, that the "enjoyment as of right" must mean an enjoyment had, not secretly or by stealth, or by tacit sufferance, or by permission asked from time to time, on each occasion or even on many occasions of using it; but an enjoyment had openly, notoriously, without particular leave at the time, by a person claiming to use it without danger of being treated as a trespasser, as a matter of right, whether strictly *legal by prescription and adverse user or by [*383] deed conferring the right, or, though not strictly legal, yet lawful to the extent of excusing a trespass, as by a consent or agreement in writing not under seal, in case of a plea for forty years, or by such writing or parol consent or agreement, contract or license, in case of a plea for twenty years. According to this view of the act, a license in writing must be replied to a plea of forty years' enjoyment, if it cover the whole time, and the same of a parol license in case of a plea for twenty years.

But it was argued by the Attorney-General, that each leave given, in case of permission repeatedly asked, is as much a consent or agreement *pro hac vice* as a consent or agreement for twenty years, and therefore, according to this view of the act, ought to be replied, which is contrary to the decision of the Monmouthshire Canal Company v. Harford, 1 Cr. M. & R. 614, S. C. 5 Tyrwh. 68. On looking at the report of that case, we find that the decision rests on this ground, viz., that the asking leave from time to time *within* the forty or twenty years, breaks the continuity of the enjoyment as of right, because each asking of leave is an admission that, at that time, the asker had no right; and, therefore, the evidence of such asking *within* the period is admissible under a general traverse of the enjoyment for forty or twenty years as of right. To this ground of decision we quite accede; and it will follow that, not only an asking leave, but an agreement *commencing within the period* may be given in evidence under the general traverse, notwithstanding the words of the fifth section; for the party cannot and does not *rely on it as an answer to an enjoyment as of right [*384] which he confesses, nor as avoiding any such enjoyment during the time covered by the agreement; but as showing that there was not, at the time when the agreement was made, an enjoyment as of right; and so the continuity is broken, which is inconsistent with the simple fact of enjoyment during the forty or twenty years.

The evidence proposed ought therefore to have been received on the first issue; and, on the second, it may also have been admissible, to show that the cessation to use was by reason of want of right, and not from voluntary abstinence:

The rule for a new trial must therefore be made absolute.

Rule absolute.¹

¹ See *Beaseley v. Clarke*, 2 New Ca. 705.

The KING v. GEORGE HENRY WARD, Esq. Jan. 12.

On the trial of an indictment for a nuisance in a navigable river and common king's highway, called the harbor of C. by erecting an embankment in the waterway, a finding by the jury that the embankment was a nuisance, but that the inconvenience was counterbalanced by the public benefit arising from the alteration, amounts to a verdict of Guilty.

It is no defence to such an indictment, that, although the work be in some degree a

hinderance to navigation, it is advantageous, in a greater degree, to other uses of the port.

INDICTMENT, stating that the Medina river was an ancient navigable river and common King's highway for all the liege subjects, &c., with vessels, boats, &c., to pass, repass, and navigate, &c., and that the defendant, in a certain part thereof called Cowes harbor, upon the soil and in the waterway of the said [*385] *river and highway, did erect and continue a certain building of stones, &c., across the stream and waterway of the said river, by reason whereof the liege subjects, &c., could not pass, repass, and navigate, &c., as they before used, and of right ought, &c.¹ Plea, Not Guilty. This indictment was tried before Lord DENMAN, C. J., at the Winchester Summer assizes, 1834. The principal points of the case, as stated by his Lordship in delivering judgment upon the motion made to set aside the verdict as after-mentioned, were as follows:—

The subject of indictment was a causeway projecting into the water, and raised on a kind of platform. The causeway originally was of gravel, shingle, and stone, called a hard, and went sloping down to the water. The defendant's father had sued out a writ of *ad quod damnum*, under which the proceedings were regularly conducted to their close; then he removed the causeway, and made a new one along the water's edge, considerably to the south. In the year 1833, this new causeway or wharf² was considerably lengthened in the same direction, which was inwards up the harbor. It was also then first raised on piles, and much heightened, and, instead of sloping down, it is now, at the extremity, five feet four inches higher than the shore.

The indictment was preferred by the corporation of Newport, on the complaint of the harbor-master and water-bailiff, who are sworn to present nuisances in the harbor. The case which the prosecutors sought to *establish may [*386] be taken from the following passage, which I copy from my note of the harbor-master's evidence:—"The causeway is decidedly an inconvenience to the navigation. Small vessels of twenty-six or twenty-eight tons are much obstructed in their tacking, when making their way up to Newport with the tide. They were in the habit of using a setting-pole, which this prevents, and sends them out into the best³ of the water." He described also some inconvenience to which square-rigged vessels, lightermen, and row-boats were exposed in consequence of the present state of the causeway, both as to navigation and landing. Many witnesses were called in support of these allegations. On the defendant's part, some witnesses denied the existence of these inconveniences altogether; others represented them as very trifling. But he mainly placed his defence on the advantages obtained by the public from the general result of the alteration, which were thus described by the captain of a steamboat:—"I consider the alteration a great benefit to the public; first, in launching and landing boats more readily; secondly, steamboats" (and of course other vessels) "can approach where they could not; thirdly, vessels obtain shelter from the quay." And these results were hardly disputed on the part of the prosecution. The learned counsel cited *Rex v. Russell*, 6 B. & C. 566, and *Hale, De Portibus Maris*, p. 85, Ch. 7, *Hargrave's Law Tracts*.

In summing up the evidence after a long trial, I asked the jury to state their opinion whether the causeway in its altered state was a nuisance to the navigation of the *river; and whether the public benefit was greater than the [*387] inconvenience. The jury, after deliberation, stated that an impediment had been created; but I declined to receive that expression, as not necessarily equivalent to the word nuisance, which might be too trifling in degree to be properly so called. They said at length that they considered it to be a nui-

¹ See the indictment more fully set out at the end of this case.

² There was a wharf in front of the Fountain Inn (not complained of) with which the causeway communicated; see p. 387, post. The counsel on both sides treated the wharf and causeway as distinct.

³ The witness explained this to mean the deepest.

sance; but they added, both at first and at last, that the inconvenience was counterbalanced by the public benefit arising from the alteration made by the defendant.

In addition to the facts recapitulated as above by the Lord Chief Justice, the following particulars were stated at the trial, some of which were adverted to in argument upon the after-mentioned rule:—The causeway built by Mr. Ward the father was erected in 1823. The whole was the defendant's private property. It was represented, on behalf of the prosecution, that the causeway extended below low-water mark. On the defendant's part, this was denied to be the case, except at particular tides. The way from the present causeway into the town of Cowes was either through the Fountain Inn, which was Mr. Ward's property, or under an archway, formed by part of the Fountain premises. The latter passage, and the causeway, were open at all times for landing and embarking. It was stated as probable that the number of persons using the causeway for those purposes, in a year, amounted to 50,000. Steamboat proprietors paid 2*d.* for each passenger landing and embarking, which amounted to 200*l.* a year.¹ Other persons landed and embarked without paying. Instances were mentioned, *in which persons going to and from a particular steamboat had been forbidden to land where the other steamboat [*388] passengers landed; but this appeared to have taken place at the wharf, and before the defendant's time. Cattle and goods landed, or going out, were paid for, but not in all instances. There are other places in Cowes, where persons are at liberty to land and embark at all times, but no other where it is always convenient to do so. Some evidence was given (but contradicted by the defendant's witnesses) to show that the causeway had occasioned accumulations of sand and mud in parts of the harbor. In answer to the evidence adduced to show that the causeway narrowed the space for tacking, and thereby interfered with the navigation, it was stated that there was a line of moorings farther out in the stream than the end of Mr. Ward's causeway, on the same side, and a similar line on the opposite side; that pilot and other vessels constantly lay at these moorings; that the space between them and the shore was usually occupied by small boats; and that the regular course for vessels going up the Medina was between the two lines of moorings. But it was also stated that vessels tacking often kept their course as far as the depth of water would allow; that, at the place in question, the harbor was very narrow, and the tide strong, and that it was often important for vessels working in or out to have an opportunity of making as long tacks as possible. *Follett*, in addressing the jury for the defendant, insisted, not only upon the usefulness of the work in question to the harbor, but also upon the benefit conferred by it on the Isle of Wight generally, in favoring the resort of visitors.

On the above finding of the jury, *Follett*, in the *ensuing term, obtained a rule to show cause why a verdict of Not Guilty should not be [*389] entered, on the ground that the finding amounted to an acquittal. In the last term,²

Erle and *Sewell* showed cause. The benefits arising from this work are either inconsiderable, or felt only by a portion of the public. They are for the most part received only at particular seasons, whereas the obstruction is constant. No permanent right of access to this causeway is given to the public; some persons have been warned off; others pay to embark or disembark. And, supposing that the defendant had dedicated the causeway to the public as far as lay in him, it does not appear that his own right to the soil was more than temporary, in which case there could be no dedication unless the owner of the fee consented; *Wood v. Veal*, 5 B. & Ald. 454. The act of erecting this

¹ It was represented, on behalf of the defendant, that the payments mentioned were required at the wharf only, and that the causeway (as distinguished from the wharf) was free.

² November 18th. Before Lord DENMAN, C. J., PATTERSON, WILLIAMS, and COLWIDGE, Js.

causeway was not done in immediate exercise of any of the rights appertaining to a port, as the right of passage, of landing and embarking, of fishing, or of staying for shelter or to take in goods, although it might ultimately favor the enjoyment of those rights. The immediate act was a nuisance to known vested rights, and is not to be justified by a reference to distant results, or advantages to be reaped by a different part of the community from that which suffers the inconvenience. No authority, unless it be *Rex v. Russell*,¹ contradicts this proposition. In that case *the defendant's counsel mainly relied upon [390] *Hale, De Portibus Maris*, part ii. c. vii. *Harg. Law Tracts*, 85. Lord HALE there gives several evidences of nuisances "common to all men that have occasion to come, go, or stay at ports." The fourth of these is "the building of new wears or enhancing of old, whereby navigation or passage of vessels is obstructed." That is stated absolutely, and without limitation, as a head of nuisance. It may be said in the following paragraph, where he gives, as a fifth instance, "the straitening of the port, by building too far into the water, where ships or vessels might have formerly ridden," he adds, "for it is to be observed, that nuisance or not nuisance in such case is a question of fact." But the preceding instance is stated positively, and without qualification, as one of nuisance. In this fifth paragraph, Lord HALE merely shows that, where a structure is erected below the high-water or the low-water mark, it is not therefore inevitably a nuisance; as, for example, if it be built in a place where the water flowed among shallows: and undoubtedly other instances of the same kind might be put, where the structure could not possibly be a nuisance. HALE's conclusion is that, in the case "of building within the extent of a port in or near the water, whether it be a nuisance or not is *questio facti*, and to be determined by a jury upon evidence, and not *questio juris*." The jury are [391] *to say whether or not the thing complained of is a nuisance to any right existing, and which can be known at the time. Here the jury have found Mr. Ward's causeway to be such a nuisance; and, if that has been rightly found within the meaning of the passages in Hale referred to, it is no answer to say that some benefit is produced. A nuisance is, in the contemplation of the law, criminal; and it is against first principles to say that there can be a compensation or set-off for a crime. In *Rex v. Lord Grosvenor*, 2 Stark. N. P. C. 511, also referred to in *Rex v. Russell*, 6 B. & C. 566, ABBOTT, C. J., left it to the jury, "whether the convenience of the public at large, or of that portion of it which is interested in the navigation of the river Thames has been affected or diminished by this alteration." He does indeed say, "The public have a right to all the convenience which the former state of the river afforded, unless by the change some greater degree of convenience is rendered." But the mode of putting the case there was consistent with the construction just given to the passages in Hale. The question substantially laid before the jury was, whether, considering the advantages arising from the existence of the recess which had been blocked up, the public had, upon the whole, any beneficial right in its continuance. The Lord Chief Justice was evidently of opinion that if, at the time of the erection, the public was deriving any benefit from the state of things interfered with by the act of the defendants, they were not entitled to take that benefit away. He says, at the end of his address to the jury, "The question is, whether if this wharf be suffered to remain, the public [392] convenience *will suffer."—"Although the benefits which were enjoyed before the erection, were limited to particular times and seasons of the

¹ 6. B. & C. 566. In answer to an inquiry made by the Court, as to this case, at the beginning of the present argument, Cresswell stated that a fresh indictment had been preferred against Mr. Russell, raising the same question as before; that the cause had been tried at the Carlisle assizes before HULLOCK, B., and certain facts found by the jury, which were to have been made the basis of a special verdict; but that, in consequence of the death of the learned Judge, difficulties had arisen in settling the verdict, and the case had not proceeded; one cause of which was, that the question had been rendered less important by the general use of steamboats for towing.

weather, and were enjoyed but occasionally, yet the public is not to be deprived of them by the erection of a wharf for mere private convenience." His Lordship did not there look to any but the immediate effects of the alteration; and, even if a wider construction could be given to his language, the question put by him could be carried no farther than this; whether the public, formerly exercising the right said to be taken away, reaped greater benefit from the alteration, than the same public had derived from the original state of things. But even that construction would not affect the present question; for not only are the injury and benefit not *ejusdem generis*, but one portion of the public suffers, and another receives the compensation.

There does not appear to be any authority upon the point since this case, except *Russell v. Russell*, 6 B. & C. 566. In that case there were peculiar circumstances. The staiths had in some degree been recognised by an act of parliament, which gave the public certain rights in resorting to them, and so far made them a matter of public concern. Besides, the question being whether or not the staiths were a nuisance to the navigation of the river Tyne, it was proved that they benefited it in one respect, namely, by clearing it of keels. The alleged injury to the navigation was attended by a direct benefit to the navigation. Lord TENTERDEN thought that, if the case had been left to the jury entirely upon the question of injury to the navigation, and a verdict found for the *defendants, no objection could have been taken. It is [*393] true that BAYLEY and HOLROYD, Js., thought that BAYLEY, J., had [*393] properly directed the jury, in his summing up, to take into consideration certain advantages accruing to distant portions of the community; but Lord TENTERDEN was of a different opinion. This case was relied upon in argument in *Rex v. Pease*, 4 B. & Ad. 30; but the Court, there, treat the decision as questionable. The authorities cited for the prosecution in *Rex v. Russell*, 6 B. & C. 566, show that an individual cannot justify interfering with public rights of his own authority, even where it may be alleged that in so doing he has given some benefit to the public; *Rex v. Warde*, Cro. Car. 266; *Payne v. Partridge*, 1 Salk. 12. In *Hind v. Manfield*, Noy, 103, it was laid down, without qualification, that an individual could not divert part of the river Thames, and thereby weaken the current, without an *ad quod damnum*, "because that river is as an highway."

To allow the kind of defence attempted in this case would introduce very inconvenient inquiries. For example, it is alleged that the work complained of promotes the general prosperity of the Isle of Wight, by favoring the resort of visitors and giving an impulse to trade and to improvements. How can a jury try such a question? They can estimate the injury done in a particular quarter; but the benefit which may be indirectly conferred upon places at a distance is too wide a subject for them to enter upon. So, in *Rex v. Russell*, 6 B. & C. 566; it was said that the coal staiths produced an ultimate benefit to the inhabitants of London; but a Northumberland jury could not judge of that. Nor is the principle a just one, *that a nuisance in one place may be [*394] compensated by any degree of benefit conferred in another; as if a [*394] gasometer created a nuisance in Southwark, and it was answered that the gas lights connected with it were beneficial to a street in London. No comparison can be instituted between accommodation to one set of persons, and loss of rights to another. And where could this kind of justification stop? If an actual benefit may be alleged, so may an intended benefit. A man may erect a causeway which will be convenient to steamboats in a place where none are used, but where he says he will establish them; or he may turn an ordinary highway into a railway, and justify it by the increased convenience to those who will use steam carriages; which, however, according to the judgment of Lord TENTERDEN in *Rex v. Sir John Morris*, 1 B. & Ad. 447, would be no excuse. [PATTESON, J. The present question was not much considered there: Lord TENTERDEN held, that the doctrine said to be established by *Rex v. Russell*, 6

B. & C. 566; was not applicable; and his observation, which has been referred to, was this:—"It is said, indeed, that all persons may use this railway who will pay for so doing; but no man has a right to tell the public that they shall discontinue the use of such carriages as they have been accustomed to employ, and adopt another kind, in order to pass along a new description of road, paying him for the liberty of doing so."]

Sir W. W. Follett and Bere, contra. The real question is, not whether a person may obstruct the navigation of a harbor, and look, for his justification, to *advantages resulting in other places; but whether he may not erect [*395] a structure in a port, which is an impediment to the navigation, but which is, on the whole, a benefit to that port. (They commented at length upon the facts proved, with reference to these points.) The question, how far the public had acquired a right to use the causeway, went to the jury as part of the question of benefit. The taking of two-pence from the steamboat passengers did not disprove the right: that payment was made for landing at the wharf. As to the causeway, the evidence for the prosecution did not establish that any restriction of this kind existed. The doctrine of *Rex v. Russell*, 6 B. & C. 566, need not come under discussion; nor is there any conflict of authorities. Erections may be made in a harbor, below high-water mark, and in places where vessels might perhaps have sailed; and the question whether they are a nuisance, or not, will depend on this,—whether, upon the whole, they produce public benefit; not giving to the terms "public benefit" too extended a sense, but applying them to the public frequenting the port. If this view of such cases were not admitted, every wharf in the port of London, perhaps, would be a nuisance, because it occupied a space over which some boat might have been punted; and no lapse of time could render it legal. Suppose the Plymouth Breakwater to have been erected by an individual; could that be called a nuisance to the port? It impedes the navigation, but the benefit to the port counterbalances that inconvenience. The same may be said of the Cobb at Lyme. Suppose a harbor had in it a shoal, which might be sailed [*396] over at high water, but was dangerous *at other times, and a vessel were moored there to point it out: that would not be a nuisance, but a cause of safety. There is a fallacy in comparing this case with that of a highway. A highway is for a passage only; and, in general, that which impedes the passage is a nuisance to the highway. But a port is not merely a place of passage: "A port is a haven, and somewhat more. 1. It is a place for arriving and unloading of ships or vessels." HALE, *De Portibus Maris*, part ii. c. ii.; Harg. Law Tracts, 46. An erection made in a port, though it impede the passage, is not necessarily a nuisance, because the public has other and more important rights in a harbor than that of passage, and to these the thing done may be advantageous; and whether, taking these into consideration, the erection be a nuisance or not, is a question for the jury. This is laid down in the judgment of HOLROYD, J., in *Rex v. Russell*.¹ Here the question has been decided by a jury in the defendant's favor. Lord HALE (*De Portibus Maris*, part ii. c. vii.; Harg. Law Tracts, 85), mentions as a nuisance common to all men using a port, "the building of new wears or inhancing of old, whereby navigation or passage of vessels is obstructed." The argument for the prosecution in this case is, in effect, that every building which at all straitens the passage is within this clause. But Lord HALE goes on to add, as another instance, "the straitening of the port, by building too far into the water, where ships or vessels might have formerly ridden;" and he proceeds, "for it is to be [*397] observed, that nuisance or not nuisance *in such case is a question of fact. It is not therefore every building below the high-water mark, nor every building below the low-water mark, is *ipso facto* in law a nuisance; for that would destroy all the keys that are in all the ports in England. For they

¹ 6 B. & C. 586, 587. Sir W. W. Follett here read the passage beginning, "But, independently of these statutes;" and ending, "in law a nuisance."

are all built below the high-water mark; for otherwise vessels could not come at them to unlade; and some are built below the low-water mark. And it would be impossible for the King to license the building of a new wharf or key, whereof there are a thousand instances, if *ipso facto* it were a common nuisance, because it straitens the port, for the King cannot license a common nuisance. Nay, in many cases it is an advantage to a port to keep in the sea-water from diffusing at large; and the water may flow in shallows, where it is impossible for vessels to ride. Indeed, where the soil is the King's, the building below the high-water mark is a purpresture, an incroachment and intrusion upon the King's soil, which he may either demolish or seize, or arent at his pleasure; but it is not *ipso facto* a common nuisance, unless indeed it be a damage to the port and navigation. In the case therefore of building within the extent of a port in or near the water, whether it be a nuisance or not is *questio facti*, and to be determined by a jury upon evidence, and not *questio juris*." The whole result of this and other authorities is that, although the port may be straitened, the question, nuisance or no nuisance, is for the jury upon the whole of the facts. Even in the case of a high road, it is not true that every obstruction to the right of passage is a nuisance. The public may have other rights on a highway. A market or fair is in many instances lawfully held in a public street. A board placed in front of a building while it *undergoes repair is not a nuisance, though it obstructs the highway. [*398]

In *Rex v. Lord Grosvenor*, 2 Stark. N. P. C. 513, ABBOTT, C. J., in his summing up, said, "The question is not whether any private advantage has resulted from the alteration to any particular individuals, but whether the convenience of the public at large, or of that portion of it which is interested in the navigation of the river Thames, has been affected or diminished by this alteration." The defendant here relies upon the benefit reaped by the public, and not upon any private advantage, nor does any accrue to him. The present case does not involve any point on which the Court differed in *Rex v. Russell*, 6 B. & C. 566. BAYLEY, J., there says, in delivering judgment (page 593), "The only point upon which our difference rests, is, I believe, the point of public benefit; not the point upon the *preponderance of public benefit*, but the question, what might be taken into consideration as matter of public benefit?" Lord TENTERDEN differed from the other judges, not as to the principle sanctioned by Lord HALE, that the jury are to consider, upon a view of all the circumstances, whether or not the benefit to the public preponderates over the injury, but merely as to an ingredient in that preponderance, namely, the convenience afforded to the trade of London. [COLERIDGE, J. Lord TENTERDEN said there (page 602) that the question raised by the indictment was properly, whether the navigation and passage of vessels on the public navigable river was injured by these erections.] The general principle of compensation has scarcely been disputed in this case; but the composition is said to be too remote *and indirect. It has, [*399] indeed, been said that there can be no compensation for a crime; but the question here is, whether any crime has been committed; and the crime in question is nuisance to the port. [*Erle*. The indictment is for obstructing a navigable river and King's highway.] It adds the words "called Cowes Harbor." And the mere wording could not alter the question whether or not a nuisance to the port had been committed. The concluding part of the address to the jury by BAYLEY, J., in *Rex v. Russell*, is thus stated by HOLROYD, J., 6 B. & C. 593. "If you think this is placed not in a reasonable part of the river, that it does an unnecessary damage to the navigation, or that this is not of any public benefit, or that the public benefit resulting from it is not equal to the public inconvenience which arises from it, then you will find your verdict for the Crown." It is sufficient to contend, here, that the last part of the alternative was correctly put. And Lord TENTERDEN said afterwards, 6 B. & C. 602, "the question raised by this indictment" . . . "I take properly to have been, whether the navigation and passage of vessels on this public navigable river

was injured by these erections. Upon this question there was evidence on both sides, regard being had to that obstruction, which must necessarily take place by the transfer of coals from keels or other vessels confined to the navigation of the river, into ships of a different kind passing to sea. And if the question had been left entirely in this form, and a verdict found for the defendants, I do not, as at present advised, see that any objection could have been properly made to it. In some parts of my learned brother's direction to the jury, *and [*400] especially toward the close, the case appears to have been left mainly on this ground. But in other parts, remarks were made on the public benefit of the nature that I have alluded to, which might probably, in my judgment, have an effect upon the minds of the jury, coming as they did from so high and from so respectable an authority, that I think ought not to have been produced." Lord TENTERDEN nowhere intimates an opinion that a verdict ought to be entered for the Crown; and yet the fact of obstruction was more unequivocal in that case than in the present. The argument at the bar, there, had turned mainly upon the point that the alleged compensation did not take effect in the proper quarter. In *Rex v. Pease*, 4 B. & Ad. 30 (though it is not necessary to assimilate the case of a port to that of a high road), the principle, if rightly applied, of compensation, seems to have been held reasonable at least. And here it is not questioned that there was a compensation to the public frequenting the harbor of Cowes for the impediment created in the harbor by the defendant's causeway.

Lord DENMAN, C. J. My understanding at the trial certainly was, that the question was much the same as that in *Rex v. Russell*, 6 B. & C. 566, a case, the authority of which has been much doubted, and is perhaps likely to be more so as it is further examined. Lord TENTERDEN there did not accede to the doctrine of compensation laid down by BAYLEY, J., in his direction to the jury, nor does HOLROYD, J., appear to have adopted it. And I must say that, if the violation of rights which belong to any part of the public is to be vindicated by [*401] the benefit which *may arise to another part of the public elsewhere, we are introducing inquiries of a most vague and unsatisfactory nature, and entering into speculations upon which no jury can be properly expected to decide. However, the defendant's counsel have, in this argument, proceeded upon a narrower ground than that taken in *Rex v. Russell*, 6 B. & C. 566.

Cur. adv. vult.

Lord DENMAN, C. J., now delivered the judgment of the Court. After stating the nature of the indictment, and the principal facts of the case, the questions left to the jury, and the verdict (for which see page 385-7, ante), his Lordship proceeded as follows:—

Sir William Follett obtained a rule of this Court for the entering a verdict of Not Guilty, on the ground that the finding amounts to an acquittal. And this conclusion would probably be found irresistible, if the case of *Rex v. Russell*, 6 B. & C. 566, was well decided by the majority of this Court, or rather if the direction of the learned Judge who tried that indictment, correctly laid down the law.

That learned Judge concluded his address to the jury in these terms:—

"If you think this is placed not in a reasonable part of the river, that it does an unnecessary damage to the navigation, or that this is not of any public benefit, or that the public benefit resulting from it is not equal to the public inconvenience which arises from it, then you will find your verdict for the Crown. If on these points you are of a different opinion, then for the defendants." In substance, therefore, it should seem that the jury were directed to find the defendant Not Guilty, if his act *indicted as a nuisance, were productive [*402] of more public benefit than public inconvenience.

The greatest weight is due to the authority of Mr. Justice BAYLEY, who thus charged the jury, and afterwards upheld his opinion in this Court; and no person can hesitate to ascribe every quality of an excellent Judge to Mr. Justice

HOLROYD, who agreed with him in thinking that the rule for a new trial for misdirection ought to be discharged. But when we examine the grounds of this opinion, as delivered by the latter, they will not be found to support in any degree the proposition just noticed in the summing up; on the contrary, he plainly considers the topic to have been introduced as an answer to some observations invidiously made to the defendant's prejudice, by the counsel who conducted the prosecution, and thinks that it must be qualified throughout the summing up, and even to its close, by its connexion with that argument. Mr. Justice BAYLEY himself, who delivered his judgment after Mr. Justice HOLROYD, takes a much wider range, maintaining the right to estimate the balance of public benefit and public inconvenience, and to take into the account of the former the advantages that may be derived from the change by any part of the public. He takes for example the purchasers of coals, sent from the indicted staith to a distant market. Lord TENTERDEN thought it wrong to submit such extensive views to the jury, and that the question ought simply to have been, "whether the navigation and passage of vessels over this public navigable river was injured by those erections."

Lord TENTERDEN's dissent must be allowed to detract greatly from the authority to be ascribed to the direction given at *Nisi Prius*, which his Lordship was evidently *anxious to sustain if possible: and, when it appears that HOLROYD, J., founds his support of the direction on a distinction [*403] which excludes the general principle now contended for and avowed by BAYLEY, J., the case of *Rex v. Russell*, 6 B. & C. 566, will appear to rest on the single authority of that learned Judge, acting at *Nisi Prius*, and satisfied on reflection with the course which he had then taken. It is observable also that of the distinguished counsel who opposed the rule for a new trial in *Rex v. Russell*, 6 B. & C. 566, and who have addressed us on the present occasion, none have maintained that the direction there given was altogether conformable to law.

If indeed it were, we may well feel some surprise that the doctrine appears there for the first time; certainly no trace of it has been discovered in any law book of an early date, but the cases quoted from Cro. Car. and Salkeld display a strong repugnance to it. The first glimpse of it is detected in some expressions advanced by Lord TENTERDEN, in *Rex v. Earl Grosvenor*, 2 Stark. N. P. C. 514. His Lordship there lays it down, that "the public have a right to all the convenience which the former state of the river afforded, *unless by the change some greater degree of convenience is rendered.*" Vessels are entitled, he says, to the advantage of shelter, "unless the want of it be *compensated by some superior advantage resulting from the alteration.*" Hence it is inferred that, if the public had derived any new convenience from the change, which a jury should think greater than that which the nuisance took from them, or if some advantage superior to that of shelter had resulted from the destruction of that shelter, his Lordship would have directed an acquittal. But this by no means follows; for all who have studied the course *adopted by that [*404] learned and cautious judge are well aware that his habit never was to lay down a larger proposition of law than the case in hand required. It is evident that, in Lord Grosvenor's Case, which was that of an embankment raised by an individual for his own profit, the only question which he thought necessary to be submitted to the jury,—viz., whether the public had benefited by the alteration made,—was plainly confined to such benefits as the public might have derived from it, in the exercise of that very right the invasion of which was treated as a nuisance. If he had contemplated the doctrine of *Rex v. Russell*, 6 B. & C. 566, he would have told the jury to consider whether that part of the public which consisted of the frequenters of the wharf had not gained more than the navigating part of the public had lost, by means of the erection made. But even if the language employed had comprehended in its terms all possible modes of compensation, Lord TENTERDEN's judgment in *Rex v. Russell*, 6 B. & C. 566, plainly shows what his deliberate view of the law was, and that the

advantage gained ought to be closely connected with the inconvenience resulting ; or rather with that which would have been an inconvenience if it were not absorbed in the superior advantage. This is most apparent, from what is ascribed to him in p. 602.

In this view of the law my brother LITTLEDALE authorizes me to say that he fully agrees, though his connexion, when at the bar, with the case of *Rex v. Russell*, 6 B. & C. 566, induced him to take no part in that decision.

And in the infinite variety of active operation always going forward in this industrious community, no greater evil can be conceived than the encouragement [*405] of capitalists *and adventurers to interfere with known public rights, from motives of personal interest, on the speculation that the changes made may be rendered lawful by ultimately being thought to supply the public with something better than what they actually enjoy. There is no practical inconvenience in abiding by the opposite principle, for daily experience proves that great and acknowledged public improvement soon leads to a corresponding change in the law, accompanied, however, with the just condition of being compelled to compensate any portion of the public which may suffer for their advantage.

In the recent argument, the doctrine of compensation for nuisance was supported by one analogy only. Mr. *Bere*, comparing the right of navigation over a waterway to that of walking along the street, observed that the latter was sometimes interrupted by the exercise of other rights, as when a hoard is erected for repairing a house. But it rather appears that the hoard is placed for the safety of those possessing the right of way : it protects them from inevitable danger if it leaves them a free passage, and sends them another way if the whole street is necessarily obstructed. Every way to which houses adjoin must be considered as set out subject to these occasional interruptions, which resemble the temporary acts of loading coals in keels, alluded to in *Rex v. Russell*, 6 B. & C. 566. A permanent hoard would be abatable as a nuisance ; and it much resembles the staith in *Rex v. Russell*, 6 B. & C. 566, the wharf in *Lord Grosvenor's Case*, 2 Stark, N. P. C. 511, and the quay, for which this indictment was preferred.

But the learned counsel contended that they did not *want the authority of *Rex v. Russell*, 6 B. & C. 566, and could establish their right to a verdict of Not Guilty, on the finding of the jury, from a consideration of the nature of the place where the nuisance is charged. They say that the river Medina, as described in the indictment, is not merely a navigable river but a port, Cowes Harbor, and they rely on the various rights that may exist together in such a place, and their unavoidable inconsistency at particular times. The same remark may, however, be true, with respect to a highway, where right of common of pasture, and right of common of turbary, may exist at the same time. It is still more strikingly true in respect of navigable rivers, from which it seems impossible to distinguish the case of ports, in principle, though the degree may perhaps be different. Where such rights happen to clash in questions brought before the Courts, the valuable maxim *sic utere tuo ut alienum non lædas* will generally serve as a clue to the labyrinth.

But the possible jarring of pre-existing rights can furnish no warrant for an innovation which seeks to create a new right, to the prejudice of an old one. There is no legal principle to justify this proceeding, unless *Rex v. Russell*, 6 B. & C. 566, is well decided.

Recourse is then had to the great and venerable name of HALE, from whose excellent treatise *De Portibus Maris*, p. 85, some such words as the following may be extracted. It is not every building below the high-water mark, that is *ipso facto*, in law a nuisance, for that would destroy all the quays that are in all [*407] the ports of England. For they are built below the high-water *mark, for otherwise vessels could not come at them to unload, and some are built below the low-water. And it would be impossible for the King to license the building of a new wharf or quay, whereof there are a thousand instances, if, *ipso*

facto, it were a common nuisance. Nay, in many cases it is an advantage to a port to keep in the sea-water from diffusing at large; and the waters may flow in shallows *where it is impossible for vessels to ride*.

But HALE, in this passage, is only disputing the doctrine "that every building below the low-water mark is, *ipso facto*, in law, a nuisance;" which his observation on existing quays, and on such as may have been created under the King's license, effectually disproves; and the argument is strengthened by the fact that, in some cases, such buildings are essential to the harbor being navigated at all. Here is no question of balancing nuisances; nor was the position intended to affect the general rule laid down by the same great authority at page 9, of the same treatise, that "all nuisances and impediments of passage of boats and vessels, though in the private soil of any person, may be punished by indictments." There is no incongruity in his afterwards asserting that the question of nuisance or no nuisance is for the jury; so Lord TENTERDEN considered it in *Rex v. Russell*, 6 B. & C. 566, and gave the form in which he thought it ought to be submitted to them; and that is precisely the course taken on the trial of this indictment.

The jury, having answered my inquiry in the affirmative, have plainly found a verdict for the Crown, unless their added statement entitled the defendant to *an acquittal. For the reasons given, we think it did not, and that the [408] present rule must therefore be discharged.

Rule discharged.¹

¹ The indictment in the present case was as follows.

1st Count. That the river Medina, otherwise called Newport river, is, and from time whereof, &c., was, an ancient navigable river and common king's highway for all the liege subjects of our Lord the King, with their vessels, boats, lighters, barges, and crafts, to pass, repass, and navigate at their free will and pleasure, to wit, at the borough of Newport, in the Isle of Wight, in the county of Southampton; and that George Henry Ward, late of, &c., Esquire, on the first day of July, in the fourth year, &c., 1838, with force, &c., at the borough aforesaid, in a certain part of the said navigable river and common king's highway, called Cowes Harbor, in and upon the bed and soil of the same, and in the stream and waterway thereof, unlawfully, wilfully, knowingly, and injuriously, did erect, raise, and place, and cause to be erected and placed, a certain building composed of stones, timber, and other materials, of great length and width, viz. of the length, &c., and of the width, &c., projecting into and across the stream and waterway of the said navigable river and king's highway; and the said building, so as aforesaid erected, raised, and placed in the said river and common king's highway there, from the said 1st of July until the day of taking this inquisition, at, &c., aforesaid, the said G. H. W. then and there unlawfully, &c., did continue, and still doth continue. By reason whereof, the liege subjects, &c., during all the time aforesaid, could not, nor can they now, pass and repass, and navigate with their vessels, boats, lighters, barges, and craft in and along the said river and common king's highway, as freely as they before used and were accustomed to do, and still of right ought to do. To the great damage and common nuisance of all the liege subjects, &c., in and along the said river and common king's highway there passing and repassing and navigating with their vessels, &c., as aforesaid; to the evil example, &c., and against the peace, &c.

2d Count. That G. H. W. afterwards, to wit, on, &c., at, &c., unlawfully, &c., did raise, erect, and place, and cause to be raised, &c., a certain embankment composed of gravel, earth, &c., and other materials, in and upon the soil and bed of the said river, called the river Medina or Newport river, and common king's highway there, in the stream and waterway of the same, of great length, height, and width, to wit, &c., projecting into, and athwart and across the stream and waterway of the same navigable river and king's common highway; and the said embankment so as aforesaid erected, raised, and placed, from, &c., until, &c., to wit, at, &c., he, the said G. H. W., unlawfully, &c., did continue, and still does continue, to the great damage, &c.

*8d Count. That G. H. W., afterwards, to wit, &c., and on divers other days &c., with force, &c., at Cowes Harbor, within the borough aforesaid, unlawfully, [409] designedly, and injuriously did place and drive, and cause to be, &c., divers, to wit fifty posts to and into the bed and soil of the said navigable river and common king's highway, and did cast and throw, and cause to be, &c., divers large quantities of stone, gravel, &c., into and upon the bed, stream, course, and waterway of the said river and common king's highway there, to wit, 200 vessel loads, &c., thereby forming a certain other great mound, slipway, and embankment, projecting and extending into the bed, stream, and

waterway of the said river and common king's highway there, to a great length, height, and width, to wit, the length, &c., into the same river and common king's highway, to wit, at Cowes Harbor, &c., whereby and by means whereof, the bed, stream, course, and waterway of the said river and common king's highway there, was during all the time aforesaid, and still is, greatly obstructed, impeded, straitened, and rendered less safe and commodious to the liege subjects, &c., in and upon the said river and common king's highway there passing, repassing, and navigating with their vessels, &c., than the same otherwise would have been, and of right ought to have been and to be, to wit, at, &c., to the great damage, &c.

4th Count. That the said G. H. W., to wit, on, &c., and on divers other days, &c., with force, &c., at the borough aforesaid, unlawfully, &c., did cast and throw, and cause and procure to be, &c., divers large quantities of earth, &c., into the said river and common king's highway there, to wit, 200 cart loads, &c., whereby and by means whereof the said river and common king's highway there was during all the time aforesaid, and still is, greatly obstructed, &c. (conclusion as in the preceding count).

5th Count. That the said G. H. W., on, &c., and from thence continually until, &c., with force, &c., at Cowes Harbor within the borough aforesaid, in, upon, and across a certain navigable river and common king's highway, called the Medina River, there situate, divers, to wit, ten other walls, ten other banks, 100 other posts, 500 pieces of timber, ten other slipways, ten other wharfs, and ten other embankments, before then unlawfully, wrongfully, and injuriously erected, built, and set up, in, upon, and across the said last-mentioned navigable river and common king's highway, unlawfully, &c., did keep and continue, and still doth keep and continue, by means whereof the said last-mentioned navigable river and common king's highway is greatly obstructed, straitened, and narrowed, to wit, at the borough aforesaid, to the great damage, &c.

[*410] *DOE on the several Demises of The Governor and Company of The BANK OF ENGLAND, and GREGORY, v. CHAMBERS and Others. Jan. 12.

Ejectment being brought on two demises, and a verdict being taken for the plaintiff on one, and for the defendant on the other, and leave being reserved to the plaintiff to move to enter a verdict for him on the second demise, he is not precluded from doing so by his having obtained early execution on the verdict on the first demise, and possession having been taken under it.

To an indenture of feoffment by the Bank of England, the seal of the Bank was affixed by a paper wafered to the indenture, on which paper was written, "Sealed by order of the Court of Directors of The Governor and Company of the Bank of England, 12th December, 1833. J. K., secretary:" Held, that J. K., was not an attesting witness, and that the execution of the feoffment might be proved by the seal, without calling J. K.

Quere, Whether, when there is an attesting witness to the affixing of the seal of a corporation, such witness must be called to prove the deed?

EJECTMENT for lands in Dorsetshire. On the trial before PATTESON, J., at the Dorsetshire Spring assizes, 1835, the plaintiff proved, in support of the count on the first demise, a mortgage from the owner of the property to the Governor and Company of the Bank of England. In support of the count on the second demise, an indenture of feoffment, with livery of seisin, from the Governor and Company of the Bank of England to Gregory, was tendered in evidence. This instrument was sealed; and it was proved that the seal was that of the Bank of England. The seal was affixed by a piece of paper wafered to the parchment of the indenture; on the paper was written,—"Sealed by order of the Court of Directors of the Governor and Company of the Bank of England, 12th December, 1833. John Knight, secretary." The defendants' counsel contended that Knight was an attesting witness, and ought to be called. The learned Judge directed a verdict for the plaintiff on the first count (on the first demise) only, and for the defendants on the second count; reserving leave to move to enter a verdict for the plaintiff on the second. The plaintiff's counsel then [*411] obtained leave to issue early execution on the first demise; and possession was shortly after taken accordingly. In Easter term last, Sir W. W. Follett obtained a rule to enter a verdict pursuant to the leave reserved.

Erle now showed cause. The plaintiff having taken out execution on the

plaintiff it was contended that the practice which had prevailed in conformity with the case of *Othir v. Calvert*, 1 Bing. 275, was wrong in principle, and had been so held by PARKE, J., in the case of *Hart v. Cutbush*, 2 Dowl. P. C. 456. The 4th section of the statute of Anne permits any defendant or tenant in any action, or any plaintiff in replevin, by leave of the Court, to plead several matters; and the 5th section provides that, "if any such matter shall upon a demurrer joined be judged insufficient, costs shall be given at the discretion of the Court; or if a verdict shall be found upon any issue in the said cause for the plaintiff or demandant, costs shall be also given in like manner, unless the Judge, who tried the said issue, shall certify, that the said defendant, or tenant, or plaintiff in replevin, had a probable cause to plead such matter which upon the said issue shall be found against him." The words "at the discretion of the Court" have been held not to give the Court power to refuse the costs, but only to tax them: *Duberley v. Page*, 2 T. R. 391, and many other cases. And an avowant in replevin is a defendant within the meaning of the fourth section; *Stone v. Forsyth*, 2 Doug. 709, note (2). The words of the statute of Anne are general and without limitation, not pointing to any distinction between costs of the pleadings and costs of the trial; and reason and common sense dictate that, if the defendant has put the plaintiff to unnecessary expense, by pleading that which turns out, either in law or in fact, to be unfounded, he should pay the plaintiff that expense, *although he may be successful [417] upon the general question. Yet it appears that a practice soon prevailed of limiting the costs to those of the pleadings only. That practice was condemned in the cases of *Brooke v. Willet*, 2 H. Bl. 435, and *Vollum v. Simpson*, 2 B. & P. 368. It is true that both those cases were actions of replevin, in which the defendant is an actor, which was pointed out by one of the prothonotaries in *Othir v. Calvert*, 1 Bing. 275, and was supposed to make a difference. That supposition we think to be wholly erroneous; for the question turns upon the words of the statute of Anne, and upon the ordinary principles of justice, all of which are equally applicable to replevin and to other actions. So far, therefore, as the decision in *Othir v. Calvert*, 1 Bing. 275, depends on this distinction, we think that it cannot be supported.

But in the judgment of the Court it is said that the point was expressly ruled in *Benett v. Coster*, 1 B. & B. 465, which was decided on the authority of *Vivian v. Blake*, 11 East, 263. Now neither of those cases touches the point in question. In *Vivian v. Blake*, 11 East, 263, which was in trespass, the defendant pleaded the general issue, and a justification which covered the whole trespass. The plaintiff had a verdict on the general issue, and the defendant on the justification; and the Court held that the plaintiff was not entitled to any costs; so that the present point could not arise. In *Benett v. Coster*, 1 B. & B. 465, the questions were, who should have the general costs of the cause, and whether the defendant should have any costs: but the present question did not arise; at least it is not alluded to in the *report; though doubtless it must have arisen in the prothonotaries' office: and, whichever way it was [418] there determined, it does not appear to have been afterwards disputed.

Hart v. Cutbush, 2 Dowl. P. C. 456, is an authority the other way, and as we think, rightly decided; and though we had been led to suppose that the case of the *Duke of Newcastle v. Green*, 2 Dowl. P. C. 459, which is there referred to by PARKE, J., but which is not reported, had been compromised and not decided, we have been informed by the learned Judge himself that it was decided in the manner stated by him; and the only compromise was as to the mode of settling the accounts between the parties, which was arranged before him at chambers.

It has been objected that the consequence of holding that decision to be right will be, that issues, which have become immaterial by the decision of some one, will always be tried out for the mere sake of costs, and that great waste of time and inconvenience and delay to other suitors will be occasioned. We do not think these consequences at all necessary; but, even if they were, they are not

sufficient to prevent the statute of Anne from having that construction which appears most consonant to the intention of the legislature and to reason and justice. On these grounds we think that the Master's taxation of the plaintiff's costs is right.

A question was raised in the course of the argument, as to the allowance to the defendant of the costs of certain witnesses who were not called, as to which [*419] some doubt may be entertained; but this point was not *pressed by the plaintiff; and, as our decision is with him on the main question, it need not be discussed. The Rule must be discharged without costs.¹

¹ See Reg. Gen. Hil. 4 W. 4. General Rules and Regulations, 7, 5 B. & Ad. iv.

STOCKDALE v. CHAPMAN. Jan. 13.

To an action of trespass for false imprisonment, defendant pleaded leave and license; to which the plaintiff replied *de injuriâ*, concluding to the country, without an "*&c.*," and no issue was joined on this. There were also pleas of justification, under claims to detain the plaintiff till he made certain payments, which pleas were replied to, and issues joined on the replication: Held, that the defendant could not take advantage of the informality, after trial and verdict for the plaintiff.

TRESPASS for false imprisonment. Pleas, leave and license; and four other pleas, claiming a right to detain the plaintiff till certain payments were made.

The plaintiff, to the first plea, replied *de injuriâ*, and concluded to the country. There was no "*&c.*" added to this conclusion; and there was no similiter. The other pleas were regularly replied to, and issues regularly joined on the replications. On the trial before Lord DENMAN, C. J., at the Middlesex sittings in December last, a verdict was found for the plaintiff.

Andrews, Serjt., now moved for a rule to show cause why there should not be a new trial; and he stated, as one ground for his motion, that there had been a mis-trial, for want of issue being joined on the plea of leave and license. The cases on this point are contradictory. In *Cooke v. Burke*,² where one of three pleas, a plea of payment and satisfaction, had not been replied to, but the defendant added a similiter to all three, and the plaintiff obtained a general verdict, the Court of *Common Pleas permitted the plaintiff to amend, by [*420] adding a traverse to the second plea. But in a later case, *Griffith v. Crockford*, 3 B. & B. 1, the Court of Common Pleas set aside a verdict for want of a similiter. In a still later case, *Swain v. Lewis*, 3 Dowl. P. C. 700, PARKER, B., discharged a rule for setting aside a verdict for want of a similiter to a traverse in the plea, on the ground that "*&c.*" was added at the end of the plea, which might, after verdict, be considered to include the similiter.

The Court³ refused the rule on this point, referring to note (6) on *Bennet v. Holbech*.⁴ A rule nisi was granted on another ground.

² 5 Taunt. 184. The third plea was *nil debet*; and MANSTFIELD, C. J., said that the substance of the second plea must have been tried on the issue upon the *nil debet*.

³ Lord DENMAN, C. J., LITTLÉDALE, WILLIAMS, and COLERIDGE, Js.

⁴ 2 Wms. Saund. 819, a. See 2 Chitty's Archbold, 8d ed., pp. 984, 985. *Vivian v. Jenkin*, 3 A. & E. 741, 750.

DE VAUX v. SALVADOR. Jan. 14.

Insurance on a ship, V., with the usual warranty as to average. The ship having come into collision with another ship, and proceedings being instituted for the damage done to the other ship, the matter was referred to arbitrators, who awarded that each ship should bear half of the aggregate loss. The ship V. on the settlement had to pay a balance to the other ship: Held, not to be a loss to which the underwriters were liable.

Held, also, that the expense of the wages and provisions of the crew of the V., during the time that she was detained in repairing damage done to herself by perils of the sea, were not such a loss.

ASSUMPSIT on a policy of insurance for time on the ship *La Valeur*. The declaration claimed for general average, and for an average loss; the damage was laid to have been occasioned by perils of the sea. The policy contained the usual warranty, free from average under three pounds per cent., unless general, or the ship be stranded. The defendant, as to the claim of particular average, pleaded that the ship did *not sustain an average loss or damage to the amount of 3 per cent., on which plea issue was joined. On the trial [*421] before Lord DENMAN, C. J., at the London sittings after last term, it appeared that the *La Valeur*, being in the Hoogly river, during the time covered by the policy, came into collision with a steam vessel called the *Forbes*, and that considerable damage was done to each vessel. The owner of the *Forbes* claimed a compensation from the *La Valeur*, and threatened to detain her, and to proceed in the Court of Admiralty at Calcutta; and, upon the claim being referred to arbitration, it was awarded that each ship should bear half the joint expenses of the two. Upon the settlement, the *La Valeur* had to pay a balance to the *Forbes*. The *La Valeur* was detained by the necessity of repairing certain damage done to herself by perils of sea; and, during the time of detention, a sum of money was expended in the additional wages of the crew and provisions for them. If either this sum of money or the balance paid to the *Forbes* could be considered a particular average, then there was on the whole an average loss of 3 per cent., but not otherwise. The Lord Chief Justice was of opinion that neither of these items could be taken into the account of particular average; and a verdict was found for the defendant on the above issue.

Maule now,* moved for a rule to show cause why a verdict should not be entered for the plaintiff for such sum as the Court should direct, or why a new trial should not be had. It is clear that the aggregate *of several par- [*422] tial losses may make up the 3l. per cent.; *Blackett v. The Royal Exchange Company*, 2 Cr. & J. 244, S. C. 2 Tyrwh. 266. Here the 3l. per cent. will be made up if either of two items be allowed. First, the underwriters are liable for the sum paid to the *Forbes*. The words in the policy are, "all other perils, losses, and misfortunes that have or shall come, to the hurt, detriment, or damage of the said goods and merchandises and ship, &c., or any part thereof." There is, indeed, no English decision precisely on the point; but there seems to be as good reason for underwriters making good such loss as a loss sustained from pirates. [LITLEDAL, J. That loss is particularized.] But it would clearly be the subject of indemnity, though not particularized. A general average comes within the insurance only from the general words. The expression "free of average, under three pounds per cent., unless general," show this; for general average is specified as an exception from the exception: it must therefore be included in the subject-matter from which the main exception is made, that is, in the perils insured against. But among these perils there is no specific mention of general average: the general words therefore cover that, and the same words must also be sufficient to cover any loss by an accident like that in question. The principle is, that the underwriter makes good all that, by means of the peril, the owner is bound to pay: and here he was, in fact, as much bound to pay as the owner of goods is bound to pay harbor duties; for the owners of the *Forbes* had the legal means of enforcing the payment. It is true that, by the English common law, each party bears *his own costs, in case of a collision, if there be fault in each; and it [*423] must certainly be assumed that there was fault on each side, in the present case. But the more generally understood law in maritime states is that, if there be fault in each party, each bears half of the aggregate loss of the two; and this may perhaps be considered the more reasonable principle. In the case of *The Woodrop Sims*, 2 Dods. Adm. Rep. 85, this rule was laid down by Sir William Scott, as follows:—"This is one of those unfortunate cases in which the entire loss of a ship and cargo has been occasioned by two vessels running

* Before Lord DENMAN, C. J., LITLEDAL, WILLIAMS, and COLERIDGE, Js.

foul of each other. There are four possibilities under which an accident of this sort may occur. In the first place, it may happen without blame being imputable to either party; as where the loss is occasioned by a storm, or any other vis major: In that case, the misfortune must be borne by the party on whom it happens to light; the other not being responsible to him in any degree. Secondly, a misfortune of this kind may arise where both parties are to blame; where there has been a want of due diligence or of skill on both sides: In such a case, the rule of law is, that the loss must be apportioned between them, as having been occasioned by the fault of both of them. Thirdly, it may happen by the misconduct of the suffering party only; and then the rule is, that the sufferer must bear his own burthen. Lastly, it may have been the fault of the ship which ran the other down; and in this case the injured party would be entitled to an entire compensation from the other." In the Laws of Oleron, 15 [*424] Vin. Abr. tit. Master of a Ship, (A) 27, p. 340; *it is said, "If a ship in her voyage, lying anywhere at anchor, be struck or grappled with another vessel under sail, for want of good steering, whereby the vessel at anchor is prejudiced, and the goods in her damnified; in such a case the whole damage is to be in common, and to be equally divided and appraised half by half. And the master and mariners of the vessel that struck, or grappled with the other, shall swear on the Holy Evangelists, that they did it not wittingly or wilfully; the reason of this judgment is, that an old vessel might not purposely come in the way of a better; which she will hardly do, as long as the damage must be equally shared." In Emerigon, vol. i. p. 413 (ed. 1827), Ch. xii. s. 14, it is said, "Si l'abordage n'est pas arrivé par cas fortuit, et qu'il soit impossible de savoir par la faute de qui, c'est alors le cas de partager le différend, et de faire supporter la moitié du dommage à chacun des deux navires. Tel est le sens de l'art. 10, titre des avaries. 'En cas d'abordage de vaisseaux, est-il dit, le dommage sera payé également par les navires qui l'auront fait et souffert, soit en route, rade, ou au port.'" For which are cited Les Jugemens d'Oléron, art. 14; L'Ordonnance de Wisbuy, art. 26, 27, 50 & 70; and Le Droit Anséatique, tit. 10. The editor, M. Boulay-Paty, in the comparison, at the end of the section, with the modern code of commerce, says (p. 417) that the law is that, if there be doubt, in the case of collision, as to the cause, each vessel is to bear its part; and he goes on thus: "La loi considère donc comme les vraies causes du dommage la fortune de mer, la force majeure qui a poussé les navires l'un [*425] sur l'autre; et dans ce cas, la portion qui *incombe au navire assuré doit être à la charge des assureurs, qui, par la nature du contrat d'assurance, sont tenus de tous les accidens arrivés sur mer, quelque insolites, inconnus ou extraordinaires qu'ils soient." That reasoning applies here; and it may be added that, the less an accident can be foreseen, the more properly is it the subject of insurance, since that which was foreseen would not be insurable. Pothier, in his *Traité du Contrat d'Assurance*, ch. i. sect. ii. art. 2, § 2, 49.^a says, "L'assureur se charge par le contrat d'assurance, des risques de tous les cas fortuits qui peuvent survenir par force majeure durant le voyage, et causer à l'assuré une perte dans les choses assurées, ou par rapport auxdites choses." If, then, the *La Valeur*, as was clearly the case, could not be released without this payment, the payment falls within that class of losses which the underwriters must make good.

Secondly, as to the wages and provisions of the crew for the time during which the ship was under necessary repair. These are incidental to the repairs, and, being so, must be governed by the same rule. It is a general principle (subject to some exceptions which may easily be explained), that, where underwriters are liable to indemnify for any part of a loss, they must indemnify for the whole. Now, in the case of any damage which is the subject of general contribution, the wages and other expenses of the crew during the time of

¹ And see Boulay-Paty, *Cours de Droit Commercial Maritime*, tit. x. s. 16, tom. 4, p. 16.

² *Traité sur Différentes Matières de Droit Civil*, tom. 8me, p. 18 (2d ed. 1781).

repair, which are in the nature of accessaries to the principal expense, that of repairing, must also be the subject of general contribution. In *Abbott on Shipping*, Part III. ch. 8, s. 7, p. 350 (5th ed.), it is said, "But if [*426] a ship should necessarily go into an intermediate port for the purpose only of repairing such a damage as is in itself a proper object of general contribution, possibly the wages, &c., during the period of such a detention, may also be held to be general average, on the ground that the accessary should follow the nature of its principal." The author does not apply this to insurances, which are not the subject of his work; but the passage seems to warrant such an application of the doctrine, that the accessary is to follow its principal. Now, here, the underwriters were indisputably bound to make good the expense of the repairs: they must, therefore, bear the accessary expense. Suppose, in the case put in the extract just given, the owner of goods, who was liable to the general average, had insured these goods, the underwriters would have to make good the payment of the wages, &c. Why should the same principle not be applied, where the insurance is on the ship, to the share of general average which falls on the owner of the ship? And, if there be no cargo, and consequently no one to contribute to a general average, can that make any difference in the liability of the underwriters? Can it be contended that the principle holds if there be a single bale of goods on board, but ceases to be applicable if there be no cargo? When the damage is to the subject insured, that is a partial loss, to which the underwriter is liable; and it is immaterial to inquire whether it be a general average or not, the underwriter being liable to the assured in the whole (though, if it be a general average, he may claim contribution from those *liable to contribute); so that, in such a case, as between the underwriter and the [*427] assured, particular and general average become identical. In *Fletcher v. Poole*, 1 Park, Ins. ch. 2, p. 89, 7th ed., it was held that the extraordinary wages and provisions expended during the detention of the ship could not be recovered on a policy on the ship. But that was a mere case of detention to refit: the plaintiff claimed only the wages and provisions expended during her repairs. It does not appear that the repairs were occasioned for anything but ordinary wear and tear, or by anything for which the underwriters were liable. The same remark applies to the cases of *Eden v. Poole*, 1 Park, Ins. ch. 2, p. 91, 7th ed., and *Robertson v. Ewer*, 1 T. R. 127. In *Power v. Whitmore*, 4 M. & S. 141, the wages and provisions of the crew expended while the ship was in port repairing a damage occasioned by a tempest were held not to be the subject of general average; and, consequently, the plaintiff, whose insurance was on goods, could not recover against his underwriter money paid by him as a contribution to such expenses. That decision was on the ground that there had been no sacrifice of a part to preserve the whole, and consequently no general average to which the plaintiff was liable to contribute; reasoning which does not show that the underwriter on the ship would not be liable to pay the expenses in question, but rather that he would be; for there is no doubt that the principal damage to which the expenses in question were accessary, being a damage to the ship by the perils of the sea, would be one to which he would be liable, though the underwriter on goods (the defendant in **Power v. Whitmore*, 4 M. & S. 141), would not, according to the doctrine, laid down in *Abbott on Ship-* [*428] *ping*, Part III., ch. 8, s. 7, p. 350 (5th edit.), that such expenses are not matter of general average, but "must fall on the ship alone." Whoever is liable to the damage sustained by the ship must therefore sustain such expenses. It follows that the underwriters on the ship, who is clearly liable to the damage which the ship sustains, must pay these expenses also. A stater of averages arranges the losses in three columns, headed respectively, "General," "Ship," "Owners;" and under "Ship" he sets down all to which the underwriters on the ship are liable. So *BULLER, J.*, in *Eden v. Poole*, Park, Ins. ch. 2, p. 91, 7th ed., held the underwriters on the ship and goods not liable, because "the freight, and not the ship," was liable to the loss. In the last-cited passage in

Abbott, the author refers to the Code de Commerce, art. 403.¹ There the expenses of the wages and provisions of the crew, during the detention by a foreign power, or by the necessity for repairs, are classed together as particular averages; and the article is cited in the conference of the modern law with Emerigon (vol. i., p. 619, ch. xii., s. 41, ed. 1827), by Boulay-Paty. The same author, in a work of his own, *Cours de Droit Commercial Maritime*, vol. iv. [429] p. 40, tit. *X. s. 16, says that, in case of the arrest or other detention of a vessel after departure (and in the passage just cited, arrest "par ordre d'une puissance" is placed in the same class with detention for the purposes of repair), the insurers must bear the loss resulting from the cost of provisions and wages of the crew. This is also the American law.² Some foreign authorities class such expenses as general average, on the same principle as that upon which expenses of going into port to preserve a ship are so classed: this is apparently an extension of the Rhodian law, by which a *jactus* was requisite.³

Cur. adv. vult.

Lord DENMAN, C. J., in this term (January 30th) delivered the judgment of the Court.

This was a motion for a new trial in an action of *assumpsit*, tried before me at Guildhall, on the insurance of a ship, for loss by perils of the sea. The jury found a verdict according to my direction, excluding the expense for wages and provisions incurred from the time of her repairing damage sustained from a storm, and excluding also the sum of money which the owners had paid in consequence of some proceedings commenced in the Court of Admiralty at Calcutta, in consequence of an accidental collision with another vessel in the Hoogly river. The new trial was moved for on the ground that both these heads of damage ought to have been taken into account by the jury.

[430] *We think it clear, on authority, that the former item ought not to be allowed. As long ago as 1769, in *Fletcher v. Poole*, 1 Park, Ins. ch. ii. p. 89, 7th ed., the point was decided by Lord MANSFIELD at Nisi Prius. The doctrine has been cited in the text-books ever since that period, and is expressly recognised by BULLER, J., in *Robertson v. Ewer*, 1 T. R. 182. The facts of that case did not indeed require the doctrine, which is merely assumed in the argument of that learned Judge to illustrate his opinion on the case then before the Court. Mr. Maule therefore urged that the law rested on a single decision of Lord MANSFIELD's at Nisi Prius; but, when we consider the high authority of that great master of insurance law,—that that case was unquestioned,—that it received the sanction of so eminent a lawyer as Mr. Justice BULLER, who treats it as clear enough to lay the foundation of an argument from analogy;—when it is fully adopted in the works of distinguished writers on the subject;—and, above all, when we find no trace of even a claim being set up inconsistent with it for a period of near 70 years, though the facts must have afforded the opportunity many thousands of times, we think this point must be regarded as fully established, and that we should not be justified in casting any doubt upon it.

We would only further observe that the passage cited from Lord TENTERDEN's excellent work, *Abbott on Shipping*, 350, which speaks of these expenses as being in the nature of an accessory to a principal, is confined to the questions

¹ Tit. 11 ème, "Sont avariés particulières:—1° le dommage arrivé aux marchandises par leur vice propre, par la tempête, prise, naufrage ou échouement;—2° les frais faits pour les sauver;—3° la perte des cables, ancres, voiles, mâts, cordages, causée par tempête ou autre accident de mer;—les dépenses résultant de toutes relâches occasionnées, soit par la perte fortuite de ces objets, soit par le besoin d'avitaillement, soit par voie d'eau à réparer;—4° la nourriture et le loyer des matelots pendant la détention, quand le navire est arrêté en voyage par ordre d'une puissance, et pendant les réparations qu'on est obligé d'y faire, si le navire est affréé au voyage."

² See, however, Phillips's *Treatise on the Law of Insurance*, vol. i. ch. xvi., sec. 1, p. 370. (Boston, U. S. 1828.)

³ See, Pardessus, *Cours de Droit Commercial*, tom. 2, part iv. tit. iv. ch. iv. sect. i. § v. (740), and part iv. tit. v. ch. i. sect. ii. § i. (773).

of contribution which may exist between the owners and the freighters, and does not in anywise relate to the *demands which may be preferred against underwriters. It therefore furnishes no proof that he differed from the [*431] doctrine above alluded to. On the contrary, if he had intended to do so, he could hardly have failed to express his dissent in direct terms.

The second point appears to be entirely new, which circumstance is not so strong an argument against it as against the former claim, because the event is likely to have been of much less frequent occurrence. But, if we look for the principle on which *Fletcher v. Poole*, 1 Park, Ins. ch. ii. p. 89, 7th ed., was decided, it must obviously be that well-known maxim of our law, *in jure non remota causa sed proxima spectatur*. "It were infinite" (says BACON) *Maxims of the Law*, p. 35, of Law Tracts, 1737, "for the law to judge the causes of causes, and their impulsions one of another; therefore it contenteth itself with the immediate cause, and judgeth of acts by that, without looking to any farther degree." Such must be understood to be the mutual intention of the parties to such contracts. Then how stands the fact? The ship insured is driven against another by stress of weather; the injury she thus sustains is admitted to be direct, and the insurers are liable for it. But the collision causes the ship insured to do some damage to the other vessel; and, whenever this effect is produced, both vessels being in fault, a positive rule of the Court of Admiralty requires the damage done to both ships to be added together, and the combined amount to be equally divided between the owners of the two. It turns out that the ship insured has done more damage than she has received, and is obliged to pay the owners of the *other ship to some amount, under the rule of the [*432] Court of Admiralty. But this is neither a necessary nor a proximate effect of the perils of the sea; it grows out of an arbitrary provision in the law of nations from views of general expediency, not as dictated by natural justice, nor (possibly) quite consistent with it; and can no more be charged on the underwriters than a penalty incurred by contravention of the revenue laws of any particular state, which was rendered inevitable by perils insured against.

We think therefore that no rule ought to be granted.

Rule refused.

*RICKETTS v. BODENHAM and Others.

[*433]

Same v. Same.

Same v. Same.

Stat. 53 G. 3, c. 127, s. 7, which gives power to a justice to enforce the payment of a sum under 10*l.* due upon a church-rate, where the validity of the rate has not been questioned, nor the liability of the party, takes away the jurisdiction of the Ecclesiastical Court in such cases.

But, if the validity or liability be in question, the Ecclesiastical Courts have jurisdiction though the party has not been summoned before a justice.

Therefore, where a party, not having been summoned before a justice, was libelled in the Consistory Court for a sum which, on the face of the proceedings, was less than 10*l.*, due upon a church-rate, and sentence was given against him, this Court refused to grant a prohibition upon the ground that the validity of the rate was questioned in the proceedings in the Ecclesiastical Courts.

And afterwards, it appearing, by more particular reference to the pleadings themselves, that they did not disclose whether or not the validity was questioned, this Court held that that circumstance alone did not authorize it to issue a prohibition.

Semble, that the Consistory Court of the Bishop, the Court of Arches, and the Court of Delegates, are superior courts; and, that after sentence, unless defect of jurisdiction be apparent on the proceedings therein, it will not be intended.

Semble, that, on a motion for prohibition as above, this Court will look only to the proceedings in the Ecclesiastical Court, and not to affidavits, for the purpose of ascertaining whether the validity of the rate was there questioned.

THE defendants, being the churchwardens of the parish of Presteign, in the

diocese of Hereford, for the year commencing at Easter, 1830, instituted a suit on the 8th of July, 1830, against the plaintiff, in the Consistory Court of Hereford, for three church-rates, amounting severally to 5*l.* 15*s.*, 4*l.* 6*s.* 3*d.*, and 4*l.* 6*s.* 3*d.*, assessed by the churchwardens for the years 1827, 1828, and 1829, respectively. Before they had proceeded beyond the libel, they amended the libel, by abandoning their claim for all but the rate of 4*l.* 6*s.* 3*d.* made by the churchwardens for 1829. A decree was pronounced against the plaintiff, with costs. He then appealed to the Court of Arches, which affirmed the decree, with costs. He then appealed again to the Court of Delegates, which also affirmed the decree with costs. Three significavit were issued from the several courts, for the sum of 4*l.* 6*s.* 3*d.* and costs, and three several writs de contumace capiend.

[*434] In Trinity term last, Sir *F. Pollock* obtained three *rules to show cause why writs of prohibition should not issue to the three ecclesiastical courts respectively, on the ground that stat. 53 G. 3, c. 127, s. 7,¹ took away the jurisdiction of the spiritual courts in cases where the claim made is for a church-rate under 10*l.* The affidavit in support of the rule stated the above facts, and that questions respecting the validity of the writs and significavits were pending before this Court and the Court of Chancery; and that the plaintiff believed the whole of the writs and significavits to be irregular, invalid, and illegal; that previously to the commencement of the suit he had not been summoned, nor, to his knowledge and belief, had any proceedings been taken against him, before any justice of the peace; and that previously to such commencement the validity of the rates had not, to his knowledge, been questioned in any ecclesiastical court. There were also statements for the purpose of showing that the sentence of the Consistory Court was wrong on a point of practice.

By the affidavits in answer, it appeared that Mr. Ricketts, after the affirmation of the sentence by the Court of Delegates, presented a petition, and also a supplemental petition, to the King in Council, for a commission of review, which petitions were referred to the Lord Chancellor, and rejected; that, before the significavit from the Consistory Court of Hereford issued, as mentioned in the affidavit in support of the rule, a significavit had issued from the same court, which had been quashed for irregularity on motion before the Lord Chancellor, and that no writ de contumace capiend had issued thereon; that motions were

[*435] *afterwards made in Chancery to quash the three significavits mentioned in the affidavit in support of the rule; that the Court of Chancery had then quashed the significavit from the Consistory Court which had issued after the quashing of the previous one, but had sustained those from the other two; that, in the proceedings, Mr. Ricketts had questioned the validity of the rate; that, in the proceedings before the Court of Delegates, he had printed the whole of the rates of 1830 and 1832; and that, in his petition for the commission of review, he had insisted on the invalidity of the rate, on the following grounds, viz., that it contained on the face of it an unequal and fraudulent assessment, that it was made partly for an illegal purpose, that there was no proof in the cause that the rate was duly made, and with legal notice, as asserted in the libel; that the rate was not stated in the libel, though found in the sentence, to have been made at a meeting of the landholders; and that there was no proof that the inhabitants who attended were landholders. The affidavits further stated that Mr. Ricketts had never, during the proceedings, raised the question as to his not having been summoned before the justices; that the objections on the point of practice had formed the subject of the appeal; and that, before the suit commenced, Mr. Ricketts had, on being applied to for the rate, refused, alleging as his reason that the rate was illegal for stating a part of his land to be situate in a wrong township of the parish.

The case was argued in last Michaelmas term, November 24th² and 25th,³ and in this term, January 28th.⁴

¹ See the clause set out, ante, p. 356, note (a).

² Before Lord DENMAN, C. J., PATTERSON, WILLIAMS, and COLERIDGE, Js.

³ Before Lord DENMAN, C. J., LITTLERDALE, WILLIAMS, and COLERIDGE, Js.

*Sir John Campbell, Attorney-General showed cause. Sentence having been pronounced in each of the three courts, no prohibition can issue; In the matter of Poe, 5 B. & Ad. 681, in the case of a court martial; unless upon the face of the proceedings there be no jurisdiction; *Buggin v. Bennet*, 4 Burr. 2035, in the case of the Court of Admiralty; *Blacquiére v. Hawkins*, 1 Doug. 378, in the case of the Lord Mayor's Court in London; *Full v. Hutchins*, 2 Cowp. 422, in the case of an ecclesiastical court. Other authorities are collected in Harrison's Digest, Inferior courts, iii. 2, and Com. Dig., Prohibition (D). In *Gould v. Gapper*, 5 East, 345, and see *Gare v. Gapper*, 3 East, 472, it appeared, upon a declaration in prohibition, which was demurred to, that an ecclesiastical court had put a wrong construction on an act of parliament, and this Court (after sentence) directed that the prohibition should stand. There the nature of the question entertained by the ecclesiastical court, and the decision to which that court came, were collected from the proceedings as set forth in the declaration in prohibition and admitted by the demurrer. That case shows how the defendant here should have raised the question of the jurisdiction of the ecclesiastical court, so as to make the case cognisable by this Court after sentence. If, in this case, the plaintiff were to declare in prohibition, nothing would appear but the libel and sentence. Upon demurrer, as in *Gould v. Gapper*, 5 East, 345, and see *Gare v. Gapper*, 3 East, 472, to such a declaration, the defendant must have had judgment. Supposing the proceedings to be properly before the court, the question is, whether they necessarily show want of jurisdiction. It will be *said that stat. 53 G. 3, c. 127, s. 7, by giving to two justices of the peace power to enforce the rate in cases under 10*l.*, impliedly takes away the power of the ecclesiastical court in such cases; and that here the rate proceeded for appears on the proceedings to have been under 10*l.* The object of that provision was to prevent the necessity of summoning before an ecclesiastical tribunal parties who refused to pay small rates, but did not dispute their legal liability to do so, as Quakers. But, even admitting that the power of the ecclesiastical court is taken away by implication wherever power is given to the justices (though it might be argued that in such cases the jurisdictions are co-ordinate), still the statute gives the power to the justices only where the validity of the rate has not been questioned in any ecclesiastical court, and expressly saves the power of that court, where the validity of the rate, or the liability of the person, is questioned. It does not appear on the face of these proceedings that the validity or liability was not questioned; and the Court will presume in favor of the sentence whatever is necessary to give jurisdiction: the prohibition cannot go, unless the proceedings be necessarily on the face of them without jurisdiction, and this they are not if any state of facts consistent with them can be suggested which would give jurisdiction. Further it appears by the affidavits that the plaintiff did in fact dispute the validity of the rate. [COLERIDGE, J. How can we notice that fact upon affidavit?] If facts not on the face of the proceedings can be noticed, the Court will see that this prohibition could not have gone even before sentence, especially as it does not appear that the plaintiff, when before the ecclesiastical court, made the *complaint now raised in his affidavit, that he had not been summoned before justices; [437] and the appeals are the act of the plaintiff himself. [438]

Sir Frederick Pollock, contra. The amount proceeded for is less than 10*l.* The parties had no right to unite the bygone rates with another, in order to carry the sum above 10*l.*; and all but the last rate, which is under 10*l.*, was abandoned. Therefore it is as if the last rate alone had been demanded at first. The stat. 53 G. 3, c. 127, s. 7, expressly preserves the jurisdiction of the ecclesiastical courts in causes touching the validity of the rate, and their power to enforce payment, where the amount exceeds 10*l.* This shows that the previous part of the section, by conferring the power upon two justices when the sum does not exceed 10*l.*, takes it away in such cases from the ecclesiastical courts.

Besides, the mere fact that there is a remedy in the temporal courts is ground for a prohibition to the spiritual courts. But see *Cranden v. Walden*, 3 Lev. 17. It is said in Co. Lit. 96, b., "And here is implied another maxim of the law, that where the common or statute law giveth remedy in foro seculari (whether the matter be temporal or spiritual), the consueance of that cause belongeth to the king's temporal courts only; unless the jurisdiction of the ecclesiastical court be saved or allowed by the same statute to proceed according to the ecclesiastical laws." It is true that the ecclesiastical courts still retain the jurisdiction for any amount, where the validity of the rate, or the personal liability, is disputed; but that power is preserved merely by the enactment that the justices

[*439] *shall "forbear giving judgment," on receiving notice from the party, and that then the person demanding may proceed as before the act. This shows that the jurisdiction does not vest in the ecclesiastical courts, where the amount is less than 10*l.*, till the party has been summoned before the justices; for he otherwise has no opportunity of giving the notice. Now here the plaintiff never was so summoned; the proceedings in the ecclesiastical court are therefore merely void, and it is immaterial what the plaintiff did before a court which had no cognisance of the question. Then it is said that the application is too late. In the matter of *Poe*, 5 B. & Ad. 681, is not an authority for the point contended for: there the sentence was executed before the application was made. If the matter appear to be out of the jurisdiction of the Court, the prohibition may go after sentence, and even, in some cases, after execution. The authorities are collected in Com Dig. Prohibition (D). A cause cannot indeed be properly said to be fully over while the execution is in fieri; and, until all be done which the court below can do, the prohibition may issue. Here, as to the Consistory Court at all events, the significavit which they have issued turn out to be incorrect, and they may grant a fresh monition, *Austen v. Dugger*, 1 Add. Ecol. Rep. 307: the suit below is therefore still in fieri. It is said that the plaintiff has chosen to appeal; but, if he had not appealed, the only difference in the result would have been that he would have earlier been in the position in which he is now. By stat. 1 W. 4, c. 21, s. 1, application for prohibition may now [*440] be made upon affidavit only. Even admitting it to be necessary that *the defect of jurisdiction should appear on the proceedings, they show that the sum demanded was less than 10*l.* But the rule suggested on the other side as to this point is inaccurate. It is true that, in the case of superior courts, unless on the face of the record there be necessarily a want of jurisdiction, everything essential to the jurisdiction shall be intended; but, in the case of inferior courts, all that is essential to the jurisdiction must appear on the face of the proceedings, otherwise the jurisdiction will not be presumed; 2 Bacon's Abridgment, Courts, D. 3, and 4; 7th ed. So that the proceedings are bad, for want of showing that the validity of the rate, or the liability of the party, was in question. [Sir J. Campbell. The authorities cited as to inferior courts do not apply to the spiritual courts, which are courts Christian and superior, though liable to prohibition if they exceed their jurisdiction. As to the argument that a new monition may issue, that, at any rate, does not apply to the Court of Arches, nor the Court of Delegates, the significavits of these two courts having been held good, and those courts having therefore no more to do.]

Cur. adv. vult.

Lord DENMAN, C. J., in this term (February 1st), delivered the judgment of the Court.

There were three cases of application for a prohibition in the same cause; the first to the Consistory Court of the diocese of Hereford, the second to the Court of Arches, the last to the Court of Delegates, in each of which courts successively sentence had passed against the applicant.

[*441] It appeared that the original suit had been to enforce *the payment of a church-rate amounting to 4*l.* 6*s.* 3*d.*, and that the defence had been that the rate was made at a meeting of which no due and legal notice had been

given, that it was made for an illegal purpose, and showed upon the face of it an unequal and fraudulent assessment.

On showing cause against the motion, it was contended that the only ground of prohibition suggested was a supposed want of jurisdiction in the court below to proceed in the matter of a church-rate, where the sum to be recovered did not exceed 10*l.*, but that the objection, coming after sentence, was too late, unless it appeared on the face of the proceedings in that court. And there is no doubt that, in the case of prohibition to be granted for the sake of trial, as distinguished from those which are to be granted upon account of a wrong trial or erroneous judgment, the rule is established, that a party neglecting to contest the jurisdiction in the first instance, and taking his chance of a favorable decree, shall not be allowed after sentence to allege the want of jurisdiction as a ground of prohibition, unless the defect appears on the face of the pleadings. The justice of the rule is very apparent, and the propriety of the exception scarcely less so; for it is the duty of this Court to restrain any encroachment of jurisdiction in the inferior courts, and therefore it interferes for the sake of the public, and not of the individual, where, the want of jurisdiction appearing on the face of the proceedings, the case might become a precedent, if allowed to stand without impeachment.

In support of the application, Sir *F. Pollock* scarcely disputed this general doctrine; but he contended that, inasmuch as, on the face of the libel, the suit appeared *to be for a rate under 10*l.*, the want of jurisdiction was [442] from that circumstance alone, and by itself, apparent. It is necessary therefore to examine the statute 58 G. 3, c. 127, s. 7, to see whether this argument is maintainable.

That section commences with a preamble, stating the expediency that church- or chapel-rates of limited amount, unduly refused or withheld, should in certain cases be more easily and speedily recovered. It then goes on to provide for the case of a refusal or neglect by any one duly rated to a church-rate, or chapel-rate, the validity of which has not been questioned in any ecclesiastical court, to pay the sum in which he is rated; and gives a summary mode of enforcement before two justices, who are empowered to order the payment of what is due and payable in respect of such rate, so as the sum ordered to be paid do not exceed 10*l.* There is then an appeal given to the sessions against such order, with a stay of execution pending the appeal. And this is followed by the material proviso, "that nothing herein contained shall extend to alter or interfere with the jurisdiction of the ecclesiastical courts to hear and determine causes touching the validity of any church-rate or chapel-rate, or from proceeding to enforce the payment of any such rate, if the same shall exceed the sum of 10*l.* from the party proceeded against." If the section had stopped here, we should have thought it clear that a distinction was made between suits in which the validity of a rate was questioned, and those in which, the rate being disputed, the only object was to enforce the payment; that, as to the former, the jurisdiction of the ecclesiastical courts was left wholly untouched; in the latter, it was by implication taken away *where the sum does not [443] exceed 10*l.* This interpretation makes the enacting part of the section and the proviso consistent, and both together to form a complete enactment on the subject. But this view of the statute is made more clear by the proviso which immediately follows, that, "if the validity of such rate, or the liability of the person from whom it is demanded to pay the same, be disputed, and the party disputing the same give notice thereof to the justices, the justices shall forbear giving judgment thereupon, and the person or persons demanding the same may then proceed to the recovery of their demand, according to due course of law, as heretofore used and accustomed." This proviso applies only to cases under 10*l.*; and the effect of it is that, even in such cases, the moment it appears that the question is one not merely of enforcing payment, but touching the validity of the rate, the summary jurisdiction is at an end, and that of the civil court attaches.

If this interpretation of the section be correct, it is obvious that the mere fact, that on the face of the proceedings the suit appears to relate to an assessment for a sum not exceeding 10*l.*, cannot prove a want of jurisdiction in the ecclesiastical court to entertain the cause. Without entering into the argument at the bar, as to presumptions for or against the proceedings of inferior courts, or whether the doctrine applies to the ecclesiastical courts, it is at least undeniable that this Court ought to examine the whole of the proceedings, in order to collect from them, if it can, whether the suit, admitted to be for less than 10*l.*, was a suit in which the validity of the rate or the liability of the defendant was questioned, or whether it was merely for enforcing the [*444] payment; *this being the real point on which the question of jurisdiction must depend.

Now, upon such examination, it is obvious that the validity of the rate, and nothing else, was in question; it follows, therefore, that there is no want of jurisdiction apparent on the face of the proceedings: and it becomes unnecessary to give any opinion upon other points made in the argument.

Considering that Mr. Ricketts has proceeded through two stages of appeal without raising the ground of objection which is now made, we cannot regret that all the authorities warrant us in discharging this rule.

Rule discharged.

In Easter term following (April 18th), Sir *Frederick Pollock* again applied¹ for a rule to show cause why a prohibition should not issue, on an affidavit by the plaintiff that the validity of the rate had not been questioned in the ecclesiastical court, nor had the defendant then disputed his liability to pay; that he should not have questioned either, if he had been summoned before justices; and that he conceived the Court to have given judgment on the supposition that he had raised such a question before the ecclesiastical court. The proceedings, as entered in the books of the Consistory Court, were annexed to the affidavit; and the material part of them was as follows. Mr. Ricketts was cited in the Consistory Court, in a cause of subtraction of church-rates, and appeared personally. The libel, as amended, stated that the churchwardens for 1829, [*445] being about to expend money *on the repair of the parish church and for other things relating to the office of churchwardens, met, January 1st, 1830, with some of the most substantial inhabitants of the parish, pursuant to legal notice, in order to make a church-rate or assessment, and did make a rate at three pence in the pound, &c.; that Mr. Ricketts, at that time of the making the rate, was an inhabitant, and occupied within the parish property of certain value (specified in the libel), for which he was assessed (as specified in the libel), in 4*l.* 6*s.* 3*d.*; and that he had several times been requested to pay the same, but refused, and still did refuse to pay. Mr. Ricketts prayed to be furnished with the churchwardens' accounts for 1827, 1828, and 1829, which the judge decreed. Certain accounts having been delivered into Court, in obedience to this order, R. objected to them as incomplete; and the judge, upon inspection, declared them to be incomplete. Accounts having again been delivered in, R. still objected to their incompleteness: the judge, on R.'s petition, having previously allowed him time to give his personal answers, now allowed further time, upon which the proctor on the other side waived the personal answer of R. At the next court, R. applied for costs, in consequence of the opposing proctor having waived his personal answers, upon which the judge took time to deliberate. The witnesses in support of the libel were then produced; and, upon R. objecting to their production, they were admitted by the judge. R. having failed to appear at the four next successive courts, the cause was concluded at the last of these, and R. monished to attend and hear sentence at the [*446] next court. He appeared at *the next court, and protested that he had not been duly monished, which the proctor on the other side denied; and the judge read and passed sentence; by which it was declared that the

¹ Before Lord DENMAN, C. J., LITLEDALE, PATTESON, and COLERIDGE, Js.

proctor of John Bodenham, &c., had prayed for justice to his party, but that R. had made no prayer, and that the said proctor had fully proved, &c., and that nothing, or at least nothing effectual, had been proved, &c., on behalf of R.; and the judge decreed that R. ought to be condemned, and did condemn him, in the rate of 4*l.* 6*s.* 3*d.* with costs.

Sir Frederick Pollock. The Court will not refuse to revise their judgment, ex debito justitiæ, if it shall appear to have been founded on a misconception as to the facts. It is now shown that the validity of the rate does not appear to have been questioned on the face of the proceedings; therefore the prohibition must go, for want of jurisdiction appearing, according to the rule referred to before, that, in the case of inferior courts, nothing will be intended in favor of the jurisdiction. That rule was affirmed in *Winford v. Powell*, 2 *Ld. Raym.* 1310; *Trevor v. Wall*, 1 *T. R.* 151; *Higginson v. Martin*, 2 *Mod.* 197. [*LITTLEDALE, J.* Those are cases of common law courts, which are inferior to the Courts of Westminster Hall; but ecclesiastical courts are not so.] The fact that this Court will restrain the ecclesiastical courts by prohibition shows that they are inferior to this Court, so far as the present argument is concerned; though, in some sense, they may be termed superior courts. An attempt was made to obtain a prohibition against the Lord Chancellor, sitting in bankruptcy, *which failed.¹ [*LITTLEDALE, J.* Prohibition lies to the courts of a [*447] county palatine, if they hold plea of lands out of the county.*] Here, however, the want of jurisdiction does appear on the face of the proceedings; for the claim appears to be less than 10*l.*, which takes the jurisdiction from the spiritual court, unless it appear on the record that the parties had previously been before justices. [*COLERIDGE, J.* Nothing appeared to raise the question of jurisdiction except the amount; and, by the statute, if the validity be questioned, the jurisdiction of the ecclesiastical court is as it was before.

Cur. adv. vult.

Afterwards, in the same term (May 9th), Lord DENMAN, C. J., said,

The Court has looked into this question, but does not consider it necessary to add to what was previously said. There will be no rule. Rule refused.

¹ In *Ex parte Cowan*, 8 *B. & Ald.* 128. No express decision was given on the question, whether the Court of King's Bench could prohibit the Lord Chancellor sitting in bankruptcy; but the prohibition was refused, on the ground that no excess of jurisdiction appeared in the particular case.

² *Com. Dig.* Prohibition (A 1). That the courts of the counties palatine are superior courts, see *Peacock v. Bell*, 1 *Saund.* 78.

*CLARKE and Others *v.* SPENCE and Others.

[*448]

P. contracted with a shipbuilder to build him a ship for a certain sum, to be paid by instalments as the work proceeded; the first instalment when the vessel was rammed, the second when she was timbered, &c. An agent for P. was to superintend the building. The vessel was built under such superintendence, all the materials being approved by the agent before they were used. The builder became bankrupt before the ship was completed. Afterwards the assignees completed the ship. All the instalments were paid or tendered. In an action of trover by P. against the assignees for the ship:

Held, that, on the first instalment being paid, the property in the portion then finished became, by virtue of the above contract, vested in P., subject to the right of the builder to retain such portion for the purpose of completing the work and earning the rest of the price; and that each material subsequently added became, as it was added, the property of P. as the general owner.

Held, further, that under the above circumstances the ship did not pass to the assignees as having been in the possession, order, or disposition of the bankrupt by consent of the true owner, within stat. 6 *G. 4*, c. 16, s. 72.

TROVER for a ship. Plea, the general issue. The plaintiffs were merchants, carrying on business at Newcastle-upon-Tyne, under the firm of Clarke, Plum-

mer and Co.; the defendants were the assignees of John Brunton, a bankrupt. On the trial before ALDERSON, J., at the Durham Spring assizes, 1834, a verdict was found for the plaintiffs for 1002*l.* 11*s.*, subject to the opinion of this Court on the following case.

On the 24th of February, 1832, Brunton, before his bankruptcy, contracted, by a written agreement, to build a ship (not now in question) for the plaintiffs, and the contract was performed on both sides. The agreement commenced with a specification, stating, under several heads of "dimensions," "scantling," "stores," &c., the manner in which the ship was to be built, the materials to be used, and the outfit to be furnished; and it then proceeded as follows: "It is agreed between Mr. John Brunton, of Southwick, shipbuilder, and Clarke, Plummer and Co., of Newcastle, that the said Mr. John Brunton will build a vessel of the before-mentioned dimensions and scantlings, in every point fully equal to the *Andromeda* in workmanship, and fit said hull out with the materials of the sizes and descriptions before *named, all of approved quality, [*449] &c. Mr. Benjamin Heward to superintend the building and outfit. The vessel to be launched in the month of July next ensuing: for the sum of 3250*l.*, payable as follows:

"When rammed, by bill at three months' date, to the amount of	£400
When timbered, the like payment of	400
When decked, the like payment of	400
When launched, the like payment of	500
The residue or balance, one-half at four months and six months date, to the amount of	1550
	<hr/> £3250.

"JOHN BRUNTON for self and Co.

"Signed at Southwick, 24th February, 1832.

"THOMAS CLARKE."

"1832, March 22d. Agreed with Mr. Brunton to make the vessel six inches deeper, say to be 17½ feet deep, for which he is to be paid 25*l.* On the same day arranged with Mr. Heward to inspect the building of the vessel, for which he is to be paid the sum of 40*l.*

"THOMAS CLARKE."

On the 5th of July, 1832, Brunton contracted in writing with the plaintiffs to build them another ship, the subject of this action. The agreement was as follows:

"Southwick, 5th July, 1832.

"Messrs. Clarke, Plummer and Co., Newcastle.

"SIRS:—I agree to build you a vessel of the following dimensions for the sum of 3400*l.*;" (here followed a statement of dimensions;) "to be finished in [*450] every *respect similar to the vessel I contracted to build for you on the 24th of February last, with the exception of the anchors, which for the present vessel are to be of the weights," &c. "The vessel to be launched in the month of December next, and to be paid for in the same way as the vessel already alluded to.

I am, sirs, yours respectfully,

"JOHN BRUNTON."

"Mr. Heward to superintend the building of the within-named vessel, and to be paid 40*l.* for the same.

"T. C."

Brunton proceeded to build the last-named vessel in his yard at Southwick, and before his bankruptcy the vessel was rammed and timbered. Two instalments of the agreed price, viz., 400*l.* when the vessel was rammed, and 402*l.* 11*s.* when the vessel was timbered, were paid according to the agreement, before the bankruptcy; and the plaintiffs also paid Brunton before his bank-

ruptcy 200*l.* by way of anticipation on the third instalment: the payments before the bankruptcy amounting in all to 1002*l.* 11*s.*

Brunton became bankrupt in October, 1832, after the ship was all timbered and planked (except about five planks outside), but not decked. The fiat issued November 1st, 1832, and the defendants were appointed assignees on the 16th.

The frame of the vessel at the time of the bankruptcy, on the 15th of October, 1832, was worth 1601*l.* 13*s.* 7*d.*, that being the value of the timber and the work done upon her. After Brunton became bankrupt, the defendants as assignees took possession of the whole of the ships, timber, goods, chattels, and effects *in Brunton's yards and premises, and, amongst other things, of [*451] the frame of the vessel in question.

On the 27th of November, 1832, the plaintiffs gave notice in writing to the defendants, then in possession of the frame of the said vessel, that the same was the property of Clarke, Plummer and Co.; and they required the defendants to give up possession, threatening legal proceedings on non-compliance. They did not at that time tender any money. A week or two after Christmas, 1832, the defendants proceeded to complete the vessel, and, on the 7th of February, 1833, the plaintiffs gave the following notice to the defendants, addressed to them as assignees of Brunton:

"Messrs. Clarke, Plummer and Co. having been informed that, in finishing the vessel contracted to be built for them by John Brunton, you are not proceeding in a proper and sufficient manner and according to the terms of such contract, we do therefore give you notice that they require that Mr. Heward, the person appointed by them to superintend the building of the said vessel, shall be allowed to inspect and superintend the same accordingly; and, if you refuse to accede thereto, and the said vessel should be found, when finished, to be deficient in any respect from the terms of the said contract, they will hold you personally responsible for such deficiency."

On March 1st, 1833, when the third instalment would have become payable according to the terms of the contract, if no alteration had been produced by the bankruptcy, 200*l.*, as the balance of the said third instalment, was tendered by the plaintiffs to the defendants and by them refused. On March 23d, 1833, the ship was *launched. A bill at three months for 500*l.*, as for the fourth instalment, was tendered by the plaintiffs to the defendants, and [*452] refused. The defendants afterwards sold the vessel for 2600*l.* Before the sale was completed, the plaintiffs tendered to the defendants 1750*l.* (making, with 1002*l.* 11*s.* paid as before mentioned, 2752*l.* 11*s.*) in payment for the vessel, and demanded the vessel from them, which they refused. It was admitted on the trial that the vessel was never of greater value than 2700*l.*

Heward, the person appointed under the agreement to superintend the building of the vessel, was called as a witness for the plaintiffs, and stated that he was, during the building of the said vessel, duly authorized by them to superintend the building on their behalf. That he had been engaged in superintending the building of other vessels, as well for the plaintiffs as other persons, in Brunton's and in other shipbuilding yards. He proved that, when the pieces of timber for the vessel were ready for the keel stem and stern-post, he was sent for by Brunton to look at them previously to their being prepared for those purposes. That he went with Brunton and inspected them; and, when he had approved of them, they were immediately prepared; and, when they were ready to put together, he attended and saw the ram set up. That Brunton showed him the plan of the vessel, and consulted with him thereon, which he approved; and, from that time until Brunton's failure, he attended at the building yard daily, to inspect and superintend the work on behalf of the plaintiffs. That three or four times, or more, during the progress of the work, he had occasion to reject parcels of timber and other things that were about to be put *into the vessel, on account of their insufficiency; and upon his making objection [*453]

thereto they were removed. That Brunton once persisted in putting a timber into the ship, which Heward had objected to, on which occasion one of the plaintiffs, at Heward's instance, attended, and insisted on its being removed, and it was by Brunton's orders removed accordingly. That Heward had for several years been employed to inspect ships for various persons in the progress of the building, and that he never knew an instance of a single timber or plank, that had been passed by him and fixed in the vessel, having been afterwards removed by the builder, or timbers approved by him for building afterwards used by the builder, unless for the purpose of completing the vessel under his inspection. Brunton, after his failure, and when he understood the defendants were proceeding to finish the vessel, attended at the building yard, and stated that he had come there to inspect the progress of the work on behalf of the plaintiffs as usual; this he did for several days, until he was ordered off the premises by the foreman at the instance of the defendants.

Evidence was offered, on the part of the defendants, that the vessel was in the order and disposition of the bankrupt as reputed owner at the time of the bankruptcy, which evidence was rejected.

The questions for the Court, were, whether, under the circumstances above stated, the plaintiffs were entitled to maintain trover? If they were, the verdict was to be entered for the plaintiffs, damages 100*2*l. 1*1*s. If not, a nonsuit to be entered. Secondly, whether the evidence as to reputed ownership was properly rejected? If so, the verdict was to stand; if not, there was [*454] to be a new trial. This case was argued in last Michaelmas term.¹

W. H. Watson for the plaintiffs. First, under the agreement of July, 1832, referring to that of February, 1832, the property in the successive portions of the vessel, as they were completed, vested in the plaintiffs. Brunton's agreement was, not to furnish the plaintiffs with a vessel at a given date, but to build a specific and particular vessel, to be paid for at intervals as the work went on, and to be constructed under the superintendence of a person acting on the plaintiffs' behalf, and who was to approve of every timber *Woods v. Russell*, 5 B. & Ald. 942, was a similar case, and the words of ABBOTT, C. J., there (p. 946) are a direct authority for the plaintiffs. "This ship is built upon a special contract, and it is part of the terms of the contract, that given portions of the price shall be paid according to the progress of the work; part when the keel is laid, part when they are at the light plank. The payment of these instalments appears to us to appropriate specifically to the defendant the very ship so in progress, and to vest in the defendant a property in that ship, and that, as between him and the builder, he is entitled to insist upon the completion of that very ship, and that the builder is not entitled to require him to accept any other." This, indeed, was not the ground on which the case was decided: but the opinion of the Lord Chief Justice is express. He distinguishes the case from *Mucklow v. Mangles*, 1 Taunt. 318, "because the bargain there for building the barge [*455] does not appear to have stipulated for the advances which were made, and those advances do not appear to have been regulated by the progress of the work:" and he observes that the opinion of HEATH, J., appears to have been founded on the notion that the builder was not obliged to deliver the specific barge, but might have substituted another. Here that could not have been done. Each part of the vessel, as it was approved of by Heward, became specifically appropriated. The judgment of ABBOTT, C. J., founded upon the appropriation of the materials, and the mode of payment, is conformable to the rule of law laid down in 2 Bla. Comm. 448. "As soon as the bargain is struck, the property of the goods is transferred to the vendee, and that of the price to the vendor; but the vendee cannot take the goods, until he tenders the price agreed on. But if he tenders the money to the vendor, and he refuses it, the vendee may seize the goods, or have an action against the vendor for detaining them."

¹ November 18th. Before PATTERSON, WILLIAMS, and COLBRIDGE, Js. Lord DENMAN, C. J., was absent, being unwell.

In *Atkinson v. Bell*, 8 B. & C. 277, where it was held that the machines manufactured for the defendants did not become their property without actual delivery, the judgment proceeded on the want of any specific appropriation of the materials, and the right which the maker had over them while the work was in progress. BAYLEY, J., there said, "The case of *Woods v. Russell*, 5 B. & Ald. 942, is distinguishable. The foundation of that decision was, that as by the contract given portions of the price were to be paid according to the progress of the work, by the payment of those portions of the price the ship was irrevocably appropriated to the person paying the money. That was a purchase of the specific *articles of which the ship was made." In *Carruthers v. Payne*, [456] 5 Bing. 270, the plaintiff ordered a chariot to be built, and paid for it; and after it had been finished in other respects, desired to have a front seat added; but, the order not being performed, he sent for it, and the builder promised to deliver it. The builder became bankrupt; his assignees seized the chariot; and, it being contended that trover did not lie at the suit of the plaintiff, BEST, J., said, "If the article in dispute had rested as it was immediately after the bargain, perhaps there might be ground for the objection, and the case might fall within the principle of the decision in *Mucklow v. Mangles*," 1 Taunt. 318; "although, if a case precisely the same as *Mucklow v. Mangles*, 1 Taunt. 318, were to occur again, it might require further consideration. But the present case is very different from that; for here both the builder and purchaser treated the chariot as finished; the whole of the price was paid, and the plaintiff sent for it several times." PARKER, J., also doubted whether he should adopt the decision in *Mucklow v. Mangles*, 1 Taunt. 318, if such a case were to occur again. The present case, however, falls within the authority of all those cited, because, here, by the contract, there was a specific appropriation of the several parts as they were finished, and payment made or tendered for each successively. The payments and tender left the assignees no lien. It may be said that, when the third instalment was due, the whole 400*l.* should have been tendered, without regard to the 200*l.* paid in advance; but the payment of that sum to the bankrupt was payment to the assignees. Besides, even if the plaintiffs had not shown a sufficient tender, and *demand and refusal, it is immaterial, [457] because there was a direct conversion by selling and disposing of the ship.

Then, as to reputed ownership; to support a claim by the assignees on that ground, the bankrupt ought to have had the ship in his possession, order, and disposition, "by the consent and permission of the true owner," according to stat. 6 G. 4, c. 15, s. 72. But, to give consent, the owner ought to be entitled to possession. Here, the ship was not to be delivered till complete; in the mean time Brunton was entitled to the possession. That being so, the reputation of ownership was immaterial; and evidence of it ought not to be admitted. The credit which the bankrupt may have obtained by holding the property is, in itself, of no weight: the case is not within sec. 72, of the statute, unless the bankrupt, at the time of the act of bankruptcy, had possession by the owner's consent and permission. It was so considered in *Smith v. Topping*, 5 B. & Ad. 674, see *Shaw v. Harvey*, 1 A. & E. 924, note (a), and *Carruthers v. Payne*, 5 Bing. 270, in which cases possession was held against the wish of the true owner, and in *Muller v. Moss*, 1 M. & S. 335, where the bankrupt did not hold by permission, but had a right for the time, which case more resembles the present. In the *Earl of Shaftesbury v. Russell*, 1 B. & C. 666, where the party in possession of goods had only a limited use of them, and that under the provisions of a will, and not by any consent of the trustees, who were the true owners, it was held that, "if he had been a trader and a bankrupt, and had had the goods in his possession at the time of his bankruptcy, under the circumstances *stated in this case, they would not be considered as in his order and [458] disposition with the consent of the true owner, within the meaning of [the 21 Ja. 1, c. 19."

Coltman, contra. As to the first point; *Woods v. Russell*, 5 B. & Ald. 942, the case chiefly relied upon for the plaintiffs, was not decided on the ground stated by ABBOTT, C. J., in the passage which has been cited; the decision proceeded on the fact that the bankrupt had signed a certificate to enable the defendant to have the ship registered in his own name; and, in the subsequent case, in which *Woods v. Russell*, 5 B. & Ald. 942, is referred to, this is always pointed out. *Battersby v. Gale and others*,¹ in which *this Court refused [*459] a rule nisi for a new trial, in Easter term, 1833, is, to some extent, an authority on the present question. In that case the motion was grounded on the judgment of ABBOTT, C. J., in *Woods v. Russell*, 5 B. & Ald. 942; but it is evident, from the intimation of opinion then given, that, if a decision had been necessary, the law laid down in that judgment would not have been fully recognised; for it was asked whether, if the instalment paid had been less than the value of the work upon the performance of which that instalment was payable, the builder would not have had a lien for the residue. If that were so, the purchaser could not, by paying the instalments, acquire the property in the successive portions of the ship, unless the amount of each instalment precisely equalled the value of the corresponding portion of the work. If *Woods v. Russell*, 5 B. & Ald. 942, had been a clear authority on the point now in question, *Goode v. Langley*, 7 B. & C. 26, might have been decided on the ground [*460] *that the gig seized in that case had become the plaintiff's property before it was taken by the sheriff; but the Court declined entering upon that point. [PATTESON, J. In that case there was no arrangement, as here, for paying by instalments. The present case is put by the plaintiffs as if the ship were several ships, or several parcels of goods, and the property in each vested as the instalment was paid. Then, after an instalment had been paid, a

¹ This was an action of trover against the assignees of Brunton, a bankrupt, for an unfinished ship. At the trial before GURNER, B., at the Lancaster Spring assizes, 1833, it appeared that Brunton had contracted with the plaintiffs to build them a ship (under the inspection of their agent) for a certain price, which was to be paid by instalments, three of the instalments as the work proceeded, and the last, which was much larger than the others, when the ship was launched and completed. After the first instalment had become due, part of the ship being finished, the plaintiffs paid Brunton on account 1000*l.*, which more than covered the first instalment. Brunton became bankrupt before the second instalment was due. The plaintiffs demanded the frame of the ship, alleging that the sum they had paid beyond the first instalment bore the same proportion to the second instalment as the work completed since the first instalment was payable bore to the work which should have been done since the first instalment became payable, to make the second instalment payable. The defendants refused to give up the frame, alleging that the whole work done was worth more than 1000*l.* Evidence of value was given on both sides. The learned Judge left it to the jury whether the ship, in the state she was in when the work stopped, was or was not worth more than 1000*l.* The jury were of opinion that she was at that time worth 1102*l.*, and, under the learned Judge's direction, they found a verdict for the defendants. In the next term (April 16th), *Wigham* moved for a new trial on the ground of misdirection, contending that the true question for the jury was, whether the amount paid beyond the first instalment was or was not proportionate to the work done since that instalment was payable, reference being had to the contract price, and not to actual value; and he cited the passage referred to in the text, from the judgment of ABBOTT, C. J., in *Woods v. Russell*, 5 B. & Ald. 946, and *Atkinson v. Bell*, 8 B. & C. 277, as recognising the law there laid down, which, he contended, was applicable to the present case. PARKER, J., observed that, unless the instalments were exactly adjusted to the value of the several parts of the work upon the completion of which they were to become payable, it might be that, when an instalment became due, the work then finished might be worth more than the instalment; and he asked whether, in that case, the ship-builder would not have a lien for the excess? To which *Wigham* answered that, if that were so, still the amount for which the lien attached must be regulated by the contract price; whereas this case had gone to the jury upon the question of general value. The Court (Lord DENMAN, C. J., LITTLEDALE, PARKER, and PATTESON, Js.) took time to confer with GURNER, B.; and in the same term (April 26), Lord DENMAN, C. J., said that the learned Judge had reported to the Court that the ground upon which the case was put in moving had not been taken at the trial; and consequently the rule was refused.

part of the ship, which was complete, would be vested in the plaintiffs, and a part, which was being completed, in the bankrupt. It would seem that they would be tenants in common.] The parties here contemplated an entire contract. The plaintiffs wished to have a complete ship; and this mode of payment was arranged for the mutual accommodation of the parties, and not with a view of appropriating parts of the work as it went on. With the property a risk would pass; and it is not to be supposed that the plaintiffs meant to incur that risk before they received the ship. The appointing of a superintendent was only to secure the plaintiffs against the putting in of bad materials as the work proceeded. ABBOTT, C. J., said, in *Woods v. Russell*, 5 B. & Ald. 946, that the payment by instalments had the effect of specifically appropriating the very ship in progress; but, supposing the parts to be so appropriated, it does not follow that the property in them passed. There may be an agreement to appropriate particular materials to a work; and, after the work has been executed to a certain extent with those materials, the purchaser may be entitled to bring an action if he is deprived of them; but yet the property may not vest *in him as the work proceeds. If it does, at what time does the vesting [*461] take place? Does each stick of timber become the property of the plaintiffs as it is put in? or does a property pass in each distinct portion of the frame as it is completed? [Watson. The plaintiffs say that each particular portion of the ship passed to them, as it was completed. As a stick of timber was put in, that, and the whole ship with it, so far as the work was completed, became their property. The effect of the payments was only to devest the builder's lien. COLERIDGE, J. Then you argue that the property passed independently of any payment of instalments.] If the property in each piece of timber passes at the time when it is put in, at what price does it pass? At the market price of the day? That may be very different from the artificial value (if it may be so termed) which the piece acquires from the use made of it in the work. Or will it be said that, as the value of the whole ship is to the value of the particular piece of wood, so shall the whole price be to the price of the piece of wood? But this is not the contract of the parties. To apply the question more particularly to the present case. The value of the frame, as it stood between the times for payment of the second and third instalments, was 1600*l*. Did the property vest in the plaintiffs at that price? If so, it became afterwards vested at a different price; for, when the third instalment became due, the builder was entitled to only 1,200*l*. And, if the plaintiffs could not then have demanded the frame without a tender of the remaining 400*l*., it cannot consistently be said that the plaintiffs acquired the property on paying the instalment. If the passage cited from 2 Bla. Comm. 448, were applicable, the property in so *much of the work as might from time to time be done [*462] would pass as soon as the contract was made; the instalments might be dismissed from consideration, and the supposed authority of *Woods v. Russell*, 5 B. & Ald. 942, would be unnecessary. [PATTERSON, J. In that passage Blackstone is speaking of a sale of goods, not a contract for work.] As no property vested, in this case, during the progress of the work, no question could arise as to lien, nor can the payments be accounted for as intended to devest it. Suppose the bankrupt had, between the times for paying the first and the second instalment, refused to complete the work: if the plaintiffs had then required him to deliver so much as was completed, he could not have insisted on his lien. The plaintiffs might have said, "You have a right to detain the work for the purpose of finishing it; but, unless you finish it, you can have no right to hold it on a claim of lien." The assignees can have no right which the bankrupt would not have had, except that they may repudiate the contract. But, so doing, they can have no lien. If they could, they would also have a right of action for the money; but an assignee cannot renounce the contract, and yet sue in respect of the work done. It is true that in *Woods v. Russell*, 5 B. & Ald. 942, the assignees were held entitled to recover a portion of the fourth instal-

ment, though the work had not been completed; but the Court there thought the non-completion waived by the act of the defendant. The rule in the case of sales is that, while anything remains to be done by the seller before the goods are in a deliverable state, the property shall not pass: *Rugg v. Minett*, 11 East, 210; *Simmons v. Swift*, 5 B. & C. 857; *Tarling v. Baxter*, 6 B. & C. 360.

[*463] *And it is reasonable that the property, which carries with it the risk, should not be held to pass while anything remains to be done by the seller. The rule thus recognised with respect to goods sold, applies a fortiori in a case like the present, where the property is changing in its nature and increasing in value while it remains in the workman's hands. [COLERIDGE, J. You may be assuming too much in supposing that the risk remains with the builder while the ship is undelivered. If the ship had been burnt, could the plaintiffs have recovered back the instalments?] It is perhaps not material to contend so.

As to the reputed ownership. *Smith v. Topping*, 5 B. & Ad. 674, and *Caruthers v. Payne*, 5 Bing. 270, differed entirely in their circumstances from the present case. [PATTESON, J. Assuming that the property had passed to the plaintiffs, how does this differ from the case of a ship put into the hands of a builder to repair after a voyage?] In that case the ship has once been notoriously in the possession of the owner. Here the work was never out of the possession of the bankrupt. The case comes within the distinction taken in *Lingard v. Messiter*, 1 B. & C. 308. [PATTESON, J. The question here turns upon the nature of the possession. The ship was in the hands of the builder for the purpose of a specific work: she was a thing unfinished. There is nothing here of a possession by consent of the owner.]

W. H. Watson in reply. In *Woods v. Russell*, 5 B. & Ald. 942, the certificate was one only of many circumstances from which the Court held that the property vested. Here *the terms of the contract, and the mode of payment, show that the parties intended the property to pass. ABBOTT, C. J., said there, "The payment of these instalments appears to us to appropriate specifically to the defendant the very ship so in progress, and to vest in the defendant a property in that ship." [PATTESON, J. With great respect to the authority of Lord TENTERDEN, I should say that that expression is inaccurate. As that case was put, it could not be necessary that a second instalment should be paid, to make the property vest.] By the contract here, the plaintiffs were to pay for a particular ship which was in progress. The identical ship was to be delivered. The payments were to be made for the parts of that ship: if she had been burnt while building, the plaintiffs could not in any form of action have recovered back the sums advanced. If the builder had withdrawn that ship and substituted another, it would not have been a completion of his contract. The doctrine laid down in *Woods v. Russell*, 5 B. & Ald. 946, is not the opinion of the Lord Chief Justice alone, but that of the whole Court. In *Goode v. Langley*, 7 B. & C. 26, PARKE, J., then at the bar, admitted in argument that the doctrine in question was established by *Woods v. Russell*, 5 B. & Ald. 946. *Battersby v. Gale*, page 458, note (b), *antè*, is consistent with the argument for the plaintiffs. A property had passed on part of the vessel being finished, but there was a lien for work done since the instalment had been paid; and the question was how the amount of that lien should be estimated. Here the defendants argue, in effect, that the remedy of the plaintiffs, if the work was not completed, was for a breach of contract, and not for a conversion. [*465] But that *is not so. If the bankrupt had refused to complete the work, the plaintiffs might have taken possession, and finished it for themselves without making any tender. Any question of price, at a time between the periods fixed for paying the instalments, might be satisfactorily settled by a jury. The builder and the plaintiffs were not tenants in common. As soon as the property in any part of the ship vested, the rest of the work done and not paid for, was only work done on the plaintiff's chattel. In *Rugg*

v. Minett, 11 East, 210, and other cases of that class, the right of the purchaser was incomplete till there had been a specific appropriation: here the article was appropriated and vested in the plaintiffs as the work went on, by force of the contract. *Cur. adv. vult.*

WILLIAMS, J., in this term (February 1st), delivered the judgment of the Court. The principal question raised by this case is, in whom, under the special terms of the contract entered into between the plaintiffs and the bankrupt, John Brunton, the general property in so much of the vessel as had been put together at the time of the bankruptcy was vested.

All consideration of any special property which might be in the bankrupt, by reason of a lien for moneys expended on the vessel, according to the doctrine laid down in *Woods v. Russell*, 5 B. & Ald. 942, is removed from the case by the tender of all such moneys, which has been made by the plaintiffs: and we desire it to be distinctly understood that, in the judgment which we are about to pronounce, we give no opinion whatever as to the soundness of that doctrine.

*On the part of the plaintiffs, it was not denied in argument, nor could be according to decided cases, *Mucklow v. Mangles*, 1 Taunt. 318; *Simmons v. Swift*, 5 B. & C. 857; *Rohde v. Thwaites*, 6 B. & C. 388; *Goode v. Langley*, 7 B. & C. 26; *Atkinson v. Bell*, 8 B. & C. 277; *Carruthers v. Payne*, 5 Bing. 270, and known principles of law, that, in general, under a contract for the building a vessel, or making any other thing not existing in specie at the time of the contract, no property vests in the party whom, for distinction, we will call the purchaser, during the progress of the work, nor until the vessel, or thing, is finished and delivered, or at least ready for delivery and approved by the purchaser; and that, even where the contract contains a specification of the dimensions and other particulars of the vessel or thing, and fixes the precise mode and time of payment by months and days. The builder or maker is not bound to deliver to the purchaser the identical vessel or thing which is in progress, but may, if he please, dispose of that to some other person, and deliver to the purchaser another vessel or thing, provided it answers to the specification contained in the contract. But it is urged, on the authority of *Woods v. Russell*, 5 B. & Ald. 946, that, where the contract provides, as that in question does, that a vessel shall be built under the superintendence of a person appointed by the purchaser, and also fixes the payment by instalments, regulated by particular stages in the progress of the work, the general property in all the planks and other things used in the progress of the work vest in the purchaser at the time when they are put to the fabric under the approval of the superintendent; *or, at all events, as soon as the first instalment is paid. The facts in the case of *Woods v. Russell*, 5 B. & Ald. 946, did not make it necessary to determine this point; neither did the decision of the Court proceed ultimately on any such point, but on the ground that the vessel, by virtue of the certificate of the builder, had been registered in the name of the purchaser, and that the builder had, by his own act, declared the general property to be in the purchaser. This appears both by the judgment itself, and by the notice taken of it by Lord TENTERDEN in the last edition of his book on Shipping, page 44. But there is a passage in the course of that judgment which goes strongly to establish the point contended for by the learned counsel for the plaintiffs; and, though the opinion expressed in that passage is extrajudicial, yet, considering that time was taken before the judgment was pronounced, and the very great learning of those by whom it was pronounced, we should certainly hesitate very much before we could come to any conclusion contrary to that opinion. The passage is as follows:—(His Lordship then read the passage cited, *antè*, p. 454.)

If it be intended in this passage that the specific appropriation of the parts of a vessel while in progress, however made, of itself vests the property in the person who gives the order, the proposition, in so general a form, may be doubtful.

It seems to be clear that, as, by the contract, the vessel was to be built under

a superintendent appointed by the purchaser, the builder could not compel the purchaser to accept any vessel not constructed of materials approved by the [468] superintendent; and, on the other *hand, that the purchaser could not refuse any vessel which had been so approved. It follows that, as soon as any materials have been approved by the superintendent and used in the progress of the work, the fabric consisting of such materials is appropriated to the purchaser; otherwise the superintendent might be called upon, when one vessel had been nearly constructed, to begin his work *de novo*, and superintend the building of a second: and, in this point of view, the appointment of a superintendent, by the contract, appears to be of considerable importance. As soon as the last of the necessary materials is approved and added to the fabric the vessel is complete; the appropriation is complete; and, assuredly, the general property in the vessel must vest in the purchaser, nothing remaining to be done prior to the delivery; and this is agreeable to the current of all the authorities, most of which have been cited above.

Until, however, the last of the necessary materials be added, the vessel is not complete; the thing contracted for is not in existence: for the contract is for a complete vessel, not for parts of a vessel; and we have not been able to find any authority for saying that, whilst the thing contracted for is not in existence as a whole, and is incomplete, the general property in such parts of it as are from time to time constructed shall vest in the purchaser, except the above passage in the case of *Woods v. Russell*, 5 B. & Ald. 946.

Granted therefore that, under such a contract as this, the parts of the vessel, as they are added to the fabric, are appropriated to the purchaser by way of [469] *contract, so that neither could he refuse them when the vessel should be completed, nor the builder compel him to accept any other, yet it does not necessarily follow that such appropriation vests the property in the purchaser until the whole thing contracted for is in existence, that is, until the completion of the vessel. But, in the passage under discussion, the payment under the contract is relied on as the most material point, the appropriation being affected, as it is said, by that payment; and accordingly, in *Atkinson v. Bell*, 8 B. & C. 282, Mr. Justice BAYLEY, in alluding to *Woods v. Russell*, 5 B. & Ald. 942, says, "that as by the contract given portions of the price were to be paid according to the progress of the work, by the payment of those portions of the price the ship was irrevocably appropriated to the person paying the money. That was a purchase of the specific articles of which the ship was made."

Now it is to be observed, in regard to the payment which is relied on in these passages, that, where an actual delivery has taken place, payment is wholly immaterial to the vesting of the property; and further, that, by the modern doctrine and the cases above alluded to, in order to vest the property in goods under contracts of sale, it is only necessary that the identical goods which are the subject of the contract should be ascertained, and the price fixed; and when those things are done the general property vests by the contract before actual delivery; and the payment of the price is quite immaterial for that purpose. Whether that modern doctrine be founded on a misconception of the civil law or not, we [470] do not think it necessary or proper *to discuss: the doctrine has been clearly laid down and acted on for many years, and ought not to be lightly disturbed; nor does this case turn upon that doctrine. A doubt may exist whether such a contract as the present be properly a contract of buying and selling; but, assuming it to be so, and we have so treated it for this purpose, the requisites to the vesting of the general property under the contract are clear. The payment of the instalments may indeed be evidence that the purchaser has approved of the fabric so far as it has been constructed, and may therefore as it were ratify the appropriation made by the builder; but in itself it can operate nothing, unless it be by the contract made a condition precedent to the vesting of the property.

It is not so made by the contract in question in express terms; neither was it

in the case of *Woods v. Russell*, 5 B. & Ald. 942; but we apprehend that the passage above cited from the judgment in that case is founded on the notion that provision for the payment regulated by particular stages of the work is made in the contract, with a view to give the purchaser the security of certain portions of the work for the money he is to pay, and is equivalent to an express provision that on payment of the first instalment the general property in so much of the vessel as is then constructed shall vest in the purchaser. If this notion be correct, the payment is no doubt material to the vesting of the property, and the effect of such payment is, that there is not only an appropriation of so much of the vessel as is then constructed, but also a vesting of the general property in *so much in the purchaser, subject to the right of the builder to retain it in order to complete it, and earn the rest of the price. The rights of [*471] the parties will then be in the same state as if so much of the vessel as is then constructed had originally belonged to the purchaser, and had been delivered by him to the builder to be added to and finished; and it will follow that every plank and article subsequently added will, as added, become the property of the purchaser as general owner.

Several reasons may perhaps be adduced to show that the more obvious intention to be collected from the terms of this contract is that, the builder requiring advances of money in the progress of an expensive work, the purchaser is contented to make such advances, provided he sees the work in such a state of progress as that he may calculate in having an equivalent for his money within a reasonable time; and therefore he stipulates that his advances shall be made at specified stages of the work.

But, even if this be the more obvious intention, it by no means follows that the view taken of the contract by the Court in *Woods v. Russell*, 5 B. & Ald. 946, is not correct; for the intention there supposed is not in any respect inconsistent with that which is above suggested; both may well exist at the same time: and though, if it were the intention of the contracting parties that the general property should vest in the manner supposed, such intention might have been expressed in less ambiguous terms, yet, if it can fairly be collected from those which have been used, there is nothing either in principle or [*472] *in practice to prevent the Court from carrying it into effect.

On the contrary, as such a construction has been put on a similar contract by so high an authority in the case of *Woods v. Russell*, 5 B. & Ald. 946, which as to this point in particular has been subsequently recognised, and as that construction has probably been acted upon, since that decision, by persons engaged in ship-building, we feel that we ought not to depart from such a construction; and we adopt the opinion of the Court in *Woods v. Russell*, 5 B. & Ald. 946, though with some hesitation for the reasons above assigned.

Another point was raised upon the statute 6 G. 4, c. 16, s. 72, with respect to reputed ownership in cases of bankruptcy, as to which it is sufficient to say that this case is plainly not within the statute; for, although the plaintiffs were the true owners of the vessel, yet it was not in the possession, order, or disposition of the bankrupt within that section, any more than a vessel or other article sent to a builder or manufacturer to be repaired is within that section. We think, therefore, that the evidence as to reputed ownership was properly rejected.

Upon the whole, we are of opinion that the plaintiffs are entitled to maintain this action of trover, and that the verdict must be entered for them for the sum stated in the case, viz., 1002*l.* 1*l*s. Verdict to be entered as above.

*POWER v. BARHAM. Jan. 14.

[*473]

In assumpsit for breach of a warranty of pictures, it was proved, among other things, that the defendant, at the time of the sale, gave the following bill of parcels: "Four

pictures, Views in Venice, Canaletto, 160*l*." The Judge left it to the jury upon this and the rest of the evidence, whether the defendant had contracted that the pictures were those of the artist named, or whether his name had been used merely as matter of description, or intimation of opinion. The jury found for the plaintiff, saying that the bill of parcels amounted to a warranty:
Held, that the question had been rightly left to the jury, and that the verdict was not to be disturbed.

ASSUMPSIT. The declaration stated that, in consideration that the plaintiff, at the defendant's request, would buy of him four pictures at a certain price, to wit, &c., the defendant "promised the plaintiff that the said pictures were painted by a certain artist or master in painting, called or named Canaletti, otherwise Canaletto." Breach, that the said pictures "were not, nor was either of them, painted by the said artist or master called or named Canaletti, otherwise Canaletto," whereby the said pictures were and are of little or no use, &c., and the plaintiff lost the benefits, &c. Plea, non assumpsit. On the trial before COLERIDGE, J., at the sittings in Middlesex after last term, it appeared that the defendant sold the pictures to the plaintiff for 160*l*., and, at the time of the sale, gave the following bill of parcels and receipt:

"Mr. N. POWER.

"Bought of J. BARHAM.

"May 14th, 1832.

Four pictures, Views in Venice, Canaletto,	-	-	-	£160 0 0
Settled by two pictures,	-	-	-	£50 0 0
And a bill at five months,	-	-	-	110 0 0
				<hr/>
				£160 0 0

"J. BARHAM."

A carver and gilder, who had been employed by the plaintiff to procure original pictures for him, gave evidence of previous representations by the defendant to [474] *him and to the plaintiff, that the pictures were genuine; some doubt, however, was raised as to the expressions actually used. The witness stated that the pictures were in the manner of Canaletti, and, at the time of the sale, appeared to him worth the money. A witness experienced in paintings stated, that he considered the paintings not to be Canaletti's, and valued them at about 8*l*. each; and some other evidence was given on this point. For the defendant it was contended that the bill of parcels was not a warranty, but only an expression of opinion; and *Jendwine v. Slade*, 2 Esp. N. P. C. 572, was cited. The learned Judge, in summing up, told the jury that the pictures were admitted not to be Canaletti's, and that the only question on the pleadings was, whether the promise was made; and he submitted to their consideration, upon the whole of the evidence, whether the defendant had made a representation as part of his contract, that the pictures were genuine, not using the name of Canaletti as matter of description merely, or as an expression of opinion upon something as to which both parties were to exercise a judgment, but taking upon himself to represent that the pictures were Canaletti's. His Lordship noticed the argument on behalf of the defendant, as to the bill of parcels; and that the words of Lord KENYON, in the case referred to, must be considered, not as a general rule of law, but as a direction to the jury on the circumstances of that case. The jury found a verdict for the plaintiff, saying, "We think the bill of parcels is a warranty."

Sir J. Campbell, Attorney-General, now moved for a new trial on the ground [475] of misdirection. The question *was, whether the defendant had entered into a binding contract that the pictures were Canaletti's. The jury ought to have been told that the words in the bill of parcels did not amount to a warranty. *Jendwine v. Slade*, 2 Esp. N. P. C. 572, was a stronger case against the defendant than this, because the artists' names there were inserted in the

catalogue of sale. But Lord KENYON said, "It was impossible to make this the case of a warranty; the pictures were the work of artists some centuries back, and there being no way of tracing the picture itself, it could only be matter of opinion whether the picture in question was the work of the artist whose name it bore, or not. What then does the catalogue import? That, in the opinion of the seller, the picture is the work of the artist whose name he has affixed to it. The action in its present shape must go on the ground of some fraud in the sale. But if the seller only represents what he himself believes, he can be guilty of no fraud. The catalogue of pictures in question leaves the determination to the judgment of the buyer, who is to exercise that judgment in the purchase." It is not necessary to contend here, that there could not be a warranty of a picture as Canaletti's; but there was no evidence of any. No fraud is imputed. No positive undertaking could be implied, from the bill of parcels, that the pictures were by Canaletti. It only implied that they passed for and were believed to be that painter's; that the vendor had bought them as his, and thought them so. It cannot be contended that every description given in a bill of parcels is a warranty. [COLERIDGE, J. Do you say that the writing ought not to have gone to the *jury?] Not as evidence, by itself, of a warranty. [COLERIDGE, J. I said that it was to be considered [*476] with all the attendant circumstances.]

Lord DENMAN, C. J. I think that the case was correctly left to the jury. We must take the learned Judge to have stated to them that the language of Lord KENYON in *Jendwine v. Slade*, 2 Esp. N. P. C. 572, was merely the intimation of his opinion upon such a contract as was then before him. It may be true, that in the case of very old pictures, a person can only express an opinion as to their genuineness; and that is laid down by Lord KENYON in the case referred to. But the case here is that pictures are sold with a bill of parcels, containing the words "Four pictures, Views in Venice, Canaletto." Now words like these must derive their explanation from the ordinary way in which such matters are transacted. It was, therefore, for the jury to say, under all the circumstances, what was the effect of the words, and whether they implied a warranty of genuineness, or conveyed only a description, or an expression of opinion. I think that their finding was right: Canaletti is not a very old painter.¹ But, at all events, it was proper that the bill of parcels should go to the jury with the rest of the evidence.

LITLEDALE, J. The case was rightly sent to the jury; though, as to their decision, I think that all the auctioneers in London would be alarmed if they thought *that such words as these were to be understood as a war- [*477]ranty.

WILLIAMS, J. The words in question might be a mere expression of opinion, or might amount to a warranty; it was for the jury to say which they imported. The language ascribed to Lord KENYON seems to imply that, if a master is very old, there can be no means of saying that a certain picture is his, and, therefore, no warranty. The Attorney-General admits that this is not correctly applicable to the present case. If a person will undertake to sell these things as the productions of a particular master, he must take the consequences.

COLERIDGE, J. concurred.

Rule refused.

¹ Canaletti died in 1768; Claude Lorraine and Teniers (the younger), the painters mentioned in *Jendwine v. Slade*, died, the first in 1682, the latter in 1694.

*DOE on the demise of HOBBS and others v. JOHN COCKELL and ELIZABETH, his Wife. Jan. 15. [*478]

In ejectment by churchwardens and overseers, on demises laid after stat. 59 G. 3, c. 12, it appeared that the defendants, before and since the statute, had paid rent to the successive churchwardens, and that the late churchwardens and overseers (appointed

since the statute) had given a proper notice to quit. Defendants produced a lease, made before the statute, for fifty-nine years, to parties under whom they claimed, purporting to be made with the consent of the vicar, the majority of the aldermen and burgesses of the borough of R., and of others the inhabitants of the parish, whose names were subscribed to a memorandum on the back of the lease expressing such consent. The churchwardens were the demising parties, and the rent was made payable to them and their successors for the time being. The premises were described as belonging to the parish church.

On a special case stating these facts : Held that, notwithstanding the consent expressed as above, the premises must be taken to have been parish property, demised by the churchwardens as such ; and consequently that the lease passed no legal interest in the term, and the present churchwardens and overseers might treat the lessees as tenants from year to year.

Held, further, that a parishioner, liable to poor's rate, was, at common law, a competent witness for the plaintiff in such action, no evidence being given that the premises were of any annual value beyond that at which they were demised.

EJECTMENT for a messuage and premises in the parish of St. Mary, Reading, Berkshire. The demise was laid May 1st, 1834, and described the lessors of the plaintiff by their names, and as the churchwardens and overseers of the poor of the above parish for the time being. On the trial before Alderson, B. at the Berkshire Summer assizes, 1834, a verdict was found for the plaintiff, subject to the opinion of this Court upon the following case :—

The lessors of the plaintiff were the churchwardens and overseers of the parish when the action was commenced, and at the time of the demise laid in the declaration. The defendants and their predecessors had paid rent for the premises to the successive churchwardens, before and since the passing of the statute 59 G. 3, c. 12, and until the expiration of a notice to quit stated in the case, which was of the same date, in the same form, and signed by the same parties, as that in Doe dem. Higgs v. Terry, *anté*, p. 275. The defendants put [479] in a lease *of December 20th, 1800, between John Moore and William Watlington, wardens of the parish church of St. Mary, Reading, of the first part ; William Blackall Simonds of the second part ; and the Reverend John Lichfield and Hannah, his wife, of the third part, and purporting to be made with the consent and agreement of the Reverend Charles Sturgess, vicar of the said church of St. Mary, and also with the consent of the major part of the aldermen and burgesses of the borough of Reading, and others the inhabitants and parishioners of the said parish, whose names were thereon endorsed, whereby, in consideration of the surrender of a former lease therein stated to be vested in the said W. B. Simonds, in trust for the said J. Lichfield and Hannah, his wife, and of the sum of 12*l.* therein mentioned to be paid by Lichfield and his wife to Moore and Watlington, the premises now in question, therein described as belonging to the said church of St. Mary, were mentioned to be thereby demised to the said Lichfield and Hannah his wife, their executors, &c., to hold from Michaelmas then last, for fifty-nine years, yielding and paying to the said churchwardens and their successors for the time being, wardens of the said church, for the use of the said parish church of St. Mary, the yearly rent of 3*l.*, at Lady-day and Michaelmas. The defendants were assignees of the lessees under this lease. The lease had the following endorsement :—"Memorandum ; that we, whose names are hereunto subscribed, the parishioners and inhabitants of the parish of St. Mary, do consent that the within lease be made to the within-named John Lichfield and Hannah, his wife, at such yearly rent, and under such covenants and agreements, as within expressed. Witness our [480] hands, the 20th day of December, 1800. *Charles Sturgess, vicar, W. Blandy, alderman, W. B. Simonds, James James, Francis Lockey, Richard Harbert." It was alleged for the plaintiff, as in Doe dem. Higgs v. Terry, *ante*, p. 274, that the lease was void ; that Cockell had held as tenant from year to year ; and that the notice had determined that tenancy.

A further question was raised on the competency of a witness named Hall, who was examined for the plaintiff, and who stated that he had small tenements

directed in sects. 1 and 4. The former practice, by which a party was placed in a fictitious custody of the marshal, and declared against by the bye, is abolished by the statute; and, if a party is really in custody of the officer of another Court, he need not now be brought into this *Court to be charged with [*486] a declaration; but the act, by sect. 8, and sched. No. 5, gives a form of detainer, which is to state the custody in which the party actually is. If it be true, here, that the defendant is in the marshal's custody, the declaration should state the mode in which the present action is commenced, according to the statute, and according to the form prescribed in the General Rules, Mich. 3 W. 4, 4 B. & Ad. 4, 5. In the absence of such statement it may be assumed that the defendant is not actually in such custody, but that the plaintiff is erroneously declaring in the old form. Supposing this were a case removed from the Palace Court, the present form of declaring would not be available. Formerly, the mere fact of a party's being in the custody of the marshal gave this Court jurisdiction, and no process was necessary. Since the act, that is no longer so; and, although the party be in the custody of the marshal, it must be shown how the jurisdiction attaches. But the plaintiff has no right to demand that the fact of the custody should be assumed. It may be said that the defendant might have moved to set the declaration aside for irregularity; but he is also entitled to demur.

Ball, contra. The act, by sect. 19, is declared not to apply to causes removed from inferior courts; neither, therefore, do the rules of Mich. 3 W. 4, 4 B. & Ad. 4, 5, so apply. The forms given by those rules are not adapted to an action commenced by plaint. And in Chitty's Forms of Practical Proceedings in the Courts of King's Bench, &c., 2d ed. 1835, p. 650, the form of commencement of a declaration in K. B., after removal, is that *adopted [*487] here. The present declaration, therefore, may be good as a declaration in a cause removed from an inferior court. And, supposing it to be irregular, the defendant cannot demur. The proper course in such cases is to apply to the Court or a Judge to set aside what is erroneous: *Thompson v. Dicas*, 1 Cro. & M. 768, S. C. 3 Tyr. 873; *Harper v. Chumneys*, 2 Dowl. P. C. 680. If an error has been committed here, it is only a misrecital of the writ.

J. Jervis, in reply. It is not necessary to dispute the cases just cited. The objection in those was not, as it is here, that the Court was not shown to have jurisdiction. The fictitious jurisdiction, formerly claimed by the Courts, being now taken away, the old form used in this Court would no longer be available in the case of a person really in the marshal's custody, any more than the old form in the Exchequer would suffice if the plaintiff were, in reality, a debtor accounting there. The true origin of the jurisdiction must be shown. It is true that the power of the Court over cases removed is still kept up by sect. 19; but the forms referable to the fictitious jurisdiction ought no longer to be used in those cases. The declaration should state that the action was commenced by plaint below, and removed hither. Otherwise, the rules laid down under the statute might always be evaded; for, in any case of a declaration like the present, it might be suggested that the statement was consistent with the fact.

Lord DENMAN, C. J. The form adopted here is one which may be good or bad according to circumstances, *and those circumstances do not appear. [*488] We are asked to presume that the defendant is not really in the custody of the marshal, and that the declaration is erroneously commenced in the old form. But we are not to presume against our own jurisdiction if we find that on the record which gives jurisdiction. It is said that, if this be so held, the statute, in a case like the present, is repealed; but that is the defendant's own fault. He should have raised the objection by an application to the Court.

LITTLEDALE, J. This commencement would have been regular before the act; and, if the cause is one removed from an inferior court, the act and the rules of Mich. 3 W. 4, 4 B. & Ad. 4, 5, have no application. It is said we are to presume that the action was commenced here, and consequently that the

Court is without jurisdiction; and that the case of an action commenced in an inferior Court is an exception, within which the plaintiff ought expressly to have brought himself. But that is treating as an exception the case in which the practice is continued as it was before the act. Suppose the act had said that, in ninety-nine cases out of a hundred, the form of proceeding should be as before, but that in the hundredth it should be altered; could it then have been contended that in the ninety-nine cases a party, using the old form, was bound to show that he did not come within the hundredth? It does not appear that the present action is one commenced by summons, or that it was not removed from the Palace Court; in which case it is not taken out of the rule stated in [*489] Com. *Dig. Pleader (C. 8), that the plaintiff cannot declare against one in B. R., but *in custodia mareschalli*, except where the defendant has privilege, or the action is brought in Middlesex. If the declaration is irregular, there should have been an application to set it aside.

WILLIAMS, J. If there is an irregularity in the declaration, advantage might have been taken of it by a proper application to the Court. The statement which, according to Mr. Jervis, should have been made, that the action was commenced in the Palace Court, is an addition to the forms established under stat. 2 W. 4. c. 39, which contain no such recital, and need not, because the act does not apply to causes removed from inferior Courts.¹ Judgment for the plaintiff.

¹ COLBRIDGE, J. was absent on account of a domestic affliction.

MARGETTS v. BAYS. Jan. 15.

A plea that the "supposed debt, if any such there be," did not accrue within six years, is bad on special demurrer, for not confessing the debt.

DEBT for work and labor, for money paid, and on an account stated. Pleas, first, nil debet; secondly, "that the supposed debt in the said declaration mentioned, if any such there be, did not, nor did any part thereof, accrue due to the said plaintiff at any time within six years," &c. The plaintiff demurred specially to the second plea, assigning for cause that it did not confess and avoid, or deny, the cause of action, but was pleaded to the supposed debt, if any such there be, instead of admitting the said debt. Joinder in demurrer.

* *W. H. Watson*, in support of the demurrer, cited *Gould v. Lasbury*, [*490] 1 C. M. & R. 254, S. C. 4 Tyrwh. 863.

C. Chadwicke Jones, contra. That was a plea of discharge under the Insolvent Debtors' Act, 7 G. 4, c. 57, and there the defendant could not but avow the debt, as he would be under the necessity of inserting it in his schedule in order to obtain the benefit of the act, with respect to it, under sects. 40, 46. But there is no reason against a party's saying, "if I ever owed the debt, it is six years since I was first liable;" and this form of pleading is not uncommon. In *Gale v. Capern*, 1 A. & E. 102, a set-off for a promissory note being pleaded, the replication was "that the said supposed debt and cause of set-off" did not accrue within six years; and Lord DENMAN, C. J., in delivering the judgment of the Court upon the question, what evidence of the making and endorsement of the note was required, said, "The question is, whether this be not a virtual admission that the action did accrue at some time in the manner alleged;" and he added, that "the effect of the replication was, that the plaintiff did so admit." [Lord DENMAN, C. J. That was after trial; but here the form of the plea is specially demurred to, which makes all the difference.]

Per Curiam.¹ The plea in this form cannot be supported.

Leave granted to amend on payment of costs.

¹ Lord DENMAN, C. J., LITTLÉDALE and WILLIAMS, Js. COLBRIDGE, J., was absent: see p. 489, ante.

[*491] The KING v. The Inhabitants of SPARSHOLT. Jan. 16.

By the regulations of a bridewell, the turnkeys were to be appointed by the keeper, but the appointment was subject to the approbation and confirmation of the visiting justices. The keeper might suspend, but not permanently displace them without the authority of the visiting justices. They were to receive their salaries from the county treasurer, but in all other respects to be under the immediate orders and control of the keeper: Held, that an appointment to the place of turnkey, and discharge of its duties under the above regulations at a yearly salary, did not constitute a hiring and service by which a settlement could be gained.

UPON an appeal against an order of two justices for the removal of Edith Rogers, widow, and her three children, from the parish of St. Maurice in the city of Winchester, to the parish of Sparsholt in the county of Southampton, the sessions confirmed the order, subject to the opinion of this Court on the following case:—

By certain of the regulations for the government of the county bridewell at Winchester, made at the Easter sessions, 1822, and allowed and confirmed by the Judges at the summer assizes following, it is provided:—1. That the right of appointment of turnkeys or assistants employed in the bridewell be vested in the keeper of the bridewell in the first instance; but that such appointment be subject always to the approbation and confirmation of the visiting justices: That the keeper of the bridewell have power to suspend from the execution of the duties of his station any turnkey or assistant, and to appoint a temporary assistant in his room, but shall within three days of such suspension report to the visiting justices the cause for his having so acted, and shall not, until an inquiry has been instituted by the visiting justices, permanently appoint any other person in the room of the turnkey or assistant suspended from office. 2. That the turnkeys of the bridewell shall receive the payment of their salaries from the treasurer of the county, but shall in all other *respects be under the immediate orders and control of the keeper of the bridewell, by [*492] whom they may for disobedience of orders or improper behavior be suspended from their situations. 3. That the appointment and removal of the keeper of the bridewell shall be made in strict conformity with the acts of parliament for the regulation of the same. 4. That any turnkey of the bridewell, who may be convicted of drunkenness, shall be dismissed by the visiting justices from office. Rule 20 commences thus:—"That no keeper, turnkey, or any other officer attached to the bridewell shall," &c. Rule 21 commences thus:—"That the keeper of the bridewell, and the officers of the prison, together with the keeper's family and servants, shall be required," &c. Rule 26 provides "That the keeper of the bridewell shall not, without the permission of the visiting justices, lodge or board in his house any persons other than his own family and servants, and those of his assistants."

In 1822, and after the allowance and confirmation of the said regulations, Robert Rogers (since deceased) was appointed to the office of second turnkey in the said bridewell by the keeper, in accordance with the above-cited regulation, at the annual salary of 45*l.* which was afterwards advanced to 50*l.* on his promotion to the office of the first turnkey. There was no agreement made, at the time of engaging Rogers, for any particular length of service, or for any notice previous to its determination. Rogers duly served in that situation from 1822 to 1826, when he married the pauper Edith, after which he continued in the same situation till 1833, when he was discharged at a few days' notice for misconduct, in conformity with the above regulations. His salary was always paid *by the treasurer of the county, and Rogers resided, during the whole period of his employment as turnkey, in the bridewell, which is [*493] situated in the parish of Saint Bartholomew, Hyde, near Winchester, in the county of Southampton.

The question for the opinion of the Court was, whether Robert Rogers acquired a settlement by hiring and service in the parish of Saint Bartholomew Hyde.

Sir *W. W. Follett* (with whom was *C. Rawlinson*), in support of the order of sessions, was stopped by the Court.

Dampier, *contra*. Although the word "officer" is used in the regulations, *Rogers* was in fact a servant. In *Rex v. Sandhurst*, 7 B. & C. 557, an employment as servant in the Royal Military College at Blackwater was held to be such a service as conferred a settlement, though the party was not servant to a private individual, but to the Crown, under the control of a board established for public purposes; on which account it was contended that the employment was rather an office than a service. The present case states that the pauper was appointed (which means hired, at the annual salary (that is wages) of 45*l*. The mention of an annual salary implies that the hiring was yearly, *Turner v. Robinson*, 5 B. & Ad. 789; *Fawcett v. Cash*, 5 B. & Ad. 904; or, if the words do not ascertain the time, then the hiring is general, and for a year. It may be contended that this is a hiring for a limited service; but so is the hiring of a huntsman, a groom, or a clerk; under which, however, service will confer a settlement.

[*494] **Lord DENMAN*, C. J. In *Rex v. Sandhurst*, 7 B. & C. 557, the sessions doubted whether a person hired into the particular establishment there described could be considered a servant, for the purpose of settlement. I can see no reason why he should not have been so considered. But here the facts are different. The turnkey is not hired by the keeper of the bridewell, for the approbation of the justices constitutes the hiring. The control is in the keeper of the bridewell; but he is not the hiring party. The turnkey is not his servant. Nor is he the servant of the magistrates, for it is not their orders that he is to obey. The case, therefore, is distinguishable from *Rex v. Sandhurst*, 7 B. & C. 557. I should not feel bound by the particular words used in the case, to come to this decision, if it were not supported, as I think it is, by the nature of the contract itself.

LITLEDALE, J. I also think that the turnkey in this case was not a servant. There is nothing from which the Court can know whose servant he was. He was so far under the control of the keeper of the bridewell as to obey his directions, but was not servant to him. During part of the time, he was assistant turnkey; but that did not make him a servant. The orders must be confirmed.

WILLIAMS, J., concurred.¹

Orders confirmed.

¹*COLERIDGE*, J., was absent. See p. 489, *antè*.

[*495] **The KING v. The Inhabitants of ST. GILES-IN-THE-FIELDS.*
January 16th.

Pauper rented a house at 24*l*. a year, which he paid, and resided in the house with his family. He was in the habit of taking in persons to sleep in some of the rooms, letting sometimes a bed, sometimes half a bed, generally by the night, but occasionally for a week, in which case, however, the bed only was let, and the pauper reserved the right of putting another bed into the room. The lodgers had no right to the rooms by day. The pauper had constant access to and control over the whole house, and kept the keys of all the rooms. Held, an actual occupation of the dwelling-house, within stat. 1 W. 4, c. 18, s. 1.

ON appeal against an order of two justices whereby *Thomas Barrow* and his wife and children were removed from the parish of *St. Giles-in-the-Fields*, in the county of *Middlesex*, to the parish of *St. Marylebone*, in the same county, the sessions quashed the order, subject to the opinion of this Court upon the following case:—

In 1831 the pauper became the tenant of a house in the appellant parish at the yearly rent of 24*l*. He held the house for three years, paid the rent, and complied with all the requisites of the statutes, 6 G. 4, c. 57, and 1 W. 4, c. 18, if, under the circumstances after mentioned, he was sufficiently in the occupation of the house in question.

The pauper resided in the house with his family. The furniture in all the
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rooms was his; and he was in the habit of taking in laboring people to sleep in some of the rooms, sometimes letting a bed, sometimes half a bed, the letting being generally by the night, but in some instances it appeared that a bed had been let for the period of a week. The persons who thus slept in the house had no right to the rooms during the day, the pauper and his family having the constant access to and control over the whole of the house, and the pauper always retaining the keys of all the rooms in his own possession. In the instances of letting for a week, which were of rare occurrence, the pauper let the bed *only, reserving to himself the right of putting another bed in the [*496] same room at any time, if he thought proper.

The question for the opinion of the Court was, whether the pauper actually occupied the house within the meaning of the statute.

Adolphus in support of the order of sessions. The question is, whether the house, in this case, was "actually occupied" by the pauper, within stat. 1 W. 4, c. 18, s. 1. *Rex v. St. Nicholas, Rochester*, 5 B. & Ad. 219, and *Rex v. St. Nicholas, Colchester*, 2 A. & E. 599, show that it was not. The statute requires an occupation uninterrupted by the rights of any other person. It will be said here that a bed only was let; but the room was let, so far as the right to the bed was concerned. Unless that was so, there could have been no possession of the bed. The landlord could not exclude the lodger. There was a part of the room into which the landlord could not intrude. He was never master of the outer door, while a lodger was entitled to come to one of the beds. The case of an innkeeper is different; he is bound by law to receive persons into his house; and he occupies by his guests. And it is sufficient to say that, if that case arose, it might be decided on its own grounds. The rule which has been laid down for the interpretation of the statute, in the cases already decided, is plain, and ought not to be broken in upon. The word "exclusive," which was used in those cases with reference to the lodger's occupation, ought not to be pressed too far. The true construction of the statute is that, if a person in any manner *separates his tenement into parts, and gives up one part, he ceases to be in the actual occupation of that tenement within the statute. [*497]

J. L. Adolphus (with whom was *W. Clarkson*), contra, was stopped by the Court.

LORD DENMAN, C. J. It is clear that this was an actual occupation within the statute, although there was something which the pauper did not actually hold at all times, and although the parties, whom he took in, could not have been turned out in the dead of night. The case of an innkeeper is a very strong illustration of this case, and nearly the same. A person who lives in a house, and merely lets out parts of it in the manner stated here, does not cease to be the actual occupier.

LITLEDALE, J. The facts of this case completely distinguish it from *Rex v. St. Nicholas, Rochester*, 5 B. & Ad. 219, where the tenant let a part of the house, and it was actually occupied by another person.

WILLIAMS, J. I am of the same opinion. It is true, as has been urged, that it is desirable not to fritter down plain rules, but we must deal with a case according to the facts, and here they put an end to all question.¹

Order of sessions quashed.²

¹ COLERIDGE, J., was absent. See p. 489, ante.

² See *Rex v. Pakefield*, p. 612, post.

*The KING v. BOULTBEE. Jan. 16.

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The rule, that a statute taking away certiorari does not bind the Crown unless named, is not limited to cases where the Crown has an actual interest, but extends to all prosecutions in the name of the King.

And the rule in favor of the Crown is not defeated by the prosecutor having become nominally defendant; as where a conviction has been quashed at sessions, with costs to be paid by the prosecutor, and he seeks to quash the order of sessions.

By the Game Act, 1 & 2 W. 4, c. 82, the justices, before whom any person is summarily

convicted in penalties under that statute, may adjudge that such party shall pay the penalty immediately or at a future time, and, in default of payment, be imprisoned for a certain period : and it is enacted, that the conviction may be drawn in a certain form (corresponding with the above provision) : that the party convicted may appeal to the sessions, giving notice to the complainant of the cause and matter of appeal, within three days after the conviction ; and that no such conviction shall be quashed for want of form. A party, summarily convicted under the act, appealed, giving notice of several objections on the merits. By the conviction, when returned to the sessions, it appeared that the party was adjudged to pay the penalty forthwith, and that nothing was said of imprisonment in case of default. The sessions quashed the conviction on this ground, stating in their order that they quashed it for want of form. The objection was not taken in the notice of appeal, nor did it appear that the appellant, when he gave the notice, had means of knowing how the conviction would be framed. Held, that assuming the conviction to be defective in substance, the sessions had no power to quash it on this objection, no notice of it having been given.

RICHARD PICKERING was convicted by the Rev. James Roberts, a justice of the peace for the county of Warwick, on the information of John Boulton, Esq., of having committed a trespass, by entering and being, in the daytime, upon a piece of land in the possession and occupation of John Rowbottom, in search of game, with a dog and gun, contrary to stat. 1 & 2 W. 4, c. 32. The adjudication was as follows :—“ And I do adjudge that the said R. P., shall, for the said offence, forfeit the sum of 1*l*., and shall pay the said sum, together with the sum of 10*s*. for costs, forthwith. And I direct that the said sum of 1*l*., being the amount of the said penalty, shall be paid to John Brendon, one of the overseers of the poor of the said parish in which the said offence was committed, to be by him applied according to the directions of the statute in such case made and provided. And I do order that the said sum of 10*s*. for costs shall be paid to John Boulton, Esq., the complainant. Given” &c. Within [*499] the time prescribed by the act, Pickering gave notice of appeal, *which was duly served on Mr. Boulton. Several grounds of appeal were stated in the notice, involving the merits of the information and conviction, and the notice concluded, “ And I further give you notice that I am aggrieved by the aforesaid conviction, and shall, on the trial of the appeal aforesaid, insist on all other causes, matters, and things, which I can or lawfully may do.” The appeal came on at the Sessions, and, by order of the Court, recited to be made upon full hearing of the said matter, and counsel on both sides, the conviction was adjudged to be quashed, for want of form, with costs, to be paid by Mr. Boulton to Pickering. The informality relied upon was, that the Justice did not, by the conviction, adjudge that, in default of the penalty and costs being paid, the party convicted should be imprisoned and kept to hard labor, according [*500] to the form given by sect. 39, of the statute.¹ The *causes of appeal mentioned in the notice were not gone into. Application was afterwards

¹ The material clauses of stat. 1 & 2 W. 4, c. 32, are as follows :—Sect. 38, enacts, “ That the justice or justices of the peace by whom any person shall be summarily convicted and adjudged to pay any sum of money for any offence against this act, together with costs, may adjudge that such person shall pay the same either immediately or within such period as the said justice or justices shall think fit, and that in default of payment at the time appointed such person shall be imprisoned in the common gaol or house of correction (with or without hard labor), as to the justice or justices shall seem meet, for any term not exceeding two calendar months where the amount to be paid, exclusive of costs, shall not amount to 5*l*., and for any term not exceeding three calendar months in any other case, the imprisonment to cease in each of the cases aforesaid upon payment of the amount and costs.”

Sect. 39 enacts, that the justices before whom any person shall be summarily convicted of any offence against this act may cause the conviction to be drawn up in the form subjoined. The form states the conviction, and that the justices do adjudge that the party shall forfeit the sum of, &c., “ and shall forthwith pay the said sum, together with the sum of — for costs ; and that in default of immediate payment of the said sums, he the said A. O., shall be imprisoned [or imprisoned and kept to hard labor] in the — of — for the space of — unless the said sums shall be sooner paid ; [or and I [or we] order that the said sums shall be paid by the said A. O., on or before the —

made to Lord DENMAN, C. J., at chambers, on behalf of Mr. Boulton, for a certiorari to remove into this Court all orders of the Sessions touching the conviction and appeal, and the adjudication thereon. The application was grounded upon several objections to the order quashing the conviction, viz. 1. That the conviction was valid, and not bad for want of form. 2. That, by stat. 1 & 2 W. 4, c. 32, s. 45, no summary conviction under the act could be quashed for want of form. 3. That Pickering's *notice of appeal did not specify [*501] the objection in point of form, upon which the judgment of the Sessions proceeded; and that for want of such specification, which was required by stat. 1 & 2 W. 4, c. 32, s. 44, the Sessions were precluded from entertaining the objection. 4. That, if the conviction was bad for want of form, as objected at Sessions, it was a nullity, and there was nothing to appeal against. 5. That the appeal, as entered with the clerk of the peace, was against the Rev. James Roberts, the convicting magistrate, and not against Mr. Boulton, and therefore the Sessions could not order the latter to pay costs to the appellant; and that the prosecutor of an information was not liable to costs for a mistake of the convicting magistrate. The certiorari was granted; and the proceedings having been returned, a rule nisi was obtained for quashing the order of Sessions by which the conviction was quashed. A rule nisi was also obtained in the last term for quashing the certiorari. Both rules were now discussed together.

Hill and Kelly, against the rule for quashing the order of Sessions, and in support of the rule for quashing the certiorari. The power of enforcing this penalty is given by special provision of an act of parliament, which must be followed, or the power fails. By sect. 39, the adjudication should be, that the party pay the penalty, or be imprisoned. This conviction adjudges that Pickering do forthwith pay the penalty, without any alternative. The judgment is imperfect, and cannot be enforced. The Sessions were bound to quash the conviction on that account. It is indeed *stated, in the order of Sessions, [*502] that the conviction was quashed for want of form, but that is not so; and, whatever the Sessions may have adjudged, if, upon the order being brought here, the Court see that it is bad in substance, they will not allow it to have any effect. It is said that the notice of appeal did not set out the objection upon which the conviction was quashed; but it is not denied that the prosecutor in fact had notice of it. The certiorari is taken away in distinct terms by sect. 45. It is true that the certiorari in this case is applied for by the prosecutor of the information; and it may be contended, on the authority of *Rex v. Allen*, 15 East, 333, that a clause taking away certiorari does not bind the Crown, unless named. But that decision was on a revenue act, and clearly had refe-

day of — and in default of payment on or before that day I [or we] adjudge the said A. O., to be imprisoned [or imprisoned and kept to hard labor] in the — of — for the space of — unless the said sums shall be sooner paid; and I [or we] direct," &c. (the penalty to be paid to one of the overseers of the poor, to be applied according to the statute, and the sum of — for costs to the complainant). "Given," &c.

Sect. 44 enacts, "That any person who shall think himself aggrieved by any summary conviction in pursuance of this act may appeal to the justices at the next general or quarter Sessions of the peace to be holden, not less than twelve days after such conviction, for the county," &c., "wherein the cause of complaint shall have arisen, provided that such person shall give to the complainant a notice in writing of such appeal, and of the cause and matter thereof, within three days after such conviction, and seven clear days at the least before such Sessions, and shall also either remain in custody until the Sessions, or within such three days enter into a recognizance," &c. (to appear and try, to abide the judgment, and to pay costs): "and the Court at such Sessions shall hear and determine the matter of the appeal, and shall make such order therein, with or without costs to either party, as to the Court shall seem meet; and in case of the dismissal of the appeal, or the affirmance of the conviction, shall order and adjudge the offender to be dealt with and punished according to the conviction, and to pay such costs as shall be awarded, and shall, if necessary, issue process for enforcing such judgment."

Sect. 45 enacts, "That no summary conviction in pursuance of this act, or adjudication made on appeal therefrom, shall be quashed for want of form, or be removed by certiorari or otherwise into any of his Majesty's superior courts of record."

¹ This point is not further noticed, as no decision was given upon it.

rence to cases where the Crown is an actual party. Here the proceeding is between individuals; the Crown does not move in it. It may be suggested that, by sect. 38, of the present act, a party may be adjudged to pay the penalty and costs immediately, and that, if such adjudication were made and complied with, and the conviction drawn up afterwards, the alternative form would be inapplicable. But, although it is true that the formal conviction may be drawn up long after the adjudication has taken place, that does not dispense with the necessity of framing it as it should have been framed if made out at the time. In felony, where a particular judgment is prescribed by law, the omission of a material part vitiates the sentence, see *Rex v. Fletcher*, Russ. & Ry. 58.

Bere and Daniel, contra. A statute taking away the right of removal by certiorari does not bind the *Crown, unless there be express words for [*503] that purpose; *Rex v. Allen*, 15 East, 333. That was a prosecution in which the Crown had a direct interest; but the language of the Court there admits of a general application, and the decision was grounded upon a series of cases in which the prosecutors were private persons. *Rex v. Farewell*, 2 Stra. 1209; *Rex v. Clace*, 4 Burr. 2456; *Rex v. Cumberland*, 6 T. R. 194; *S. C. in Error*, *The Inhabitants of Cumberland v. The King*, 3 B. & P. 354; *Rex v. Bodenham*, 1 Cowp. 78, are cases of that description. [Lord DENMAN, C. J. Has not the prosecutor in this case become the defendant?] He is only so in form, like the plaintiff below, in a cause where the defendant brings a writ of error. But further, if the conviction was not in pursuance of the act, so that the sessions had no jurisdiction over the case, then, according to the principle admitted in *Rex v. Fowler*, 1 A. & E. 836, the certiorari is not taken away. Here they had no jurisdiction to make this order. They could not adjudicate upon any matter of complaint which was not stated in the notice of appeal, according to sect. 44, of 1 & 2 W. 4, c. 32; and the point on which the Sessions decided was not taken in the notice. [Lord DENMAN, C. J. The objection probably could not be discovered till the parties came into Court. LITTLEDALE, J. The notice of appeal is to be given within three days after conviction. The conviction would not be drawn at that time.] The party intending to appeal might apply to the magistrates to have it drawn. [Lord DENMAN, C. J. Would it be in the power of the Sessions to confirm a materially vicious conviction?] The Sessions here have stated the defect to be matter of form. [Lord DENMAN, C. J. *That is their opinion: we may think it substance.] The obser- [*504] vation, that the Sessions could not confirm the conviction, if materially bad, would apply to cases in which the statute allows more time for the appeal, and where the party intending to appeal has an opportunity of seeing that which he is to appeal against; as under the act for amending the poor law, 4 & 5 W. 4, c. 76. And, by the statute in question here, the appellant, though he had not seen the conviction, was not necessarily subjected to any hardship. If he had stated, as his ground of appeal, that he was not guilty, he might, under that notice, have taken any substantial objection; *Rex v. The Justices of Newcastle-upon-Tyne*, 1 B. & Ad. 933. But, as he has alleged specific objections, the Sessions could not go out of those. And the Sessions expressly state that they have quashed the conviction for matter of form, which, by sect. 45 of stat. 1 & 2 W. 4, c. 32, they are prohibited from doing. As to the objection itself, the statute does not imperatively require that the form there given shall be used. Enough has been adjudged here; and, at all events, the convicted party cannot complain that the full measure of punishment has not been inflicted.

Lord DENMAN, C. J. The statute gives an appeal to the Sessions, on condition that the appeal be brought not less than twelve days after the conviction, and that notice be given of the appeal, and of the cause and matter thereof, within three days after the conviction, and seven clear days before the Sessions: and the Sessions are to hear and determine the matter of the appeal, and make [*505] such order therein as to them shall *seem meet. Here the convicted party has appealed and given a regular notice. Then what were the

cause and matter of appeal stated in the notice? Three objections were stated, all going directly to the merits. Those objections were the matter upon which the Sessions were to adjudicate. They were to try the merits. But they have set aside the question as to these, and decided that the conviction was bad in form. The notice could not refer to objections merely on the face of the conviction; for a conviction is seldom drawn till the time of the Sessions; and this was probably never seen by the parties before that time. The justices, being as it were empannelled to try the merits of the appeal, have proceeded to try something else. If the alleged defect was merely form, the statute cures it, and precludes them from interfering; if it was an objection in substance to the jurisdiction, and was well founded, then, although the Sessions had confirmed the conviction, no man could have justified the putting it in force: either the conviction was good, or nothing could have been done upon it. Then as to the clause (sect. 45), which takes away the certiorari; if there had been no decision upon similar clauses in other statutes, it would appear that such a provision bound even the Crown. But it has often been held that the right of the Crown in such cases is not to be taken away unless by express words. In *Rex v. Bodenham*, 1 Cowp. 78, a distinction was attempted between cases in which the proceeding is actually that of the King, as where the revenue is concerned, and those in which the prosecution is private; and the Court said, "In cases of this sort there is no distinction." That is a direct authority on the point. *And again, in *Rex v. Allen*, 15 East, 333, although the information was for [*506] penalties under a revenue act, and although GROSE, J., and LE BLANC, J., in their judgments, adverted to the nature of the statute, BAYLEY, J., relied upon the rule "that general words in an act, that no certiorari shall be allowed, or the like, shall not bind the Crown, unless such an intention is to be collected from other parts of the act." The rest of the Court did not, in their judgments, limit this general doctrine; and no disapprobation was expressed of the decision in *Rex v. Bodenham*, 1 Cowp. 78, which was cited in argument. It is therefore perfectly clear, after much discussion of the point, that the certiorari is not taken away in the case of the Crown, considered generally as a suitor in a court of justice, and not merely with reference to the enforcement of any particular prerogative in respect of revenue.¹ The rule for quashing the order of Sessions will therefore be absolute, and the rule for quashing the certiorari discharged.

LITLEDAL, J. The general rule is, that the Crown, unless named, is not bound by a statute; and that, in the cases which have been cited, has been held applicable to clauses taking away certiorari. A distinction has been suggested between cases in which the Attorney-General is proceeding directly on behalf of the Crown, or a private prosecutor to enforce a conviction, and where a party, as in this instance, is endeavoring to get rid of the costs of a prosecution in which he has failed, and stands in the situation of a defendant: but that appears *to me too refined; although the party is called the defendant, [*507] that is only by the course of the Court; he is still, in fact, the prosecutor in the proceeding below. Then as to the order of Sessions; the cause and matter of the appeal, stated in the notice, and which the Sessions were to hear and determine, was confined to three grounds of objection. The Sessions, by their order, stated to be made on full hearing of the matter, and counsel on both sides, quash the conviction for want of form. They do not decide the matter of the appeal. Want of form is not mentioned in the notice. It is true that, when notice is given, the party cannot know whether or not there is a defect of form; but, if the statute takes from him the opportunity of raising that objection, it cannot be helped: the Sessions are not, therefore, enabled to enter upon matter not included in the notice. They had not, then, any right to make this order; and the more especially, as the statute says that no summary conviction under it shall be quashed for want of form.

¹ As to the removal of indictments or presentments by the prosecutor, see now *stat. 5 & 6 W. 4, c. 33, s. 1.*

WILLIAMS, J. I am of the same opinion. The distinction between cases in which the Crown proceeds as upon a private interest, and those in which an individual prosecutes in the name of the Crown, is somewhat invidious, and was overruled in *Rex. v. Bodenham*, 1 Cowp. 78. Then as to the ground of decision in the present case. Appeal is a remedy given by statute, and the legislature, in giving, may restrict it. Probably it was intended here that the appellant should be in a great degree precluded from objections on the form of the conviction. [*508] The appellant here, in his notice, expressly took grounds which went to the merits only. They were the "matter" of the appeal. It is true that the conviction, as drawn up, was not within his reach when he was obliged to give his notice; but if the objection arising upon it went to the jurisdiction, then at all events the conviction would not be available; if it fell short of impugning the jurisdiction, it was merely matter of form, and defects in form are cured by the statute. The Sessions have quashed the conviction for want of form, and not upon any ground taken by the appellant.¹

Rule for quashing the certiorari discharged.

Rule absolute for quashing the order of Sessions.

¹ COLERIDGE, J., was absent, see p. 489, *antè*.

THE KING v. THE INHABITANTS OF AMERSHAM. Jan. 16.

Pauper was bound apprentice by an indenture, which stated that 10*l.*, had been paid to the mistress as a consideration, out of the funds of a charity. The mistress had agreed with D., the pauper's grandmother (who was no party to the indenture), to take the apprentice for 25*l.*, which D. was to pay. The 10*l.*, was paid as part of the 25*l.*, out of the charity funds; but the mistress, at the time of making the agreement, did not know that this was intended. It did not appear that the trustees of the charity knew of any payment contemplated or made, except that of 10*l.*:

Held, that the indenture was void under stat. 8 Ann. c. 9, s. 39, for not truly stating the sum paid or contracted for with the apprentice.

ON appeal against an order of two justices, whereby Anna Seamons was removed from the parish of Aylesbury, in the county of Buckingham, to the parish of Amersham, in the same county, the Sessions confirmed the order, subject to the opinion of this Court upon a case, the material parts of which were as follows:—

William Harding, by his will, dated August 5th, 1719, devised estates to [*509] trustees to employ the rents and profits *towards putting out poor children apprentices. The respondents proved an indenture made May 8th, 1827, between W. R., W. B. E., &c., Esquires, trustees of W. Harding's charity, of the first part; Anna Seamons, a poor person, and settled inhabitant within the parish of Aylesbury, of the second part; and Catherine Read, spinster, of Amersham, in the county of Bucks, of the third part: whereby Anna Seamons, by the nomination and placing of the said W. R., W. B. E., &c., bound herself apprentice to Catherine Read, for the term of seven years, to learn the art or business of a dress-maker; and the said C. Read, in consideration of the sum of 10*l.*, of lawful money to her paid by the said trustees out of the said public charity of the said W. H., covenanted to teach Anna Seamons the art or mystery of a dress-maker.

Before the execution of the indenture, C. Read attended a meeting of the trustees, held May 8th; and afterwards the indenture was executed by Anna Seamons and C. Read, in the presence of, and attested by, John Parrott, agent to the trustees of the charity; and he paid the 10*l.* mentioned in the indenture to C. Read, the mistress, as the consideration for taking the pauper apprentice. C. Read signed a receipt endorsed upon the indenture as follows:—"Received, on the day and year within written, by me the within named Catharine Read, of and from the within named trustees, by the hands of W. R. and W. B. E.,

treasurer, the sum of 10*l.*, being the full consideration money within mentioned to be by the said trustees to me paid.

CATHARINE READ.

"Witness, JOHN PARROTT."

The pauper served three years under the indenture.

The appellants proved that Mrs. Dawney, the wife of *Mr. Dawney, the pauper's grandfather, had (by his authority) applied to C. Read to take Anna Seamons apprentice, in April in the same year; and upon that occasion the premium which Mrs. Dawney agreed to pay, and which C. Read agreed to receive, was 25*l.*; that this arrangement was made at Amersham; that C. Read did not know, until she came to Aylesbury and was introduced to the trustees, that any part of the premium she was to receive was to be paid from the funds of Harding's charity; and, being informed of the fact, was, at first, unwilling to take the apprentice, but eventually consented. After the indenture was executed, C. Read received from Mr. Dawney 15*l.* to make up the amount which he had agreed to pay, and which she had agreed to receive. Upon her going before the trustees to complete the binding, no conversation took place between her and the trustees, or any of them, or between her and Mr. Parrott, respecting any additional sum to be paid to her by Mr. Dawney with the apprentice; nor was it in evidence that the trustees, or Mr. Parrott, knew or suspected that any additional sum was so paid, or contracted for, beyond the sum mentioned in the indenture.

The question for the opinion of the Court was, whether the indenture was void by reason of the full consideration for the binding not being set out according to stat. 8 Ann. c. 9, s. 39.

Sir W. W. Follett and Bligh in support of the order of Sessions. The stat. 8 Ann. c. 9, s. 49, enacts that all such indentures as are there mentioned, "wherein shall not be truly inserted and written the full sum and sums of money received, or in anywise directly or indirectly given, paid, secured, or contracted for, with, or in *relation to" the apprentice, shall be void. The meaning is, that the indenture shall state the full sum which the parties to the binding, on each side, contract to give and to receive. A further payment made in pursuance of an agreement not effectual in law, even where the master was party to such agreement, has been held not to avoid the indenture; *Rex v. Bourton-upon-Dunsmore*, 9 B. & C. 872. Here the contract for payment of 25*l.* was entered into by a married woman. It is true that her husband fulfilled it; but that was after the execution of the indenture. Before that time there was no binding agreement between any parties for the payment of more than 10*l.* In *Rex v. Baildon*, 3 B. & Ad. 427, which may be referred to on the other side, the consideration to the master for taking the apprentice was stated in the indenture to be 4*l.* paid by a charity; but the boy's mother, without the knowledge of the trustees of the charity, agreed with the master to give him, and did give him, 1*l.* more: and the indenture was held void; but there the mother was a person capable of contracting, and was party to the indenture. And the subsequent decision in *Rex v. Aylesbury*, 3 B. & Ad. 569, renders it questionable whether, even in such a case, an agreement made without the knowledge of the trustees would be such a valid contract that the consideration introduced by it must be stated in the indenture. It does not appear in this case that the trustees knew of any agreement for a larger sum than 10*l.* It would be very hard if the child bound apprentice by them were to lose the benefits of the indenture, by reason of an engagement entered into without their knowledge, with a person to whom they were strangers.

*Sir J. Campbell, Attorney-General (with whom was Channell), contra. Mrs. Read, who was to receive the money, was a party to the indenture, and she has set out the consideration falsely. (He was then stopped by the Court.)

Lord DENMAN, C. J. The decision in *Rex v. Aylesbury*, 3 B. & Ad. 569, does not clash with that in *Rex v. Baildon*, 3 B. & Ad. 427. In the judgment

of Lord Kenyon in *Rex v. Leighton*, 4 T. R. 732, cited in *Rex v. Aylesbury*, 3 B. & Ad. 569, it is said, "The clear meaning of the statute of Anne is that where money or money's worth is given to the master by the friends of the apprentice by way of premium, a duty ought to be paid for it; but that where meat, clothes, &c. are to be provided for the apprentice, no duty is payable, because there is not anything given to the master." That judgment was sufficient for the decision of *Rex v. Aylesbury*, 3 B. & Ad. 569. The present case falls within the first part of Lord Kenyon's words there cited. It is a penalty, which the statute imposes upon the master, that if, by the statement in the indenture, he cheats the revenue, he loses his control over his apprentice. And, as to the apprentice, an indenture not duly stamped is void for the purpose of settlement, according to *Rex v. Edgeworth*, 3 T. R. 353.

LITTLEDALE and WILLIAMS, Js., concurred.¹ Order of sessions quashed.

¹ COLERIDGE, J., was absent. See p. 489, ante.

[*513]

*The KING v. BOXALL and others. Jan. 18.

Under stat. 5 & 6 W. 4, c. 33, as well as by the antecedent practice, a certiorari obtained by one of several defendants removes the indictment as to all, and the previous recognizances of all are discharged, though the parties not applying for the certiorari do not give any fresh security.

Application being made, under such circumstances, for a procedendo, unless the defendants not suing out the certiorari would enter into recognizances, the Court refused a rule to show cause.

THIS was an indictment found at the Surrey sessions, against thirty-three defendants, for a conspiracy, and removed, for trial, to the Central Criminal Court. All the defendants but three afterwards pleaded and traversed in the Central Criminal Court, and entered into recognizances, with sureties, to try there. The same attorneys acted for all the defendants who traversed. Two of the last-mentioned defendants applied by the same attorneys to LITTLEDALE, J., at chambers for a certiorari to remove the indictment into this Court, which was granted, each of the parties giving his own recognizance in 100*l.* and two sureties of 50*l.* each. No security was given in this Court by any of the other parties.

W. Clarkson now moved for a rule to show cause why a procedendo should not issue. The effect of the certiorari, if sustained, will be that, two of the defendants having removed the indictment by certiorari, all the others who have given recognizances and sureties will be discharged, and the prosecutor will be unable to enforce their appearance. A procedendo, therefore, ought to issue, at all events, unless those parties give security. The new act, 5 & 6 W. 4, c. 33, s. 2, as to certiorari, directs that "every person indicted," &c., who shall obtain a certiorari, not being in custody, &c., shall, before the allowance of the writ, enter into a recognizance, in the sums ordered by this Court or one of its

[*514] *Judges, with the conditions prescribed by former statutes, and thereupon the clauses and provisions contained in the former acts, as to costs or otherwise, shall extend to such recognizances. Here two only of thirty-three defendants have applied to remove the indictment; and the rest offer no recognizance or surety in lieu of those which would be discharged by the certiorari. All the persons indicted should have entered into recognizances, before a certiorari was granted, of which all will take advantage. (He then adverted to facts, alleged on affidavit, as showing that the prosecutor would be subject to much hardship and difficulty if the certiorari continued in force.)

LORD DENMAN, C. J. The practice is not altered by the late statute. Any one defendant may apply for a certiorari; and the circumstance that, by his obtaining it, the recognizances of the other defendants are discharged, may serve

to guide the discretion of a judge as to granting or withholding the writ, but is no ground for a *procedendo*.

LITLEDAL, J. In a case before me some time ago, I refused to grant a *certiorari* unless all the parties indicted would enter into recognizances, and they did so; but I found afterwards that, by the practice, if they had not consented, I should have had no right to withhold the writ merely on that account. The new act does not alter the practice.

WILLIAMS, J., concurred.¹

Rule refused.

¹ Coleridge, J., was absent. See p. 489, *antè*.

*MORGAN v. BROWN and Another. Jan. 19.

[*515]

A statutory conviction of A. and B. for an offence several in its nature (as an assault under stat. 9 G. 4, c. 81), adjudging that they, the said A. and B., for their said offence do forfeit the sum of, &c., and in default of payment be imprisoned for the space of &c., is bad, inasmuch as the penalty ought to be imposed on the parties severally, and not jointly. And a party committed under such a conviction may recover in trespass against the committing magistrate.

THIS was an action for assault and false imprisonment. Plea, not guilty. On the trial before WILLIAMS, J., at the Shropshire Summer assizes, 1834, it appeared that the defendants, magistrates of Shropshire, had summarily convicted the plaintiff and one Parker of an assault, under stat. 9 G. 4, c. 31, s. 27. The conviction was as follows:—"County of Salop. Be it remembered, that on, &c., R. Parker and E. Morgan are convicted before us, &c., for that they the said R. P. and E. M. on, &c., at, &c., did violently assault one E. Yapp. We the said justices do therefore adjudge the said R. P. and E. M. for their said offence to forfeit and pay the sum of 4s., and also the sum of 6s. for costs; and, in default of immediate payment of the said sums as aforesaid, to be imprisoned in the House of Correction at Shrewsbury for the space of fourteen days, unless the said sum shall be sooner paid; and we direct that the said sum of 4s. shall be paid," &c. (the fine to one of the high constables of the parish where the offence was committed, and the costs to the prosecutor).¹ Upon this conviction the plaintiff and Parker were committed to the House of Correction. The commitment recited the conviction, and ordered that, in default of immediate payment of the sums therein mentioned, the parties should be imprisoned in the House of Correction for fourteen days, unless the said sums should be sooner paid. Among other objections on behalf of the plaintiff, it was urged that the conviction *was bad, as it imposed a joint fine upon two persons. The learned Judge held this objection fatal, and the plaintiff had a verdict. [*516] In the ensuing term a rule nisi was obtained for a new trial, or to enter a nonsuit.

Talfourd, Serjt., and C. Phillips, now showed cause.² The fine ought to have been several. The effect of imposing a joint fine on the two parties is that, if one were willing to pay his own proportion, he could not be discharged unless the other paid his. And the adjudication ought to show that the magistrates have exercised their judgment as to the amount of fine to be paid by each. No instance can be given in which a conviction like this has been supported.

Sir J. Campbell, Attorney-General, and Godson, *contra*. This was not a joint offence, but one for which the parties were liable severally, according to the distinction stated by Lord MANSFIELD in *Rex v. Clark*, 2 Cowp. 612. By the statute each might have been fined in the full amount here imposed. Supposing, therefore, that the effect of this adjudication were to subject either to the whole penalty, there has been no excess of jurisdiction. [Lord DENMAN,

¹ See the form of conviction, in the case of a single defendant, stat. 9 G. 4, c. 31, s. 35.

² Three objections to the conviction were relied upon; but the judgment of the Court proceeded wholly upon that above stated.

C. J. In Hawk. P. C. book ii. c. 48, s. 18, Vol. iv. p. 473, ed. 1795, it is said, "that where there are several defendants, a joint award of one fine against them all is erroneous, for it ought to be several against each defendant; for otherwise one who hath paid his proportionable part might be continued in prison till all the others have also paid theirs, which would be in effect to punish him for the offence of another." It is only said that the *judgment will be erroneous. Here it is sufficient if the conviction be not a nullity. And the case supposed in that passage probably is where the judgment imposes the full fine allowed by law. By 9 G. 4, c. 31, s. 27, a party summarily convicted of an assault is to "forfeit and pay such fine as shall appear to" the justices "to be meet, not exceeding, together with costs (if ordered), the sum of 5*l*." Here the magistrates have ordered the parties to pay 4*s*. and 6*s*. costs. If the exercise of their authority would not be lawful unless a forfeiture to the whole amount of 4*s*. and 6*s*. was imposed on each, the Court will construe the conviction as having that effect. They have reduced the fine in this case from 5*l*. to 4*s*. It was in their discretion to reduce it still lower. They might reduce it to 4*s*. in the case of one defendant, and nothing in that of the other, but, at the same time, adjudge that both should be imprisoned till the one fine was paid. Then even according to the view of the case taken on the other side, the proceeding is not invalid.

Lord DENMAN, C. J. We are all clearly of opinion, on this objection, that the conviction was bad. The best mode in which the case can be put for the defendants is that, upon the conviction, it is ambiguous whether the parties are adjudged to forfeit 8*s*. or 4*s*., and whether they are to pay 12*s*. costs or 6*s*. But that alone is a sufficient objection. A party has a right to know precisely the amount of penalty imposed upon him, in order that he may be able to relieve himself. And, besides, this is clearly a several offence, and the magistrates are bound to consider the conduct of the parties respectively in imposing the fine.

[*518] The defendants *would make the right to fine commensurate with the power; but they have no right to impose a fine unless they are satisfied that it is the proper one. And on a conviction like this, the magistrates may have intended one party to pay a fine little more than nominal, and the other a more considerable one; yet the first might be imprisoned till the latter had paid his fine. It is laid down in the passage of Hawkins, already referred to, that a judgment having this effect would be erroneous. The rule must be discharged.

LITLEDALE, J. The party informing in this case might have proceeded against the plaintiff and Parker jointly or severally, either by action or criminally. The proceeding is instituted under stat. 9 G. 4, c. 31: the magistrates hear the complaint, and decide that 4*s*. be paid as a fine, and 6*s*. for costs, and that the parties be imprisoned fourteen days, unless the fine and costs be sooner paid. It is not certain, upon the face of the conviction, whether the magistrates intended that each defendant should pay 4*s*., or that that sum should be paid between them; but, upon the whole, I think it must be taken to mean that one fine of 4*s*. should be paid. Then, supposing the case were that of an indictment against two persons, could there be a judgment against them jointly, that they should pay a fine? It is the constant practice in this Court, on judgment against several parties, where a fine is imposed, that the case of each is considered separately. By the stat. 9 G. 4, c. 31, s. 28, a summary conviction of assault, under that act, is made a bar to any further criminal proceeding. The conviction, therefore, stands in the place of an indictment; and the officers of the Court say [*519] that, on indictment, *there is no instance of a joint fine upon two persons for an assault. In Godfrey's case, 11 Rep. 42 a, referred to in the margin of the passage of Hawkins which has been cited, it is said, page 44 b, that when a fine is imposed against law, as joint, where it should be several, it may be avoided by plea and judgment of the Court. And so in this case, the adjudication of a joint fine, being brought before the Court, may be declared invalid,

as well as if the question had been raised by plea. The general result of the authorities cited in Hawkins, I think, is that, where a fine is imposed upon several defendants, it should be imposed upon them separately. And therefore, upon those authorities, as well as on the grounds of reason and the practice of the Court, I am of opinion that there should, in this case, have been separate fines, and that the conviction was bad, not in form but in substance.

WILLIAMS, J., concurred.¹

Rule discharged.

¹COLERIDGE, J., was absent. See p. 489, *antè*.

JOHNSON v. The Churchwardens and Overseers of the Parish of ST. PETER, HEREFORD. *January 19. [*520]

A. demised to B., for a term of years, two messuages; the lease contained a covenant by B., that he would, during the term, keep the premises in repair, and leave them, at the end of the term, in good repair and in the same state as they were in at the beginning. At the end of the term, the messuages were out of repair, and had been converted into a single house. B. held on without a fresh lease, and C. afterwards purchased the reversion of A., and B. continued to hold on under C.: Held,

1. That B. was not liable in assumpsit on an implied contract to put the messuages in such repair, and in the same state, as they were in at the commencement of the term.
2. That, supposing B. so liable, C. had no right of action for breaches of the contract committed before he purchased the reversion.

ON the trial of this cause at the Hereford Summer assizes, 1834, before ALDERSON, B., a verdict was taken for the plaintiff, with 500*l.* damages, subject to the award of a barrister, who was to state on the face of his award any question of law which he might be requested to raise, either as to the right of the plaintiff to recover, or as to the principle on which the damages, if any, were to be settled. The arbitrator found specially as follows:—

I find that, by an indenture of lease, bearing date 15th of December, 1807, Harcourt Woakes demised two messuages to Francis Gritton and William George, churchwardens, and Thomas Day, overseer of the poor of the parish of St. Peter in Hereford, and to their successors, for the term of twenty-one years from the 25th of December then next, at the yearly rent of 16*l.* 16*s.* payable at Midsummer and Christmas. This lease contained the following covenant by Gritton, George, and Day, for themselves and their successors, churchwardens and overseers of the parish of St. Peter for the time being: that they the said F. G., W. G., and T. D., and their successors, churchwardens and overseers, &c., shall and will from time to time, and at all times during the said term, at their own costs* and charges, keep in good and tenantable repair the said messuages or dwell- [*521] ing houses hereby demised, and, at the end or sooner determination of the said term, shall and will quit and leave the said premises and every part thereof in such good and tenantable repair; and also that they the said F. G., W. G., and T. D., churchwardens, &c., shall and will use and keep the same, and every part thereof, as and for a workhouse or house of industry for the use of the said parish of St. Peter, or for such other uses and purposes as they may think proper to convert the same, provided the said premises and every part thereof are left in the same state and condition as they are at present, at the end of the said term. The premises were occupied by the parish of St. Peter under this lease, until its expiration on the 25th of December, 1828, the two messuages having been converted into one poor-house, and continuing in that state on the 25th of December. Possession of the premises was not given up at that time; but they continued to be occupied as the parish poor-house; and the rent of 16*l.* 16*s.* per annum was paid by the parish officers for the time being until the 2d of February, 1833, when possession was given up, after notice to quit served by the churchwardens and overseers upon the plaintiff; but the premises were not re-converted into two distinct tenements.

I find that the interest of Harcourt Woakes in the premises had, at the time when the lease expired, become vested in one John Henderson, who afterwards conveyed the same to the plaintiff by lease and release of the 9th and 10th of February, 1829. The rent payable by the parish for these premises was then [*522] apportioned, and a part paid over to Mr. Henderson; from which *time the rent-days were altered from Christmas and Midsummer to the 2d of February and the 2d of August. I find that the above covenant to repair was broken by the said Gritton, George, and Day, at the expiration of the said lease, and the dilapidations amounted to the sum of 53*l.*; and I find that that amount of dilapidations still continued at the time when the possession was given up, on the 2d of February, 1833, but no more. And I find that the covenant for the leaving of the premises in the same state and condition as at the time of the demise was also broken at the expiration of the lease, if the Court shall be of opinion that the non-conversion of the workhouse into two distinct tenements constituted a breach thereof. If the defendants are to be considered as holding after the determination of the lease upon the terms of tenants from year to year simply, then I find that they fully repaired the premises during the whole of such their yearly tenancy, as far as such tenants are liable. If they are to be considered as holding subject to the same terms as were contained in the above lease, then, as to the amount of dilapidations, I do not find anything to be due beyond the above-mentioned sum of 53*l.*, which was so due, as already stated, on the 25th of December, 1828, and still continued due on the 2d of February, 1833, the dilapidations being the same at both periods; but I find that the re-conversion of the poor-house into two houses, in the same state and condition as at the original demise, would have cost the sum of 5*l.*

The declaration consisted of three counts. The first stated that, in consideration that the defendants had become tenants to the plaintiff of certain premises [*523] that had before then consisted of two separate messuages, but *which had been altered and converted into a workhouse, and so continued and remained at the time of making the promise after mentioned, upon certain terms and conditions, that is to say, that the defendants would during the continuance of the said tenancy keep the said premises in good and tenantable repair, and, at the expiration of the said tenancy, re-alter and re-convert the said workhouse into two separate houses, and restore the said premises to the same state and condition in which they were previous to their alteration and conversion, and deliver them up in such good and tenantable repair, the defendants promised so to do: the plaintiff then alleged that the tenancy continued for a long space of time, until the defendants quitted and delivered up possession; and he stated, as a breach, that the defendants did not keep the said premises in good and tenantable repair, nor re-alter or re-convert the said workhouse into two separate messuages, or restore the said premises to their former state and condition. The second count was confined to the non-repair, and alleged that the defendants held the premises upon terms and conditions similar to those contained in the covenant of Gritton, George, and Day. The third count was the common count for not keeping in good and tenantable repair. The defendants pleaded the general issue.

Upon the above statement of facts, I award that the verdict now entered for the plaintiff shall be set aside, and a verdict be entered for the defendants, unless the Court shall be of opinion that the plaintiff is entitled to recover the said several sums of 53*l.* and 5*l.*, or either of them; and according to such decision I award that the said verdict shall be reduced to the sum of 58*l.*, 53*l.*, or 5*l.*, with forty shillings costs.

*In Michaelmas term, 1834, *Maule* obtained a rule to show cause [*524] why the verdict and judgment should not be entered for the plaintiffs for 53*l.*, or 5*l.*, or both sums, and the award be set aside.

Talfourd, Serjt., and *Godson* now showed cause.¹

¹ Before Lord DENMAN, C. J., LITTLEDALE, and WILLIAMS, Js.

The arbitrator has found properly. Both plaintiff and defendants are strangers to these covenants. The plaintiff purchased after the lease had expired, and the covenant had been broken; he took the premises as they were at the time of the sale to him; but he could not purchase a right for suing for past breaches. And the price which he paid must have been estimated upon this principle. Again, the defendants came into possession after the lease had expired, and after the covenants had been broken; they could not be understood as accepting a demise subject to previous dilapidations. The policy of the poor laws is, that each year shall bear its own burden. When the lease was entered into, in 1807, the stat. 59 G. 3, c. 12 had not passed; the parties then taking had, therefore, no power, such as that given in s. 17, to take in succession. It is true that, in the common case of a lessee holding on after the expiration of his lease, an agreement to continue holding upon the terms of the lease may be implied: but here the implication cannot arise, because the occupiers are no longer the same. And the particular covenants, to deliver up at the end of the term, in good repair, and to re-convert the houses at the end of the term into their former state, cannot have been contemplated by parties taking after the term had expired.

**Maule and R. V. Richards*, contrà. The argument that the plaintiff had no right to sue for these breaches, assumes that the original lessor had no right to sue upon the contract arising after the expiration of the lease. If the latter could sue, the assignee of the reversion could sue. He has as much right to enforce the implied agreement, as an assignee of the original lease would have had to enforce the covenants. Then, as to the defendants, on what terms did they hold? None can be implied, except those contained in the leases, subject to the express variations as to the days of payment. This was laid down by Lord ELLENBOROUGH in *Digby v. Atkinson*, 4 Campb. 275. It is said that this construction will be contrary to the policy of the poor laws; but, if the parish officers are allowed to hold by a lease, they must be subject to the contract to repair contained in the lease. The original lessees were trustees for the parish; if so, the case falls within stat. 59 G. 3, c. 12, s. 17, upon the authority of *Doe dem. Jackson v. Hiley*, 10 B. & C. 885. [Lord DENMAN, C. J. In *Digby v. Atkinson*, 4 Campb. 275, it was not put to the Court that the terms on which the holding on took place were a question for the jury. Must not the question be one of fact? If so, are you not bound by the arbitrator's finding?] As a presumption of fact, the arbitrator may leave it to the Court, as is often done in cases sent from quarter sessions. But it is rather a presumption of law. [LITLEDAL, J. If Lord ELLENBOROUGH lays it down as a conclusion of law, I think he goes too far. I always understood it to be a fact which was inferred, unless the state of things was altered at the expiration of the lease. But, if it is an inference of law, the covenants in a lease which had expired a hundred years ago might be enforced, though there had been repeated changes of tenants.] *Cur. adv. vult.*

Lord DENMAN, C. J., in this term (January 30th), delivered the judgment of the Court. After stating the facts, his Lordship proceeded as follows:

The plaintiff relied on the general principle, that, where premises are held on by the same tenant of the same landlord, after the expiration of a lease of them, granted to the former by the latter, without a new contract, the law will imply an agreement to hold on the same terms. He cited the case of *Digby v. Atkinson*, 4 Campb. 275, where a party so continuing, having been originally bound by his covenant to keep in repair, was held liable to make good a loss by accidental fire. That case would have been applicable, if the fire had happened during the term. But if it had, the plaintiff could only have had an action of covenant upon his lease, not assumpsit on the breach of an implied contract arising out of a new tenancy from year to year, when the defendant became tenant of premises in that very condition which he is supposed to have undertaken that they should never fall into.

The change of parties produces another difficulty. The defendants were and are clearly liable to their original lessor on their breach of covenant. How then [*527] can they be also liable to their new landlord for the *same damage arising from the breach of their implied undertaking? This would be manifestly unjust. But there is no injustice in confining the remedy to that party with whom the covenant was broken, who has either sold the premises for a lower price for that reason, or has received the full price on the supposition that the damage is to be made good. In the former case he may sue on his own account; in the latter, as trustee for his vendee.

Something was said on the alteration of the law relating to churchwardens: but we do not think it could affect the present question, as the former lease, to whatever extent it may be binding, is not the actual contract, but only evidence of the contract that came into existence at its termination.

Verdict to be entered for the defendants.¹

¹ See *Buckworth v. Simpson*, 1 C. M. & R. 884, S. C. 5 Tyrw. 844.

[*528] *JOHN SEATON, HENRY EDWARDS, and HESTER his Wife,
and MARY SEATON v. JAMES BOOTH.

A., B., and C., being interested in certain lands, but having no common legal interest in any portion of them, agreed together to put them up for sale, according to their respective interests, and the lands were so put up, under the direction of their agent, in lots. Each lot was described in a separate paper, containing the conditions of sale, in which it was stipulated that "the vendors" should deliver an abstract of title; that the conveyances should be executed, and the whole purchase-money paid, on a certain day, from which time the purchaser should have possession; and that, if the purchaser should be let in before payment of the purchase-money, he should be considered tenant at will to the vendors, and pay interest at the rate of 4 per cent. on the amount of purchase-money, as and for rent. Defendant bought four of the lots under the above conditions, two by auction, and two by private contract. No abstract of title was delivered; but defendant was let into possession, and held for several years, not paying the purchase-money. He knew of the arrangement entered into by A., B., and C. for the sale of the premises:

Held, that A., B., and C. could not jointly sue upon an implied contract by the defendant to waive the delivery of an abstract, and perform the condition for payment of 4 per cent. interest as rent.

Also, that A., B., and C. could not recover the 4 per cent. in a joint action for use and occupation.

ASSUMPSIT. The first count of the declaration stated that, before the making of the promise, &c., the plaintiffs caused to be put up to sale certain premises of Gervas Seaton deceased, to wit (describing several parcels of land), upon and subject to the following conditions, viz.: That the vendors should, at their own expense make out and deliver an abstract of the title to every purchaser whose purchase-money should amount to 200*l.* or upwards, on or before the 7th of March then next, and lodge a general abstract of the title to the whole estate at the Whitgift Ferry House, there to remain for the use and inspection of all the other purchasers: That the vendors should deliver to the said defendant¹ a copy of the deed vesting the estate in themselves or their ancestors, and the purchaser should be at the expense of the conveyances, and of all further copies [*529] of deeds which he might require: *That the conveyances should be executed, and the remainder of the purchase-money paid, on the 6th of April then next, from which time the purchaser should have possession or be entitled to the rent; but, in case he should be let into possession before the payment of his purchase-money, he should be considered as tenant at will to the vendors, and pay interest after the rate of 4*l.* per cent. per annum upon the amount of his purchase-money, as and for such rent.² The count then stated

¹ The words of the condition itself were, "the vendors shall deliver a copy of the deed vesting," &c.

² The words of the condition were "as and for rent."

that the plaintiffs, on, &c., at the request of the defendant, bargained, &c., and the defendant bought of the plaintiffs, the above-mentioned premises, upon the said conditions, for a certain price, viz., &c. And whereas afterwards, and before the making of the promise, &c., the plaintiffs had neglected and omitted to make out and deliver to the defendant an abstract of the title to the last-mentioned premises, and to lodge a general abstract, &c. (as in the conditions above set out), and had also neglected and omitted to deliver to the defendant a copy of the deed vesting the estate in themselves or their ancestors, in consideration of the premises, and that the plaintiffs, on, &c., would permit the defendant to have possession of the premises so bargained and sold to him as aforesaid, the defendant undertook and promised the plaintiffs that he would waive the said several omissions and neglects, and would abide by and perform the last-mentioned condition of sale, for the payment of interest at four per cent., &c., as and for rent, as if no such neglect or omission had been made. Averment that the plaintiffs *always, from the time of the exposure to sale, &c., have been [*530] ready and willing to perform all things in the said agreement, &c.: that they, on April 6th, 1828, permitted the defendant to have possession of the premises: that he then entered into possession, and from thence continually has remained in possession, &c.: and that the interest from the said 6th of April till the commencement of the suit amounted to, &c. Breach, non-payment. The second count was for use and occupation. Plea, the general issue.

On the trial before Lord LYNDBURST, C. B., at the York Summer assizes 1834, the following facts appeared: By the will of Gervas Seaton, deceased, certain premises, of which those in question formed part, were devised to the plaintiff John in fee, in trust to make certain allotments out of them to the plaintiffs Hester and Mary, and, subject to such trust, to his own use in fee. It did not directly appear whether or not the allotments had been made at the time of the sale. The estates comprising the premises now in question were put up to sale by auction in lots. Each lot was described on a separate paper, headed, "Upon sale by auction, at the Whitgift Ferry House, this 4th of February, 1828, the estates of the late Mr. Seaton, in lots." Then came the description of the lot; and below were printed the condition of sale. The defendant bought lots 13 and 14 at the auction, by separate biddings, subject to the conditions of sale recited in the declaration; and he signed the conditions. The condition for executing the conveyance, &c., on the 6th of April, and for payment of 4 per cent. if the purchaser should be let in before payment of the purchase-money, was *No. 8. The defendant bought two other lots, separately, by private contract, also subject to the conditions mentioned in the declaration. [*531] No other express contract was at any time entered into by him. The plaintiffs had executed a deed of covenant among themselves, according to their respective interests, for the purpose of authorizing the sale and regulating the distribution of the proceeds. The draft was prepared by Mr. Pearson, a solicitor; and the terms of it were known to the defendant. Pearson managed the sale, as attorney for the vendors. The defendant was let into possession of the above-mentioned four lots, being the premises mentioned in the declaration, and had kept possession of them ever since, without paying interest or rent. No abstract had been delivered or lodged, according to the conditions. *F. Pollock*, for the defendant, objected, first, that the first count of the declaration stated one sale of all the premises, whereas it appeared by the evidence that there were several distinct sales; and, secondly, that the alleged agreement to waive the non-delivery of an abstract, and to pay 4 per cent. on the purchase-money, had not, either expressly or impliedly, been made between the defendant and the plaintiffs jointly. He also contended that the plaintiffs could not, under the circumstances, recover on the count for use and occupation. The Lord Chief Baron held the first count not maintainable, and a verdict was taken for the defendant on that count, and for the plaintiffs on the second, leave being reserved for the

defendant to move to enter a nonsuit. A rule nisi was obtained for that purpose in the ensuing term.¹

[*532] *Alexander* and *Wightman* now showed cause. First, as to the special count. In *James v. Share*, 1 Stark. N. P. C. 426, which was cited for the defendant at the trial, two lots had been sold separately, and the purchase was stated in the declaration as if the contract had been for both lots jointly; and this was held a variance. But there the action was brought to enforce the very contract so misstated. Here, the contract for purchase of the lots on certain conditions is mere matter of inducement: the ground of action is the non-performance of a subsequent contract, namely, to abide by the eighth condition of sale notwithstanding the non-delivery of an abstract. The case, therefore, does not apply. Then as to the count for use and occupation. By the eighth condition the defendant, upon being let in, was to hold as "tenant at will to the vendors, and pay interest after the rate of 4 per cent. per annum upon the amount of his purchase-money, as and for rent." He was let in under that condition. That was clearly a holding under an "agreement," "whereon a certain rent was reserved," within stat. 11 G. 2, c. 19, s. 14. *Hull v. Vaughan*, 6 Price, 157, Peake N. P. C. 254, note (a), 8d ed., which is a stronger case than this, and *The Dean and Chapter of Rochester v. Pierce*, 1 Camp. 466, show that, in general, ownership on one side, and a permitted occupation on the other, are sufficient ground for an action for use and occupation. *Saunders v. Musgrave*, 6 B. & C. 524, where it was held that the purchaser was liable as for rent, resembles this case. In *Kirtland v. Pounsett*, 2 Taunt. 145, which may [*533] be cited on the other side, and where use and occupation *was held not to lie, the purchaser (the defendant) had paid his purchase-money, and the plaintiff had had the use of it during the time of the occupation: and the defendant had not had an occupation which could properly be called beneficial, as the holding in this case was. It will be contended that the evidence in this case does not show any contract with the plaintiffs jointly. But in the conditions of sale no person is named: the contract is with the vendors, whoever they may be. The defendant was to be "tenant at will to the vendors." It does not appear that there had been any partition among the plaintiffs. *John Seaton* and *Hester* and *Mary Seaton*, though not joint tenants, had each an interest in the whole of the lots, and they had united in putting them up to sale, and in allowing the defendant to have possession. Suppose the agreement had been, that the defendant should hold as tenant at will to the devisees of *Gervas Seaton*, or that the premises should be considered as let to the defendant for those whom it might concern; the case would not have differed materially from this, and the plaintiffs, jointly, would have been the proper parties to sue.

Sir F. Pollock (with whom was *Joseph Addison*), contra. As to the special count, the transaction there stated was, in fact, several contracts for the purchase of different lots, upon the conditions stated in the count. If that transaction was to be dismissed as mere matter of inducement, the plaintiffs ought to have shown some subsequent contract upon the terms of the eighth condition, embracing all the lots. None such is proved. As to the claim for use and occupation, the fact of a party being let into possession upon an agreement of [*534] *purchase does not of itself show a contract upon which such a claim could arise. The eighth condition, if it could be resorted to under this count, would not establish a tenancy; it was a special contract for the payment of certain interest on the purchase-money, in a particular event. *Saunders v. Musgrave*, 6 B. & C. 524, was a very different case, and is no authority for the plaintiffs. In the present instance no contract for use and occupation could arise between the defendant and the plaintiffs in respect of any one portion of the premises. They had no common interest in any part. To support an action for use and occupation there must be either an occupation by the defendant and

¹ One ground of the motion was the joinder of *Hester Edwards* as a plaintiff, but no decision was given as to this.

title proved in the plaintiffs, which is not the case here; or an actual contract, of which there is no evidence. The word "vendors" in the conditions of sale was used to avoid specifying parties; it does not enable the plaintiffs to claim as landlords if not otherwise entitled.

LORD DENMAN, C. J. This case turns entirely upon the question, whether or not the plaintiffs have jointly made any contract with the defendant. Putting out of view any point arising upon the interest of Hester Edwards, the matter for consideration is, first, whether the several persons claiming to stand in the situation of landlords of these premises have agreed to become vendors of them to such persons as might become purchasers. There is no evidence of any joint contract to this effect. Then it is said that the agreement of sale, as stated in the declaration, is merely inducement. But there is no subsequent contract proved. The undertaking *relied upon must result either from the original contract of sale, or from a joint ownership in the plaintiffs and [*535] occupation under them. But the contract proved does not support the action, and there is no joint-ownership proved. The plaintiffs, therefore, cannot recover.

LITLEDALE, J. The declaration states a contract between the plaintiffs and the defendant for the sale and purchase of the premises; and that, in consideration of being let into possession, the defendant agreed to waive the non-fulfilment by the plaintiffs of a part of the conditions, and to perform the eighth condition of sale for the payment of four per cent. interest as and for rent, as if no such omission by the plaintiffs had occurred. But the evidence did not show an express contract to that effect, made by the defendant with all the plaintiffs; and no such contract could be implied, at law, from the mere circumstance of the defendant being let into possession. The remedy was to be sought in equity. As to the count for use and occupation, the eighth condition, under which the defendant is said to have occupied, supposes that the vendors shall have performed their part of the previous contract, and provides for the case of default made by the purchaser, after such performance. The law would not imply that the vendee had subjected himself to such a condition by being let into possession while the title remained uncertain. And supposing that the defendant, under the circumstances, had agreed to be bound by the eighth condition, the action ought not to have been for use and occupation; the declaration should have been special on the contract to pay four per cent. *upon the purchase- [*536] money; a contract in the nature of an agreement for a tenancy, but not amounting to that. As EYRE, C. J., observes in *Naish v. Tatlock*, 2 H. B. 323, "the statute" (11 G. 2, c. 19, s. 14) "meant to provide an easy remedy in the simple case of actual occupation, leaving other more complicated cases to their ordinary remedy."

WILLIAMS, J., concurred.

COLERIDGE, J. As to the special count, it is enough to say that there was no evidence from which the jury could infer such a contract as is there stated; though I do not mean that circumstances might not have arisen from which that contract might have been implied. But then it is contended that the parties may have an action for use and occupation, because the defendant has come in under a contract of sale to which they, as vendors, are one entire party, and has had a beneficial occupation under it. Whether there was a beneficial occupation, upon which such an action might be grounded, it is not necessary to examine; and perhaps it may not be easy to reconcile the cases upon this subject, each of which has turned very much on its own particular circumstances. But, assuming that there was such an occupation, what is the evidence of a permission to occupy, given by these four plaintiffs? It must be inferred, either from the interest of the four plaintiffs in the premises, or from some contract entered into (though not perhaps expressly) by them. Now there is clearly no joint title. And the defendant's undertaking to purchase was by separate agreements as to the different *lots: at least the purchase by private contract [*537]

was distinct from the purchase under the sale by auction. Then, the contracts of purchase being separate, how can we infer from the terms of them one entire contract after the purchase, relating to all the property? The defendant was let in under the eighth condition. But that is a special contract; and it is contained in four several sets of conditions, annexed to the descriptions of the different lots. And, although it is said that the defendant came in under "the vendors," the contract with the vendors must be looked at with reference to the title of the parties for whom the sale is made. The plaintiffs have, therefore, failed to establish either an express or an implied contract.

Rule absolute.

[*538]

*The KING v. LANGHORN. Jan. 23.

To a quo warranto for exercising the office of mayor of a borough, the defendant pleaded that by charter the corporation had power to elect a burgess for mayor, and that, by custom, there was an indefinite number of free burgesses, and the mayor, bailiffs, and burgesses, being duly assembled, might elect whom they would for burgess; that he was elected burgess at a meeting duly assembled, according to the custom of the borough, and was afterwards duly elected mayor according to the charter. The Crown traversed the fact that the meeting at which he was made a burgess was duly assembled. It appeared, at the trial, that the meeting was not held on a day appropriated to the purpose of electing burgesses; and the jury found that the custom was to elect burgesses by the burgesses for the time being, who were indefinite in number; and that every resident burgess was to be served with a personal notice of the meeting, and, if he required it, of its object; but that the custom must be taken with the qualification that an accidental omission to serve a resident burgess was not a violation of it. It also appeared that R., a resident burgess, had told the officer whose duty it was to serve the notices, that he need not serve him, as he was frequently absent, and could hear tell of what was going on. The officer did not serve R., who was in fact in the borough at the time of the meeting. The jury found expressly that the omission to serve R., was accidental:

Held, that the qualification of the custom, as to accidental omissions, was bad in law; and that the omission to serve R., was not accidental.

INFORMATION in the nature of a quo warranto, for exercising the office of Mayor of the borough of Berwick-upon-Tweed.

The first three pleas alleged that the Mayor, by charter, was to be elected according to a method specified in the pleas, from the burgesses. They set out three different customary methods of electing a burgess, and alleged that the defendant was duly elected burgess in conformity with such customary methods respectively, and was afterwards duly elected mayor, according to the charter. The Crown took issue on the fact of the election as burgess in conformity with the method alleged in the first plea; and to the second and third pleas replied specially a customary method of electing burgesses, different from the method alleged in those pleas, with special traverses of the methods therein alleged; and the replication also took issue on the fact of the election in conformity with each method alleged in the second and third pleas respectively. The defendant joined on the issues tendered by the Crown; and also took issue on the special [*539] traverses of the customary methods respectively *set out in the second and third pleas; on which issues the Crown joined.

The fourth plea admitted the constitution of the borough, and the nature of the office of mayor, as laid in the information; and alleged that, by the governing charter (2 Ja. 1), the mayor, bailiffs, and burgesses were empowered to meet on Michaelmas day, and nominate and elect one of themselves to be mayor for the year ensuing; that, long before and at the time of granting the charter, there had been and still was an indefinite number of free burgesses, and that there had been during all that time, and still was, a custom for the mayor, bailiffs, and burgesses, for the time being, being duly assembled at a guild or meeting for that purpose, to elect and choose such person or persons to be a burgess or burgesses, as the said mayor, bailiffs, and burgesses, so assembled, or

the greater part of them, should think fit, and for the person so chosen, being first duly sworn, to become and be a burgess; that during the continuance of the custom, to wit, on March 23d, 1831, the then mayor, bailiffs, and greater part of the burgesses, then and there duly assembled at a guild or meeting of the mayor, bailiffs, and burgesses, for that purpose, after due notice in that behalf of such guild being given to the burgesses, duly elected and chose the defendant to be a burgess; that he was afterwards duly sworn (March 29th, 1831); that from thence hitherto he had been and still was a free burgess of the borough; that, whilst he was such burgess, to wit, on the feast of St. Michael the Archangel, 1831, the then mayor, bailiff, and burgesses, assembled and met, according to the term of the charter, for the purpose^{*} of electing a mayor, and, being so assembled, nominated and elected the defendant for the [*540] year next ensuing; that he took all the requisite oaths; and from thence continually till September 29th, 1832, was mayor; and by that warrant, &c.; without this, that, &c.; verification. Replication, that the mayor, bailiffs, and burgesses did not duly assemble at a guild or meeting of the mayor, bailiffs, and burgesses, for the purpose of electing and choosing a burgess or burgesses in manner, &c.; conclusion to the country. Joinder.

On the trial before Lord LYNTHURST, C. B., at the Northumberland Summer assizes, 1834, evidence was given, on the part of the Crown, to show that there was no particular day, by charter or custom, appropriated to the election of burgesses; that, previously to meetings for that purpose, notice was given by ringing a bell three times, namely, for a quarter of an hour, two hours before the guild is held, and again, for a quarter of an hour, one hour and a half before the guild is held, and again, by ringing the bell at the time appointed for the meeting of the guild, the ringing of the bell being loud enough to be heard over all the borough: and also by a serjeant at mace giving notice personally to the resident burgesses, or leaving word at their places of residence, of the intended meeting, and, if required, of the purpose for which it was to be held. It appeared also, in fact, that two resident burgesses of the name of Robertson (a fisherman) and Mace did not receive such notice, and did not attend. The serjeant at mace gave evidence that Robertson had several times, before the meeting, told him not to summon him, as he was frequently out at sea, and^{*} as he could hear tell of what was going on: and that he had [*541] accordingly not served him; and that he had omitted to serve Mace accidentally. Robertson stated that he had never used the expressions sworn to by the serjeant at mace, and that he was in the borough at the time of the election. The jury found that the custom was as pleaded by the defendant in the second plea: and, on the issue upon the fourth plea, they found for the defendant, stating that they were of opinion that the custom was to give notice by ringing the bell three times, and also by serving every resident burgess with notice of the meeting, and of its purpose, if the burgess required to know the purpose; but that the custom was to be taken with the qualification, that it was not violated by an accidental omission to serve the notice upon any individual burgess;[†] and that the omission, in the case of Robertson and Mace, was accidental. The other issues were found for the Crown. It was agreed that the reasons assigned by the jury should be considered as a special finding; and leave was given to move to enter a verdict for the Crown on the issues found for the defendant. In Michaelmas term, 1834, *Atcherly*, Serjt., obtained a rule to enter such verdict, or for a new trial, on the grounds that the service, and

¹ According to one note of the evidence, the words deposed to were "that he could hear the bell," not "that he could hear tell of what was going on."

² This custom, omitting the qualification, was the custom pleaded in the second plea, and affirmed by the verdict on that plea; and it was at first insisted in argument, that the finding on the second plea was inconsistent with the finding of the qualified custom on the fourth plea; but this point was not ultimately pressed.

notice of the purpose of the meeting, were necessary by law in the case of every resident *burgess; and also that the finding that the omission was accidental was against the evidence. Other grounds were also suggested; but the judgment of the Court renders them immaterial. The arguments on the issue as to the custom pleaded in the second plea are also rendered immaterial by the judgment of the Court, and by the issues which were found for the Crown.

Sir *F. Pollock*, *Cresswell*, *Ingham*, and *Wightman*, now showed cause. The first question is, whether the custom, as found by the jury, and with the qualification which they have incorporated into it, be necessarily a bad question: the second is, whether it has been complied with. The first question alone can have any reference to the motion for entering a verdict for the crown on the last issue found for the defendant; the second question would merely relate to the motion for a new trial, which would be granted only on payment of costs. As to the first, it cannot be necessary that notice should in every case be given to every voter. Persons not summoned might in fact attend and concur in the election, which is enough to show that there may be a lawful assembly without notice being given to every single elector; *Rex v. Chetwynd*, 7 B. & C. 695; *Rex v. Theodorick*, 8 East, 533. See *Musgrave v. Nevinson*, 2 Ld. Raym. 1358. Therefore the qualification of the custom is not necessarily inconsistent with law. Indeed a custom to serve, under all circumstances whatever, a personal notice on every elector, would be a custom requiring what, in the great majority of cases, would be impossible. As to the second question, there was evidence to support the finding of the jury. With respect to Mace, [*543] the jury *could not, on the evidence, find otherwise. As to Robertson, he had a right to waive his claim to a notice. [Lord DENMAN, C. J. Is it not a duty in every elector to attend? How then can he make such a waiver?] There may be a difference, as to this, between a select and an indefinite body. Where every corporator has an equal voice, as in the present case, each vote expresses only the will of the individual, no one representing any interests but his own; the attendance, therefore, is a mere personal privilege, which may be waived. But, where the body is select and definite, each member is intrusted with the duty of deciding for others; and this is a delegated power which he cannot renounce. Again, in the case of a definite body, no valid act can be done unless a majority of the entire number be present; but the acts of an indefinite body are valid, if done by the majority of the persons present, however small a fraction that may be of the body at large. In the latter case, therefore, as the absence of an individual is less important, the service of notice is of less consequence. Again, the waiver here was, not of the right of attendance, but of the ceremony of notice, which is only for the convenience of the burgess; in spite of that waiver, the burgess may mean to attend, taking on himself the burden of watching for the meetings. Again, after the serjeant had understood that Robertson was likely not to be in the borough, his omission to serve him was a mere accident, arising from incorrect information. Suppose a burgess was to tell the serjeant at mace that he should be certain to hear the bell, or to hear of the notice from his neighbors, and that therefore the serjeant need not [*544] give him personal notice; could it be *said, that an omission accordingly made by the serjeant was otherwise than bonâ fide and accidental?

Atcherley, Serjt., and *Coltman*, contra. First, as this election did not take place on a day appropriated to the purpose, there ought to have been notice to every resident elector of the meeting, and of its object; and the omission to summon one vitiates the meeting; *Rex v. The Mayor of Shrewsbury*, Ca. K. B. Temp. Hardw. 147, S. C. 2 Str. 1051, as *Kynaston v. The Mayor of Shrewsbury*, *Rex v. Hill*, 4 B. & C. 426, *Rex v. Tucker*, 1 Barnard, K. B. 26, *Rex v. Mayor of Liverpool*, 2 Burr. 723, *Rex v. Mayor of Doncaster*, 2 Burr. 738. It is true that it was held, in *Rex v. Chetwynd*, 7 B. & C. 695, that if all the electors be present, and concur, the want of notice is immaterial. Here, however, two

electors, who were not summoned, did not attend. Besides, *Rex v. Chetwynd*, 7 B. & C. 695, was the case of a select body. But in *Rex v. Hill*, 4 B. & C. 426, where the election was by the body at large, notice of the object of the meeting was held requisite; and this distinction is expressly relied upon by Lord TENTERDEN, in *Rex v. Pulsford*, 8 B. & C. 354. If an accidental omission of one do not vitiate the election, an accidental omission of all would not: yet, if a custom were pleaded, that notice to all might be omitted, provided this happened by accident, such a custom would unquestionably be bad on the face of it. The jury, it is true, have found the custom, as qualified; but if such a qualification be illegal, or not pertinent, their finding must be disregarded; *Priddle and Napper's Case*, 11 Rep. 10 b, 13 a; *Townsend's Case*, Plowd. 114. Again, supposing the qualified custom to be good, it has not been pursued in fact. If there be a customary method of notice, other than that [*545] which ordinarily prevails, it must be strictly followed; *Rex v. May*, 5 Burr. 2681. Here the serjeant at mace intentionally omitted to serve Robertson with notice; that was the evidence of the defendant's witness, which must conclude him; and the jury by their finding mean no more than that the omission was not from any corrupt or fraudulent motive. Neither can this omission be made good on the ground of Robertson's waiver; for Robertson had no power to waive a summons by which he was to be called on to perform a duty. If one burgess might waive, all might; and then there would be an election without notice at all. (*Hoggins* on the same side was stopped by the Court.)

Lord DENMAN, C. J. It is perfectly clear to me that the verdict must be entered for the Crown, on the last issue found for the defendant. The question is, whether the meeting was duly assembled. The jury find that it was, subject to the question whether such finding be warranted by facts which they also find. Those facts are, that the custom is for all resident burgesses to receive a personal summons; and that the resident burgesses did not receive such summons. The jury give their opinion that the custom stated ought to be received with the qualification, that an omission by accident does not vitiate; that is, that a custom to summon all, means a custom to summon all, subject to accident. If so, the verdict ought to stand for the defendant. But I think that that is not so; and that an accidental omission does not excuse the officer. If it *did, I fear that accidental omissions would soon become intentional ones. Be- [*546] sides this, one omission was not accidental. It was made, merely because the burgess told the officer not to summon him, as he was generally away from home. It is clear from authority and principle that this furnished no excuse for the officer's omitting to summon the burgess. The reason has been properly assigned at the bar, namely, that attendance was a public duty on the part of the burgess: and this was admitted, on the other side, to be true in the case of a select body; but it was argued that, in the case of an indefinite body, the rule was different. That is a distinction to which I cannot assent. The public have a right to the security arising from the service of notice; and nothing but actual impossibility will cure the omission. I come to this conclusion with great regret, because much inconvenience may be produced with respect to titles affected by the omission. This, however, must always follow where a party is unduly placed in office. And on the other hand, the conclusion of law to which I come gets rid of the examination into motives, and simply lays down the clear and intelligible duty of summoning all the electors, so as to exclude the possibility of an unfair advantage being taken.

LITLEDALE, J. I am entirely of the same opinion. (After reading the fourth plea; and the words of the issue joined upon it, his Lordship said): The other pleas, which set up various particular customs, we may for the present treat as if they were not on the record. The question then is, whether the meeting at which the defendant was elected a burgess was duly assembled. It seems that the usage and custom was to serve a personal *notice on all the resident burgesses. But then the jury find also that if any burgess [*547]

were omitted by accident, not design, the custom was still complied with. The reason for not summoning Robertson appears to have been, that he had told the serjeant not to summon him. The omission would, therefore, take place without any corrupt motive. If the serjeant had met Robertson, he might, perhaps, have given him notice: that would, however, have been pure accident, for the serjeant made no inquiry for him. Robertson, according to the serjeant's evidence, had dispensed with the service. But, whatever instructions the serjeant had received from Robertson, he was still bound to serve the notice upon him: for, supposing that Robertson had not altered his mind in the interval, which might have happened, still it is the duty of every burgeas to attend the corporate meetings, although he may not intend to take any particular part in the proceedings. Robertson, therefore, had no power to give a dispensation to the officer. But, further, I think that the qualification of the custom found by the jury ought not to be taken into consideration at all. They find indefinitely, and without any limitation, that the custom is complied with, wherever the admission has been by accident, and not by design. According to this, there might be any number of accidental omissions: such a qualification cannot be good. Suppose, however, that the plea had specially set out the qualified custom found by the jury; and the question arose whether, in Robertson's case, it had been complied with. It would be clear that it had not been complied with; for the [*548] serjeant never intended to summon *him, and omitted him, not by accident, but by design, although not from a fraudulent motive. Therefore I am of opinion, first, that the qualification of the custom is not good in law; secondly, that the facts do not support the verdict, even supposing the qualification good. Then the question is, whether this be merely a finding against evidence (in which case we should grant only a new trial), or whether the facts be so presented as to show that the verdict should be entered for the Crown. I think the custom as found by the jury not good in law. What then would be the use of sending the case to a new trial? On these facts, the jury could not find more favorably for the defendant than they have done; and, supposing their finding turned into a special verdict (for that is the way in which we are to consider the case), the judgment must be for the Crown. The rule, therefore, must be made absolute.

WILLIAMS, J. I am of the same opinion. Whether the meeting was duly assembled is a question of law. It appears that the finding of the jury is to be entered according as the Court shall direct upon the evidence; and we are therefore to look at the evidence. Now the fact is, that Robertson was omitted, not by accident, but in pursuance of a previous arrangement: that was an omission by design. Such an arrangement left it open for Robertson to change his mind, and did not authorize the officer to omit the service.

COLERIDGE, J. I am of the same opinion. I should be glad if, on these pleas, I could come to a different conclusion without its involving such consequences [*549] as *have been intimated by my Lord Chief Justice, and that we were not bound to go the length of saying that a verdict must be entered for the Crown. But the law is that, when a meeting, whether for election or amotion, takes place on a day not appropriated to that purpose by the constitution of the borough, notice must be given to all the members; and here the customary mode of giving such notice is found. It is, however, said that, on this finding of the jury, the custom found substantially involves the qualification, that an accidental omission does not violate the custom. It is not necessary to say whether such a qualification could be good. It is argued, that the omission here was, in reality, accidental, inasmuch as Robertson had informed the serjeant that he should be absent, and that, therefore, the serjeant need not serve him; that, consequently, the serjeant presumed him to be absent, and omitted to serve him from ignorance that the fact was otherwise. The evidence does not bear that out: the omission is referable to the unlawful dispensation given, in the first instance by Robertson. Even a member of an indefinite body

held and enjoyed by such owners or proprietors, and their respective tenants and occupiers of the said messuages or cottages only, as a common pasture in such manner as the said commissioners should, by their award, direct. The plea then stated that the commissioners set out, allotted, and awarded, as a common pasture to be used, stocked, and enjoyed by the owners and proprietors of commonable messuages or cottages, and their respective tenants or occupiers of the said messuages and cottages only, having right of common upon the respective commons of G. known as the East and West Commons, the following plots of land or ground : East Common Allotment, &c.—West Common Allotment (being the close in which, &c.),—and unto and for the owners and proprietors of commonable messuages or cottages and toftsteads, and their respective tenants or occupiers of the said messuages and cottages having right of common upon the West Common *in G. aforesaid, one plot of land or [554] ground (being the said close in which, &c.) containing, &c.; and the commissioners did thereby award that, from the 13th of May to the 23d of November in every year, every owner or occupier of any commonable messuage, or cottage or toftstead, being the site of an ancient commonable messuage or cottage within the said parish according to the list contained in the schedule thereunto annexed, might stock upon the said West Common two cows for every such messuage, cottage, or toftstead: the plea then alleged that in the said list the commissioners inserted the said messuage of the defendant as one of the messuages in respect of which the owner or occupier thereof might use, stock, and enjoy the said West Common, being the said close in which, &c., as a common of pasture, in the manner and during the said times in that behalf specified in the said award. The defendant then justified by virtue of the act and award in respect of his seisin and occupation of the messuage, and of his right of common appurtenant thereto. The replication traversed the right of common until the award in manner and form as alleged in the plea. Issue thereon.

There were six more pleas; but this latter part of the record was before the Court upon demurrers, and judgment was given upon it for the plaintiffs, in Trinity term, 1833.¹ The issues to the country *were tried before Bo- [555] SANQUET, J., at the Huntingdonshire Summer assizes, 1834.

The plaintiffs put in the act of parliament mentioned in the fourth plea, and two charters, one of 14 John, and the other of 2 James 1. This last (the Latin original of which was put in, with a translation)* grants that the town of Gumecester, otherwise Godmanchester, shall be one body corporate and politic by the name of the bailiffs, assistants, and commonalty of the borough of Gumecester, otherwise Godmanchester, in the county of Huntingdon; and further “that, from henceforth from time to time for ever, there may and shall be in the borough aforesaid two of the honestest and discreetest burgesses in the said borough, chosen in form hereafter in these presents mentioned, who shall be named bailiffs of the said borough: and also that there may and shall be in the borough aforesaid twelve other of the honestest and discreetest burgesses of the said borough, chosen in form hereafter in these presents mentioned, who shall be named assistants of the said borough; which two bailiffs and twelve assistants for the time being shall be of the common council of the said borough: and that the said twelve assistants for the time being shall be from time to time

¹ The Bailiffs of Godmanchester v. Phillips, 5 B. & Ad. 198, where the act is more fully set out. It was held, in that case, that the act did not authorize the commissioners to extend the benefit of their allotments in lieu of common to occupiers who were not freemen; and that the award itself did not purport to do so. But, on the pleadings there, the defendant was held to have admitted that, antecedently to the act and award, he had no right of common as occupier only, without being a freeman. This was the question of fact raised by the joinder on the replication to the fourth plea, abstracted in the text above.

² The English translation here given is from that put in. There is another translation some respects more correct, in Fox's History of Godmanchester, ch. vii. p. 183.

assistants and helpers to the bailiffs of the said borough for the time being, in all causes, businesses, and matters, touching and concerning the said borough. And, further," "that the bailiffs and assistants for the time being of the said borough, or the greater part of them, of whom the bailiffs for the time being we [*556] will shall *be two [quod ballivi et assistentes burgi prædicti pro tempore existentes, vel major pars eorum (quorum ballivos burgi prædicti pro tempore existentes duos esse volumus)], upon public summons given them, and being for that end assembled, may and shall have full power and authority from time to time of granting, ordaining, and making of laws, statutes, constitutions, decrees, and ordinances whatsoever in writing reasonably, which to them or the greatest part of them, of which the bailiffs we will shall be two [quæ eis aut majori parti eorum (quorum ballivos burgi prædicti pro tempore existentes duos esse volumus)], seem good, wholesome, honest, profitable, and necessary, as shall seem so to be according to their sound discretions, for the good regimen and government of the said borough, and of all and singular the officers," &c., "and other matters and causes whatsoever concerning the said borough or any way appertaining." The charter appointed the first bailiffs and the first assistants, the latter to hold for life, unless removed for bad behavior, &c., or some other reasonable cause, "by the bailiffs and assistants of the said borough for the time being, or the major part of them, of which part the bailiffs of the said borough we will shall be two [per ballivos et assistentes ejusdem burgi pro tempore existentes, vel per majorem partem eorundem, quorum ballivos ejusdem burgi pro tempore existentes duos esse volumus]." The charter then gave directions as to the future election and removal of the bailiffs, and proceeded as follows: "And we further will that, whensoever it shall happen that one or more of the aforesaid twelve assistants of the borough aforesaid die, or be removed from their [*557] offices of assistants of the said *borough, for any reasonable cause, which said assistants or any one or more of them, themselves not well behaving in their office, we will shall be removed at the good pleasure of the bailiffs and assistants of the borough aforesaid, for the time being, or the greater part of them" (without the quorum clause), "that then and so often it may and shall be lawful for the bailiffs and assistants of the borough aforesaid, then living or remaining, or the greater part of them" (without the quorum clause), "to elect, nominate, and appoint one or more others of the burgesses and inhabitants of the said borough, into the place or places of him or them assistant or assistants of the borough aforesaid, so happening to die or be removed, to fill the aforesaid number of twelve assistants;" &c. (the charter then directed the party elected to be sworn), "and thus from time to time as often as circumstances require." The same expressions respecting the elective body (with the quorum clause) occurred with respect to the elections of recorder and town clerk, and also with respect to the annual election of the bailiffs; but, in case of a bailiff dying in office, or being moved, the successor was to be chosen by the assistants for the time being, or the greater part of them.

For the purpose of proving their possession of the locus in quo, the plaintiffs called a witness, who, being examined on the voir dire, said that he had been an assistant and freeman, but that he had been disfranchised, and had resigned his office and freedom. On being examined further, as to the disfranchisement and resignation, he stated that, at an assembly of the bailiffs and assistants, he had given in his resignation, which had been accepted. He was then asked, by the [*558] *defendant's counsel, how many and what corporators had been present at the meeting. The counsel for the plaintiffs objected to this course of examination, on the ground that the declaration of the witness that he had been disfranchised was conclusive on the voir dire. The learned Judge ruled that the examination might be proceeded in; and the witness answered that the book would show, referred to a book then in court, in which the proceedings of the assembly were entered. The defendant's counsel proposed to put it in, for the purpose of ascertaining whether the meeting was a regular one; and the plain-

tiffs' counsel objected, on the ground that the parol evidence was sufficient to negative the incompetency. The learned Judge ruled that the book might be put in. It then appeared by the entry that the meeting had consisted of the two bailiffs and six assistants; and the witness stated that, at the time of the assembly, there were but eight assistants in the corporation, including the witness. The witness then executed the following instrument, which was signed and sealed by him:—"Know all men by these presents, that I, William Reeve, of Godmanchester, in," &c., "have remised, released, and for ever quitted claim, and confirmed, and by these presents do remise," &c., "unto the bailiffs, assistants," &c., of G., "all my right, title, and interest, as a freemen of the said borough, or as occupier of any commonable messuage or premises whatsoever, and especially all interest in and to all the lands, tenements, and other possessions belonging to the said borough, and especially to all profits of common on the West Common, and to all privileges whatsoever belonging to me as a freeman of the said borough, and all rights whatsoever relating to or connected with an *action now trying between the corporators of Godmanchester and William Phillips, but of and from the same shall stand and be for ever [559] barred and excluded by these presents. In witness whereof," &c. The defendant's counsel contended that neither the supposed resignation and disfranchisement, nor the release, rendered the witness competent: the learned Judge, however, after directing the name of the witness to be endorsed on the record under stat. 3 & 4 W. 4, c. 42, s. 27, received the evidence, giving leave to the defendant to move, for a nonsuit, in the event of no other evidence being produced.

Other evidence was then given of acts of ownership by the corporation over the locus in quo.

In answer to the plaintiffs' proof of possession, the award was put in, by which it appeared that the commissioners had allotted to the corporation 19 A. 1 R. 16 P.; and the defendant gave evidence that this amounted to one-twentieth part of the waste and common lands in the parish of Godmanchester; which evidence was given for the purpose of showing that the plaintiffs had received a compensation for their rights over the locus in quo, under the act of parliament. The plaintiffs, in reply, called witnesses,¹ who proved that, including certain balks or strips of uncultivated land, lying between the cultivated parts of the common and the land in the hands of private proprietors, the wastes and commons were, on the whole, more than twenty times as extensive as the part allotted to the corporation under *the award. Acts of ownership on the [560] balks were proved by the plaintiffs.

The learned Judge left it to the jury to say whether the locus in quo was the plaintiffs' soil, and whether the defendant had, until the time of the award, a right of common appurtenant to his messuage. He made no remarks to the jury on the subject of the balks, as distinguished from the other parts asserted to be common. Verdict for the plaintiffs on both issues. In Michaelmas term, 1834 (November 8).²

Biggs Andrews moved for a rule to show cause why a nonsuit should not be entered, or a new trial had, on the following grounds. The witnesses were incompetent, as members of the corporation, and their competency was not restored by the supposed resignation and disfranchisement, nor by the release; nor is the stat. 3 & 4 W. 4, c. 42, s. 26, applicable. Further, the omission of the learned Judge to point out to the jury the law as to the balks was a misdirection. The balks are, by presumption of law, the property of the owner of the adjoining soil. [TAUNTON, J. Is there such a presumption? The common instance of a presumption of that kind is in the case of roads. Balks are strips of land lying between lands which are private property: if the presumption be as

¹ On the subsequent motion it was urged that this evidence might have been given in chief, and ought not to have been admitted in reply; but the rule was not granted on this ground.

² Before Lord DENMAN, C. J., TAUNTON, PATTESON, and WILLIAMS, Js.

you state, it is at any rate not so familiarly known.] The presumption is much stronger in the case of balks than of roads. The road may be used by all the king's subjects: no one but the owner can use the balk, which is commonly used for turning the plough, the land up to *it having been all ploughed.

[*561] [Lord DENMAN, C. J. The learned Judge and the jury, perhaps, considered that the evidence which tended to show the balks to be part of the wastes and commons, outweighed the presumption for which you are contending.] But, if the presumption had been explained to the jury, they would have required stronger evidence on the other side. The onus of proof would then have been thrown entirely on the plaintiffs.¹

Lord DENMAN, C. J. Take a rule as to the competency of the witness. On the other points we will confer with the learned Judge. *Cur. adv. vult.*

Afterwards, in the same term (November 25th), Lord DENMAN, C. J., said that the rule must be refused on all the points, except that upon which it was already granted.

The case was argued in this term, January 25th and 28th.*

Kelly, Maltby, and John Bayley, showed cause.

There is no ground for a nonsuit, as there was evidence of possession independent of that given by the witnesses whose competency is questioned. But the rule must be discharged altogether.

First, the witness's assertion, on the voir dire, that he had resigned and had been disfranchised, is conclusive. The rule is that parol evidence on the voir [*562] dire may *either raise or remove objections to the competency without the production of documents of which the effect is given by the parol evidence; *Butchers' Company v. Jones*, 1 Esp. 160, *Rex v. Gisburn*, 15 East, 57. [COLERIDGE, J. If the document be in fact produced it ought to be referred to; *Butler v. Carver*, 2 Stark. 433. Lord DENMAN, C. J. The reference of the witness to the book comes to much the same thing as if he had produced the book.] The rule ought to be confined to this, that the document may be put into the witness's hands. [COLERIDGE, J. Do you contend that, if a witness say that he takes no interest in a will, and the will be on the table of the court, it cannot be looked at for the purpose of ascertaining whether the witness has in truth an interest?] The Judge may direct the witness to look at it, and to say, after he has done so, whether he persist in his answer; but the Court will not look at it: the reason is, that the incompetency rests on the motive operating on the witness's mind by his belief that he has an interest. This was the course adopted in *Homan v. Thompson*, 6 C. & P. 717. In *Perryman v. Steggall*, 5 C. & P. 197, a witness was allowed to give parol evidence on the voir dire of his discharge under the Insolvent Debtor's Act, in order to show his competency, though the objection to the competency arose, not upon any answer of the witness himself, but on the opening of the counsel who called him. If the practice were otherwise, the Judge at Nisi Prius would have several issues to try: here, for instance, he would have to try several issues in quo warranto; and he would have to determine both law and fact on the voir *dire.

[*563] [COLERIDGE, J. Must not you then carry your objection further, and contend that the counsel objecting to the competency cannot cross-examine the witness as to the way in which his competency has been restored?] Perhaps on principle the rule ought to be carried to that length: but here it is necessary only to say that the parol evidence must be conclusive. A party cannot come to trial prepared to contest every incidental issue of this kind. Suppose a bankrupt, on the voir dire, says that he has obtained his certificate and released his surplus: can the Court enter into an examination as to the number of creditors who have signed the certificate, and the amount of their debts, and the proportion to the number of other creditors, and the amounts of the debts of these latter?

¹ There were two other grounds of motion, which it is not thought necessary to state. As to one, see page 559, note (a), ante.

* Before Lord DENMAN, C. J., LITLEDALE, WILLIAMS, and COLERIDGE, Js.

owner of a coach for mischief done to the plaintiff by negligent driving, the driver of the defendant's coach was a good witness for the defence; the learned Judge saying, that it was just the case which the act was intended to meet.¹ [COLERIDGE, J. Would not the construction which you put upon the act take away the second action altogether? for, without the evidence furnished by the verdict, what case would the master have against the servant?] That was probably the intention of the legislature. The object was to remove the motive which the witness would have to misrepresent. This is effected by the name of the witness being endorsed on the record.

**Biggs Andrews*, contra. The evidence, independently of that of which the admissibility is now in question, was very slight as to the possession. But there must at any rate be a new trial. [*569]

First, it is true that what the witness says, on the voir dire, is to be received, although he give parol evidence of the contents of written documents. But it does not follow that his evidence is conclusive in the first instance: if so, he could not be cross-examined as to the means by which his competency was said to be restored. If a witness say he has released his interest, he may be asked whether he means to say that he has signed a release; and questions may be asked for the purpose of ascertaining whether he be mistaken. So here, when the witness spoke of a resignation and disfranchisement, it was regular to cross-examine him as to the way in which the proceedings had taken place. If he had answered that there were two bailiffs and seven assistants present at the meeting, it might have been irregular for the defendant's counsel to refer to the book; but, instead of answering so, he himself refers to the book as furnishing an answer to the question: the book, therefore, becomes evidence on the voir dire.

Secondly, the entry being made evidence, the proof of resignation and disfranchisement is negatived. There might even be ground for arguing that it was necessary for the witness to show a disfranchisement by legal judgment; at any rate, if a judgment of disfranchisement were relied upon, it must be such as could not be avoided; "for, if it appears that the witness can avoid the judgment for irregularity (as he may, if he has never been summoned, and knew nothing of his disfranchisement), he is not competent;" 1 Phillips on *Evidence, 127, book I., part 1, c. 5, s. 8 (6th ed); *Brown v. The Corporation of London*, 11 Mod. 225. But, admitting that a regular corporate meeting had power to disfranchise by accepting the resignation, the evidence shows that there was no such meeting. There should have been present a majority of the assistants. The rule is that, where the charter names a body, consisting of a definite number, as an integral part of an elective assembly, a majority of that body must be present, unless it be perfectly clear that the charter meant otherwise. Now here no other construction arises. It is said that, unless the meaning had been that the two bailiffs with enough assistants to make up in all a majority of the fourteen should be a good elective assembly, the requisition that the two bailiffs should be present would be superfluous. But that requisition may be accounted for on other grounds. The two bailiffs constitute a single officer, like the mayor: one cannot act alone; *Rex v. Smart*, 4 Burr. 2241; *Regina v. Bailiffs, Burgesses, and Commonalty of Ipswich*, 2 Ld. Raym. 1237; *Salter v. Grosvenor*, 8 Mod. 303. The requisition is, therefore, that the head officer shall make a part of the assembly; just as, where there is a mayor, the mayor and the other body or bodies are required to be present: [COLERIDGE, J. In *Rex v. Greet*, 8 B. & C. 363, it was held that a majority of each definite part was not necessary.] That arose from the peculiarity of the case; there were, among the definite bodies, two bailiffs; and in the absence of express words to the contrary, it was held that the charter could not be construed to have intended that a majority of each should attend, inasmuch as,

¹ The verdict in that case was for the plaintiff; the ruling, therefore, could not be subsequently discussed. This case was cited by BAYLEY from a note taken by himself.

[*571] upon that construction, there would have *been a dissolution of the corporation if any one bailiff had died in office, the bailiffs being eligible only by the same assembly. And it was considered that, as this could not be meant in the case of one body, it could not be meant in that of the others. But here the words are express, that both bailiffs shall attend; the presumption, therefore, that the charter requires a majority of each definite body, is strengthened. The general rule has been adhered to, where the words have at first sight, been very strong the other way, as in *Rex v. Belringer*, 4 T. R. 810, and *Rex v. Devonshire*, 1 B. & C. 609. In the latter, the charter required that the mayor should be one. [*Kelly*. In that case, the question whether there must be a majority of each integral part was alluded to by ABBOTT, C. J., but he did not decide it. See p. 613.] In *Rex v. May*, 4 B. & Ad. 843, the general rule was enforced against still stronger words. Here, if "them" be referred to the last antecedent, "assistant," the more obvious construction will be in support of the general rule. Again, the corporation do not appear to have acted on the resignation. In *Rex v. The Mayor of Rippon*, 1 Ld. Raym. 563, S. C. 2 Salk. 433, it is said that a party may revoke his resignation unless a successor be appointed.

Thirdly, the release is insufficient. The objection arises upon witness's interest in the present funds of the corporation, in the damages to be recovered in the particular action, in the subject-matter in dispute (for the issue raises the question of the corporation's right to the land), and in showing that the common [*572] was in right, not simply of a messuage, *but of a messuage occupied by a freeman. The only authority in favor of the restoration of competency by a release is the dictum cited from the first edition of Starkie on Evidence, where no authority is given except *Enfield v. Hills*, 2 Lev. 236, S. C. 2 (Thomas) Jones, 116. But that case does not support the dictum, as is pointed out in the note to *Doe dem. Mayor and Burgesses of Stafford v. Tooth*, 3 Y. & J. 21, note (c), which case is itself an authority for the defendant on this point. In *Enfield v. Hills*, 2 Lev. 236, S. C. (Thomas) Jones, 116, the defendant had released to the corporation all the advantages he might have against them by virtue of a by-law, under which by-law the corporation was to defray the costs. If Phillips, in the present case, had released to the corporation, the argument as to costs could certainly not have arisen. In *Willcock on Corporations*, p. 310, pl. 807, it is said, "If the evidence of a corporator be necessary, the only means by which he can be rendered competent, is his resignation or disfranchisement, which must be so far regular that he may neither be able to revoke his resignation, nor to reverse the proceedings on which he is disfranchised;" for which *Brown v. The Corporation of London*, 11 Mod. 225, and the note at the end of the *Mayor and Aldermen of Colchester v. —*, 1 P. Wms. 596, are cited. So, in 1 Phillips on Evidence, p. 127, Book 1, part 1, c. 5, s. 8 (6th ed.), the only means mentioned of restoring competency are resignation and the election of another, or disfranchisement. Nothing which has passed can relieve the witness, if the corporation have to pay costs to the defendant, from contributing to those costs, or, at any rate, to the costs of the plaintiffs. Even [*573] taking the release most strongly, a *member of a corporation has not only privileges, but liabilities and duties, from which he cannot relieve himself by a simple act of release. And, moreover, this would be a release to a body of whom he is himself one; for the corporation has no existence independently of its several members; a release to the corporation is a release to himself; and, even if it could have any effect, he would still, as part of the corporation, continue interested. If this release were to take effect, every member of a corporation might become competent, by the ceremony of each person successively releasing to the corporation.

Fourthly, as to the statute 3 & 4 W. 4, c. 42, s. 26. The witness takes an interest in the result of the suit, independently of any use which could be made of it as evidence. The statute relieves from the incompetency only where the interest arises merely from the verdict or judgment becoming evidence; Burgess

v. Cuthill, 1 M. & Rob. 315. The corporation, in the event of their having to pay the costs, would have so much less to distribute to each corporator; and, in the event of their succeeding, so much more. That is an interest in the witness, independent of evidence of the verdict or judgment. *Cur. adv. vult.*

Lord DENMAN, C. J. in the same term (February 1st) delivered the judgment of the Court. In this case, we were told, in the first place, that the inquiry into the constitution of the meeting at which the resignation and disfranchisement were said to have occurred, could not properly take place. But it is clear that, under circumstances *like those of the present case, there is no rule to preclude such an inquiry. It is not necessary to lay down now any [*574] general rule as to the circumstances under which, or the extent to which, the answers of a witness on the *voir dire* may be canvassed or contradicted. It is clear at least that the legal effect of his own statement on the *voir dire* may be considered: and, where he makes a statement as to the restoration of his competency, which shows apparently that the restoration is insufficient, the objection remains unanswered. Now in the present case, the witness, by referring to the entry in the book, made it a part of his own answer; and, the book being in Court, it was properly looked at as such.

We are then to look at the charter: and certainly we should have been glad if we had found that there was a disfranchisement sufficient to restore the competency. The question is, whether the two bailiffs and the six assistants constituted a sufficient assembly of the corporate body to receive the resignation. On this point the authority of the cases is too strong to be resisted. It is clear that there was not a proper assembly, and that, consequently, the resignation, not being duly accepted, was of no effect. The witness, therefore, continued to be a corporator up to the time of trial.

Then it was urged that the witness had personally released his claims. If it had been possible for any release, under these circumstances, to restore the competency, this would have been a sufficient release. But the party releasing is a member of the body to which the release is made. This was, therefore, a release of a party to himself, and could not have the effect attributed to it.

*Then recourse is had to the statute 3 & 4 W. 4, c. 42, s. 26. But [*575] we think that this statute does not apply to the present case.¹

The consequence is that the witness was throughout interested in the event of the suit, and that the verdict has been given partly on evidence which was objectionable. The defendant contends that he is entitled to a nonsuit; for that, independently of the evidence of the objectionable witnesses, no case is made out to affect him. But that is not the view taken by the learned Judge who tried the cause: the rule, therefore, must be for a new trial, not a nonsuit.

Rule absolute for a new trial.

¹ See *Pickles v. Hollings*, 1 M. & Rob. 468; *Stewart v. Barnes*, 1 M. & Rob. 472; *Creevey v. Bowman*, 1 M. & Rob. 496.

The KING *v.* O'GORMAN MAHON. Jan. 25.

A defendant being brought up for judgment for an assault, and it appearing that the prosecutor had commenced an action, which was still depending, for the same assault, the Court refused to pass any judgment except that the defendant should give security for his good behavior, he having used violent language towards the prosecutor in addressing the Court.

And this, although, at the time of the defendant being brought up, the prosecutor offered to discontinue the action.

THE defendant, having been convicted of an assault, was now brought up for judgment. It appeared on the affidavits that the prosecutor had commenced an action for the same assault. [Lord DENMAN, C. J. Has that action been discontinued? It is a rule that the Court cannot pass sentence for an assault while an action is depending for the same assault.]

Platt (with whom was *Miller*), for the prosecution, said that the prosecutor had not discontinued the action, but offered to do it now.

[*576] *Lord DENMAN, C. J. It is too late now; it should have been done before. The Court cannot pass sentence for the assault under these circumstances. But as the defendant, in addressing the Court, has used violent expressions towards the prosecutor, he must give security to keep the peace. That is all that can be ordered.

The Court ordered and adjudged that the defendant should enter into his own recognizance with two sureties to be of good behavior towards all her Majesty's subjects, and the prosecutor in particular, for two years, and that he should be imprisoned in the custody of the marshal till the recognizance was given, and the sureties found.¹

¹ *Ex parte* —, *Gent.*, One, &c. *Nov.* 11.

The Court refused a rule for a criminal information for an assault, upon its appearing that the applicant had taken out a warrant against the other party, though the applicant offered that it should be part of the rule that he should abandon the proceedings on the warrant.

SIR J. Campbell, Attorney-General, moved, at the instance of an attorney, for a criminal information against an attorney of this Court, for assaulting him in consequence of proceedings taken by the latter professionally. It was admitted that the party applying had taken out a warrant against the other attorney, on which he had been held to bail; but the applicant offered that the proceedings on this warrant should be abandoned, and that such abandonment should be part of the rule. But

Per Curiam (Lord DENMAN, C. J., PATTERSON, WILLIAMS, and COLBRIDGE, Js.) If we granted the rule, it could only be on that understanding; but, as the party has already commenced proceedings, we think it best that he should be left to the course which he has adopted in the first instance. Rule refused.

[*577]

*HALL v. COLE. *Jan.* 26.

Declaration stated that S. drew a bill, payable to his own order, on W.; that "the said S." endorsed to defendant, who endorsed to "the said S.," who endorsed to plaintiff; and that W. did not pay, of which defendant had notice. Plea, that, after the dishonor, plaintiff, without defendant's authority, took from "the said S." a cognovit in an action commenced by plaintiff against S. for the recovery of the sum specified in the bill, and, by the cognovit, agreed to give, and did without defendant's authority actually give, to S. longer time for payment than the time in which plaintiff might have obtained judgment against S.

Held that, upon this declaration, it must be intended that the person to whom defendant endorsed was, and was known by plaintiff to be, the person who endorsed to defendant; and that the plea, therefore, was sufficient, though it did not state in what character S. had been sued by plaintiff, the action against defendant being in any case a fraud on the cognovit.

Held also that, upon general demurrer, the plea was good, though it did not allege the cognovit to have been taken before the action commenced, and was pleaded in bar of the action generally, and not in bar of its further maintenance.

ASSUMPSIT. The first count of the declaration (which was dated on the 5th of July, 1834) stated that one James Stewart, on, &c., drew a bill of exchange on Joseph Watkinson for 26l. 10s., at three months, payable to the order of the said James Stewart, which Watkinson accepted, that "the said James Stewart" endorsed to the defendant, who endorsed "to the said James Stewart, who then and there endorsed the same to the said plaintiff;" that Watkinson did not pay, though the bill was presented when due, of which the defendant had notice.

Plea, that, after the presentment to, and non-payment of the said bill of exchange by, the said Joseph Watkinson, as in the said first count mentioned, to wit, 14th of July, 1836, the plaintiff did, without the knowledge, authority, or consent of the defendant, accept, receive, and take of and from "the said James Stewart," a cognovit in a certain action before then commenced by the plaintiff against "the said James Stewart" in the Court of King's Bench, for the re-

for the purposes of the agreement, the plaintiff hath not in his replication shown any excuse for not applying it to those purposes, and hath endeavored to apply it to other purposes and debts which by law he could not do; that the replication does not specifically show how the 40*l.* was appropriated, nor what was the subject-matter of the debt due from defendant to plaintiff; that the replication is a departure; and that, although defendant in his fourth plea hath shown another breach by plaintiff of the said agreement sufficient to enable defendant to rescind the same, plaintiff hath not, by his replication, traversed or denied, or confessed and avoided the said breach, and hath admitted it. Joinder in demurrer.

R. V. Richards in support of the demurrer. The replication admits that the sum of 40*l.* was received, and was, by agreement, to be appropriated to a particular purpose. It could not be applied to a different one, by making a set-off of the demand to which it was so applied. The question then may be, whether the fourth plea is one which would be bad on general demurrer. Now, whether the word "rescinded" be correctly used in the plea or not, still, where two parties have agreed to do certain acts concurrently, and one seeks to enforce performance by the other, it is a sufficient answer that he himself has not fulfilled his part of the contract. The defendant here was not bound to go on paying the sums of 40*l.* although they were not properly applied. In *Withers v. Reynolds*, 2 B. & Ad. 882, where the *defendant agreed to supply the plaintiff with straw at so much per load, to be paid for (as the Court [*603] construed the agreement) on delivery, it was held that, on the plaintiff's refusal to continue paying on delivery, the defendant might leave off sending straw, and that he was not obliged to go on with the supply and bring a cross-action. The judgments of the Court in that case apply to the present. The plaintiff here was to pay a sovereign per week out of the 40*l.* which the defendant was to advance. By ceasing to pay the sovereign, he virtually put an end to the contract. [COLERIDGE, J. Is not there a distinction between a partial and a total non-performance?] In *Withers v. Reynolds*, 2 B. & Ad. 883, the plaintiff had only refused to pay for one load of straw; yet the defendant was held to be discharged from his contract.

W. Clarkson, contra. The replication is good. The declaration shows that the payments of 40*l.* by the defendant were to be antecedent to those which the plaintiff was to make, but that the plaintiff had, in fact, paid a considerable sum, in advance, to certain persons named. Then the plea alleges that before July 1, 1834, there were persons (naming them) whom the plaintiff might have paid but did not, and that, although the defendant on April 1st, 1834, paid the plaintiff 40*l.*, to be applied to the purposes of the agreement, yet the plaintiff did not afterwards advance the sovereign per week. To the new matter so alleged, the replication is an answer. It states that, when the 40*l.* was paid on April 1st, 1834, the defendant was indebted to the *plaintiff in a large sum, for money paid by the plaintiff, as stated in the first count, [*604] that is, in discharge of the debts there referred to, beyond the amount advanced by the defendant. It does not (as is suggested on the other side) claim to appropriate the 40*l.* to demands of the plaintiff on other accounts than those comprehended in the agreement. The replication here is like the surrejoinder in *Calvert v. Gordon*, 7 B. & C. 809, which was held good. The plaintiff shows that he has performed his contract as long as he had the means. The fourth plea discloses no act done by him which could warrant the defendant in rescinding the contract. On this point *Withers v. Reynolds*, 2 B. & Ad. 882, and particularly the judgment of *PATTESON, J.*, there, is an authority for the plaintiff.

R. V. Richards, in reply. One object of the agreement was, that out of the 40*l.* the plaintiff should be enabled to pay the defendant a sovereign per week. The plaintiff cannot, in his replication, set up a right to retain, inconsistent with the stipulations of his agreement.

Lord DENMAN, C. J. The defendant, by his plea, says, "true it is, I did not pay the sums claimed, but there were some debts which you might have paid and have not, and you have not paid me the sovereign per week; therefore I have rescinded the contract." And this is said when the plaintiff is considerably in advance. It is clear that the defendant had no right to treat the contract as rescinded. That is illustrated by the judgment of PATTESON, J., in [*605] *Withers v. Reynolds*, 2 B. & Ad. 882, where it is said, "If the plaintiff had merely failed to pay for any particular load, that, of itself, might not have been an excuse to the defendant for delivering no more straw." As, therefore, the defendant, here, has not shown a valid excuse by his plea, it is unnecessary to consider whether or not the replication be bad.

LITTLEDALE, J. With respect to the plea, the plaintiff may say, "assuming that there has been a default made as to my part of the contract, it is only a partial breach, and the defendant's argument would go the length of insisting that if I had in any one week omitted to pay the sovereign, he might put an end to the contract, and deprive me of all the money I have paid in advance: for he states that he has rescinded the agreement altogether." It is a clearly recognised principle that, if there is only a partial failure of performance by one party to a contract, for which there may be a compensation in damages, the contract is not put an end to. In *Boone v. Eyre*, 1 H. Bl. 273, note (a), which was an action of covenant on a deed, whereby the plaintiff conveyed to the defendant the equity of redemption of a plantation with the stock of negroes upon it, in consideration of an annuity, and covenanted that he had good title and was lawfully possessed of the negroes, and the defendant covenanted that, the plaintiff performing everything in the deed contained on his part, he would pay the annuity, and the breach alleged was non-payment, the defendant pleaded that the defendant was not lawfully possessed of the negroes. On demurrer to the plea, Lord MANSFIELD said, "The distinction is very clear. Where mutual [*606] covenants go to the whole of the consideration on both sides, they are mutual conditions, the one precedent to the other. But where they go only to a part, where a breach may be paid for in damages, there the defendant has a remedy on his covenant, and shall not plead it as a condition precedent. If this plea were to be allowed, any one negro not being the property of the plaintiff would bar the action." So here, it cannot be contended that, if in any one week the sovereign had been unpaid, that default would put an end to a contract made up of several stipulations, some of which have been executed. It is immaterial to consider whether or not the replication be good.

WILLIAMS, J., concurred.

COLERIDGE, J. I think both the replication and the plea bad. The plea is not good, unless one party to a contract like this may treat it as rescinded, if the other fails in the slightest degree to perform his part of it. The rule is that, in rescinding as in making a contract, both parties must concur. In *Withers v. Reynolds*, 2 B. & Ad. 882, each load of straw was to be paid for on delivery. When the plaintiff said that he would not pay for the loads on delivery, that was a total failure; and the plaintiff was no longer bound to deliver. In such a case it may be taken that the party refusing has abandoned the contract. The present case is different; and the plaintiff is entitled to judgment.

Judgment for the plaintiff.

[*607] *The KING v. The Inhabitants of WHISTON. Jan. 27.

Under stat. 56 G. 3, c. 139, sects. 1 & 2, when an apprentice is bound from one parish into another, the indenture is not valid for the purpose of settlement, unless notice has been given to the overseers of the latter parish, pursuant to sect. 2, before the indenture was allowed.

But, on appeal against an order of removal grounded on such indenture, the respondents are not bound in the first instance to prove such notice: if there be no evidence to the contrary, the notice will be presumed.

ON appeal against an order of two Justices, whereby Thomas May and his wife, and their children, were removed from the parish of Saint Mary in the town of Nottingham to the township of Whiston in the West Riding of Yorkshire, the sessions confirmed the order, subject to the opinion of this Court upon the following case.

The pauper, a poor boy of and legally settled in the township of Dinnington in the said West Riding, was, in December, 1818, pursuant to an order of two Justices of the said Riding, bound apprentice by the churchwardens and overseers of the poor of Dinnington, to James Herring, residing within the township of Whiston in the same Riding, by indenture duly signed and allowed, for a term therein mentioned; and he served Herring under the indenture for more than forty days in Whiston. The township of Dinnington is about five miles from the township of Whiston; each township maintains its own poor separately; and both are within the same county, and within the jurisdiction of the peace of the two magistrates who made the order for the binding, and who afterwards signed their allowance of the indenture. On the hearing of the appeal at the general quarter sessions for the town and county of the town of Nottingham, the respondents refused to call evidence to prove that notice was given by the overseers of Dinnington to the overseers of Whiston, of their intention to bind out such apprentice, no evidence *having been offered by the appellants to prove that such notice was not given. The question [*608] for the opinion of this Court was, whether the respondents were bound, under the circumstances, to prove that notice was given.

Whitehurst, in support of the order of sessions. First, if the notice was not in fact given according to stat. 56 G. 3, c. 139, s. 2,¹ the binding is not therefore void. The object of the statute, as appears from the preamble, was the protection of poor children by enforcing an application to justices, and a proper inquiry by them, before the binding takes place. Sect. 5 enacts, "that no settlement shall be gained by any child who shall be bound by the officers of any parish, township, or place, by reason of such apprenticeship, unless such order shall be made, and such allowances of such indenture of apprenticeship shall be signed, as hereinbefore directed;" but that cannot mean that the settlement shall be defeated if the child has not been bound under all the circumstances and with all the preliminaries required by the previous sections. If that were so, it would follow that the master, who is not called upon to take part in the preliminary proceedings, *and may be totally a stranger to them, [*609] would lose the benefit of the indenture, and would, by sect. 6, be subject to a penalty, if the notice here in question were omitted. It is sufficient if the words "such order" and "such allowance" in sect. 5 be taken to mean an order in the form required by the act, and an allowance by the proper justices. [Lord DENMAN, C. J. The notice is a very important protection to the child. COLERIDGE, J. And to the parish into which he is bound.] Secondly, it was at any rate not necessary to prove the notice. The order comes in question incidentally, and in a proceeding to which it is merely collateral. An order valid on the face of it is produced; and that, *prima facie*, is conclusive. Where, on the trial of an appeal, one party produces an order of removal unappealed against, the justices who made such order are presumed to have taken the proper steps till the contrary is shown. This is a similar case. A culpable omission must be proved by the party who relies upon it; the opposite party is not bound in the first

¹ Stat. 56 G. 3, c. 139, s. 2 (latter part), is as follows:—"Provided always, that no indenture shall be allowed by any justice of the peace for the county into which such child shall be bound, who shall be engaged in the same business, employment, or manufacture in which the person to whom such child shall be bound is engaged; and notice shall be given to the overseers of the poor of the parish or place in which such child shall be intended to serve an apprenticeship, before any justice of the peace for the county or district within which such parish or place shall be, shall allow such indenture; and such notice shall be proved before such justice shall sign such indenture, unless one of such overseers shall attend such justice, and admit such notice."

instance to negative such omission: *Williams v. The East India Company*, 3 East, 192.

M. D. Hill, on the same side, was stopped by the Court.

Milner, contra, after citing *Rex v. Threlkeld*, 4 B. & Ad. 229, on the first point, was stopped by the Court as to this. Then, as to the second point, it being clear that the notice was essential, the respondents were bound to give [*610] proof of it, as of other facts affirmed by them. There is no ground, in ordinary cases, for presuming that such proof cannot be given. The appellants here are called on to prove a negative, and that in a case where the facts could not be within their cognizance. Under the new poor law, stat. 4 & 5 W. 4, c. 76, s. 79, the removing parish sends to the parish which is to receive the pauper, a copy of the examination upon which the order is made; here the appellants had not even that information. They could not be supposed to know what passed as to the allowance of the indenture. The respondents, who rely on the indenture, ought to have that knowledge; they could have obtained it from the pauper before they made the order; or, at least, they might have shown that they had instituted every proper inquiry without success. They are not, therefore, entitled to have the fact of notice presumed in their favor. Proof of a negative is never required, except in answer to something (as a charge of crime) *prima facie* established.

Lord DENMAN, C. J. I think this is a clear case, and rests on broad principles. I agree in the general doctrine stated by Mr. *Milner*, that a party is not to be called upon to prove a negative, except where there is something to be removed by him; but here was affirmative evidence, the effect of which the appellants had to remove. A proceeding had been taken by parties executing an important public duty; and there was no reason to suppose that they had acted incorrectly. If an inquiry was to be gone into on that subject, the difficulty was to be encountered by those parties who chose to say that the indenture, which appeared a legal instrument, was [*611] an invalid one. The respondents had made a strong *prima facie* case. The order of sessions, therefore, was right.

LITTLEDALE and WILLIAMS, Js., concurred.

COLERIDGE, J. The general rule is that, where a duty is performed by a public officer, he is presumed to have discharged it rightly. That presumption arose here, and the appellants were called upon to meet it by such proof as would raise a counter-presumption. In *Rex v. Haslingfield*, 2 M. & S. 558, commissioners under the inclosure act had altered the parochial situation of a road, by transferring it from one parish to another, which the act empowered them to do, after giving certain notices; but the first parish had continued to repair the road. A question being raised, whether or not the giving of the notices was to be presumed, the Court held that it was not. There a counter-presumption was raised by the fact, that the practice as to repair had continued unchanged; but the learned Judge who tried the cause said that "he should have had no difficulty in admitting the award, if the usage had been pursuant to it, presuming that the proper notices had been given."

Orders confirmed.¹

¹ See *Rex v. Witney*, Trinity term, 1836 (May 28th), post.

[*612] *The KING v. The Inhabitants of PAKEFIELD. Jan. 27.

Pauper hired a house and lands, from Michaelmas, 1832, to Michaelmas, 1833, for 80*l.*, and entered into occupation at Michaelmas, 1832. In July, 1833, he assigned to W. all his debts, securities, stock, effects, utensils in trade, household goods, furniture, crops growing or severed, implements of husbandry, cattle, live and dead stock, and all other personal estate and effects, to have, hold, and take the said moneys, &c., live and dead stock, and all other the premises assigned, to W., on trust to cultivate the

lands as long as the crops then growing should remain, and to sell the stock, crops, &c., and receive the amount of the valuation to be made as between outgoing and incoming tenant at quitting the land; and W. was to be possessed of the moneys on trust, first, to pay costs and charges, next to pay the rent, taxes, &c., which were or should be due during the continuance of the trusts, and next to pay creditors of the pauper, parties to the deed. In August, 1833, W. sold the stock, effects, and crops, which were cut and carried away by the purchasers; and afterwards W. paid the rent for the year out of the produce of the property assigned. Pauper, by himself or family, occupied the house till Michaelmas, 1833.

Heid, that there was neither an undivided occupation for the year, nor a payment of rent by the pauper, to satisfy stat. 1 W. 4, c. 18, s. 1; and that no settlement was gained.

On an appeal against an order of two justices (dated 7th of April, 1834) removing Edmund Reader from the parish of Pakefield to the parish of Walpole, both in the county of Suffolk, the Sessions quashed the order, subject to the opinion of this Court on the following case:—

On Old Michaelmas day, 1832, the pauper, who had previously been settled in Walpole, entered upon the occupation of a beer house and several acres of land in Pakefield, which he had previously hired for a year at a rent of 30*l.* for the house and land, and 10*l.* for certain brewing utensils in the house, and continued to occupy the house and land until July following. On the 17th of that month, being in embarrassed circumstances, he assigned his property to one Waterson, for the benefit of his creditors, by a deed which was put in, and which was to form part of this case.¹ The deed was executed by Waterson.

*On the 1st of August following, Waterson, under this deed, sold all the pauper's stock, farming implements, furniture, and other effects, and [*613]

¹The indenture was dated 17th July, 1833, and made between Edmund Reader, of the first part; Thomas Waterson, of the second part; and the several creditors signing and sealing, of the third part. It recited that Reader was indebted to the parties of the third part in the sums respectively set opposite their names, and, being unable to discharge the debts, had agreed to assign "all his personal estate and effects whatsoever and wheresoever" to Waterson; and it was witnessed that, in pursuance of the agreement, and in consideration of 10*l.*, Reader, at the request and by the appointment of the parties of the third part, bargained, sold, and assigned to Waterson, his executors, &c., "all and singular the debts and sums of money now due and owing to him the said Edmund Reader, and all securities and books of account for or relating to the same, and all and singular the stock, effects, and utensils in trade, household goods, and furniture of him the said E. R., and also the crops of corn, grain, and hay, whether growing or severed, muck, summerland, implements of husbandry, cattle, live and dead stock, of him, the said E. R., now being in, upon, or about the messuage or tenement, outhouses, lands, and hereditaments in his occupation in Pakefield aforesaid, and all other the personal estate and effects whatsoever and wheresoever of him the said E. R., and which he shall be possessed of, or interested in, or entitled to, at the execution of these presents (the necessary wearing apparel of himself and family only excepted), and all the estate, right, title, and interest whatsoever of him, the said E. R., in and to the same and every part thereof; to have, hold, demand, receive, and take the said moneys, stock, effects, and utensils in trade, household goods and furniture, corn, grain, hay, muck, summerland, implements of husbandry, cattle, live and dead stock, and all and singular other the premises hereby assigned," to W., his executors, &c., as and for his own goods, &c., upon trust to cultivate and manage the lands as long as the crops now growing thereon should remain, and for that purpose to employ such persons as he should think proper, and use the cattle and implements then on the premises, in the management and getting in of the same; and to sell the stock, effects, crops, &c., and get in the debts, &c., and to receive the amount of the valuation to be made on the land as between outgoing and incoming tenant at the quitting and giving up the same. And it was declared that W., his executors, &c., should stand and be possessed of the moneys that should arise from the sale, &c., on trust, first to pay costs, and charges of preparing, &c., the deed, and carrying the trusts into effect, and of managing the land, and next "pay and discharge the rent, rates, taxes, and tithes which now are, or at any time during the continuance, of the trusts hereby created shall be due and owing in respect of the premises occupied by him the said E. R." and the expenses of selling and collecting, &c.; and, lastly, to pay the residue among the creditors becoming parties thereto, in three months, rateably; with covenant by the creditors not to molest or disturb E. R. &c.

[*614] also the crops then *growing upon the land: the crops were cut and carried away by the purchasers, but the straw and colder were either left upon the premises or brought back for the use of the incoming tenant: part of the furniture was purchased for the pauper; but, after the sale, he was not possessed of any farming implements, or any stock, excepting a pig, which, after the crops were carried off, was turned out to shack upon the land. The pauper paid no rent himself; but Waterson paid the landlord 30*l.* 10*s.* towards the rent, 20*l.* 13*s.* in money out of the produce of the sale of the pauper's effects, and 9*l.* 17*s.* by the summertilths and muck on the land, and certain fixtures in the house which were taken by the landlord at that sum.

The pauper, with his family, consisting of his wife and four children, continued to live in the house and carry on the business, drawing beer there, and making profit thereof; he buying it, and bringing it from Lowestoft as he wanted it; on which profit he lived until Tuesday, the 8th of October, 1833. On that day he removed to a house which he had previously hired at Yarmouth, distant about twelve miles from Pakefield, taking with him his wife and three children, and all his effects, excepting a few articles of furniture, which were left in the house at Pakefield because the waggon employed by the pauper to remove his goods was not large enough to carry them. All the things left behind were to

[*615] have been sent to Yarmouth on the following day, but were *not in fact sent until the Thursday. The pauper left the key of the house with his son, with a command not to give it up to the landlord till the Michaelmas day; the son, who had lived with his father, continued to sleep in the house, having his clothes and chest there until the Thursday or Friday; and, on the Friday, which was Old Michaelmas day, delivered the key to the landlord, and went to lodge at the house of his master, a miller residing at Pakefield, with whom he had boarded from the day his father left the parish. The pauper and his wife and three children continued to reside at Yarmouth from the 8th of October for several months, and did not return to Pakefield until a short time before they were removed to Walpole under the said order. The question submitted by the sessions was, whether the pauper gained a settlement in Pakefield.

Biggs Andrews, and *Austin*, in support of the order of sessions. The pauper gained a settlement by hiring the dwelling-house, under stat. 1 W. 4, c. 18, s. 1. Two objections will be made, one as to the payment, the other as to the occupation. First, the rent, to the amount of 10*l.*, was paid "by the person hiring," the pauper. 'It is not necessary, to satisfy the act, that the payment should be made by the very hands of the party; his property, with his assent, as shown by the deed, and without assistance from any other quarter, satisfied the rent. Secondly, he actually occupied for a year, from Michaelmas day, 1832, to Michaelmas day, 1833. A party may occupy premises without actually residing; per

[*616] *PATTERSON, J.*, in *Rex v. Willoughby*, antè, p. 150, 151. *Here the son held the key to the end of the year. Even if that were not enough, yet the absence of the pauper for the few days at the end of the year would not break the occupation, more than absence for a day or two at any other part of the term. No other occupier can be pointed out. As for the assignment of the crops, it cannot be held that the right of the assignee to enter and take the crops destroyed the occupation of the pauper; the keys, and the control of the house and premises, being with the pauper; *Rex v. St. Giles-in-the-Fields*, antè, p. 495. The pauper could have maintained trespass. To hold that a sale of the growing crops puts an end to the occupation of the land would be carrying the doctrine of *Rex v. St. Nicholas, Colchester*, 2 A. & E. 599, and *Rex v. St. Nicholas, Rochester*, 5 B. & Ad. 219, to an extent never yet contended for.

Manning, contrà. First, The assignee, under the deed, was the occupier, he having acted on the deed, as appears by the doctrine assumed in *How v. Kennett*, 3 A. & E. 659, S. C. 5 N. & M. 1; and *Carter v. Warne*, M. & M. 479; he had a right to the occupation for the purpose of selling, and might have maintained trespass.

After the sale, the purchaser would be the occupier. A party who takes a lease and assigns it over cannot be said to occupy "under such yearly hiring." [COLERIDGE, J. Can you call this an assignment of the lease?] In *Carter v. Warne, M. & M. 479*, the words "personal property" were held sufficient to pass a lease. [*B. Andrews*. The crops, on that construction, need not have been expressly assigned.] At all events, the *pauper had not the undivided occupation. Neither has he paid the rent; for it does not, in effect, [*617] come from his pocket.

LORD DENMAN, C. J. It seems to me that neither the requisite of occupation nor that of payment is satisfied. The assignment denuded the pauper of his right in the personal property, and gave the assignee power to enter. The pauper had, therefore, not an exclusive occupation. Again, when he had parted with all the personal property, and ceased to have a control over it, a payment out of that over which he had no control was not a payment by him.

LITTLEDALE, J. There was no actual occupation under the statute. The pauper, for valuable consideration, assigned to a party who adopted the deed. And we can hardly say that a payment has been made by a party who has previously assigned over that out of which the payment is made.

WILLIAMS, J. It seems to me that the pauper had not an undivided occupation after he had parted with part of the right of possession of the place where the crops were growing, and had given another person a right to enter and take them away. Then, as to the payment, at the utmost there was only a fund provided, out of which another party was to pay.

COLERIDGE, J. I agree on the last point: the assignee was a trustee, only, to raise a fund out of which the payment was to be made. As to the occupation, I cannot agree that the pauper's interest was assigned *over; but I [*618] think he had not the exclusive occupation. And this might be inferred from the language in which the facts are stated; for it is said that the pauper continued to reside in the house. The assignee had clearly a right inconsistent with exclusive occupation by the pauper.

Order of sessions quashed.

The KING v. The Inhabitants of HARRINGTON. Jan. 27.

A printed indenture of apprenticeship executed on one day, but bearing date on another, is not void by statute 8 Ann. c. 9, and 5 G. 3, c. 46; and a settlement may be gained by service under it.

ON appeal against an order of justices, whereby Robert Cook, his wife, and children were removed from the township of Manchester in the county of Lancaster to the parish of Harrington in the county of Cumberland, the sessions confirmed the order (except as to one of the children), subject to the opinion of this Court upon the following case:—

The pauper Robert Cook had a derivative settlement in Harrington, and had no settlement in his own right unless he gained one under the circumstances herein-after stated. In June, 1815, he was bound apprentice to Michael M'Craa, a ship-smith in Workington, for six years. The indenture was a printed form filled up, and had, at the foot of it, the notice required to be added to all such printed forms by 5 G. 3, c. 46, s. 19.¹ The indenture *bore date 13th of June, 1813, [*619] but was not executed in fact until June, 1815; it was properly stamped,

¹ Stat. 5 G. 3, c. 46, s. 19, enacts, that all printed indentures, &c., for binding apprentices in Great Britain, shall have the following notice printed under the same:—

"The indenture, covenant, article, or contract, must bear date the day it is executed; and what money or other things is given or contracted for with the clerk or apprentice, must be inserted in words at length; and the duty paid to the stamp office, if in London, or within the weekly bills of mortality, within one month after the execution, and if in the country, and out of the said bills of mortality, within two months, to a distributor of the stamps, or his substitute; otherwise the indenture will be void, the master or mis-

and regular in all other respects, except as to its being antedated. The pauper gained a settlement by service under it in Workington, provided a settlement could be acquired at all by service under this indenture. The sessions held the indenture void; and the question for the opinion of this Court was, whether the same was void on account of its being antedated or not.

Wightman, in support of the order of Sessions. The indenture was absolutely void. Stat. 8 Ann. c. 9, s. 35, enacts that the full sum given or contracted for with any such apprentice as is mentioned in sect. 32, shall be inserted in some indenture, &c., which shall contain the covenants or agreements relating to the service, "and shall bear date upon the day of the signing, sealing, or other execution of the same;" upon pain that every master or mistress to whom any sum shall be given or secured for or in respect of any such apprentice, "which shall not be truly and fully so inserted and specified in some such indenture, or other writing, shall for every such offence forfeit," &c., one moiety to the crown, the other to the party who shall inform, &c., at any time after the executing of any such indenture, &c., or making any such contract, and [*620] within a year after the expiration *of the time of service. An indenture not dated according to this clause is void, by the rule laid down in *Slade v. Drake*, Hob. 298, that "affirmatives in statutes that introduce new laws, do imply a negative to all that is not in the purview." And the clause, if ambiguous, receives a legislative exposition from stat. 5 G. 3, c. 46, s. 19.

Armstrong, contra. The statute 8 Ann. c. 9, s. 35, does not declare the indenture void if not dated on the day of execution, or otherwise framed according to the directions there given. If it had the effect of rendering an indenture void which was not properly dated, it would also avoid an indenture in which the sum given or contracted for with the apprentice was not inserted. But the legislature has not considered it as so operating, for a clause (sect. 39) is afterwards introduced expressly avoiding indentures which are defective in the last particular. This section does not affect indentures bearing a wrong date, and its provisions cannot be imported into sect. 35 for that purpose. Stat. 5 G. 3, c. 46, s. 19, enacts nothing, except that a certain notice shall be added to the indenture, and that parties selling it without such notice shall be liable to a penalty. This clause has not the nature of a declaratory enactment. In 1 Nolan's Poor Law, 521, note (1), it is enumerated among the provisions, subsequent to stat. 8 Ann. c. 9, which do not affect the question of settlement. At common law a deed may be delivered after the date; Com. Dig. Fait (B 3).

Lord DENMAN, C. J. It is contended that no settlement could be gained in this case, because the indenture *is avoided by the two acts of parliament which have been referred to. The stat. 8 Ann. c. 9, s. 35, does not declare such an indenture void; it merely enacts that the indenture of apprenticeship shall bear date on the day of execution, and imposes a penalty, if it be not properly dated. Sect. 39, enacts that for certain contraventions of the statute the indenture shall be void; and among them is one of the omissions mentioned in sect. 35. We cannot, therefore, by implication, carry on to the thirty-ninth section a class of omissions which is not expressly referred to in it. Then comes the stat. 5 G. 3, c. 46. That is an act for altering, and for further securing and improving, the stamp duties; and it requires that upon every indenture there mentioned there shall be a printed notice, telling the contracting parties that the indenture is to give information of the time when the instrument was executed, and what money or other thing is given or contracted for with the apprentice; and also stating that the duty is to be paid within a certain period after the execution of the indenture; and further that, in default of

tres forfeit 50*l*. and another penalty, and the apprentice be disabled to follow his trade, or be made free."

And it is enacted, that if any printer, stationer, or other person, shall sell any such indenture without such notice being printed under the same, such printer, &c., shall, for every such offence, forfeit 10*l*.

such information being furnished by the indenture, and such duty paid, the indenture will be void. But there are no words making the indenture void if it be not properly dated; and probably, in the clause just referred to, more was thought of insuring payment of the duties than of explaining the statute of Anne. It is unnecessary to consider the cases (some of which are referred to in 2 Dwaris on Statutes, 741), where it has been held, that an instrument declared by statute to be void is only voidable. Here there is no statute which declares that an indenture shall be void if the requisite in question be not fulfilled.

*LITTLEDALE, J. The stat. 8 Ann. c. 9, s. 35, does not avoid the indenture if it be not truly dated, but only imposes a forfeiture. In [*622] sec. 39, which enumerates the omissions that shall avoid an indenture, the want of a proper date is not included. The act 5 G. 3, c. 46, s. 19, gives a notice in which it is said, in terrorem, than an indenture not truly dated will be void; but the statute does not make it so.

WILLIAMS and COLERIDGE, Js., concurred.

Orders quashed.

KELLY v. The Honorable EDWARD HENRY ROPER CURZON.

Jan. 29.

An affidavit to hold to bail, stating the defendant to be indebted to the plaintiff for money had and received by defendant for and on account of plaintiff and at his request, but not adding that it was received to plaintiff's use, is insufficient.

A RULE nisi had been obtained in this case for setting aside the capias on which the defendant had been arrested, and discharging him out of custody. The ground was the insufficiency of the affidavit to hold to bail, which stated that the defendant was indebted to the deponent, the plaintiff, in 2350*l.*, "for money had and received by him the said Honorable Edward Henry Roper Curzon, for and on account of this deponent, and at his request," but the money was not sworn to have been received to the use of the plaintiff.

Alexander, now showed cause. It is sufficient if the affidavit alleges that the defendant is indebted to the plaintiff in a certain sum, and points out the cause of action: *Coppinger v. Beaton*, 8 T. R. 388. If the defendant was *not indebted to the plaintiff for money had and received, perjury might be [*623] assigned on the affidavit.

Sir John Campbell, Attorney-General, contra. *Coppinger v. Beaton*, 8 T. R. 388 has been, in effect, overruled again and again. In the present instance, the party making the affidavit might be a surety, and, if indicted for perjury, might allege that he swore according to what he understood to be the law. After citing *Cathrow v. Hagger*, 8 East, 106, and *Taylor v. Forbes*, 11 East, 315, he was stopped by the Court.

Lord DENMAN, C. J. It is perfectly clear, upon grounds similar to those stated by Lord TENTERDEN, in *Pitt v. New*, 8 B. & C. 654 (which case is supported by *Reeves v. Hucker*, 2 Cro. & J. 44; *S. C.* 2 Tyr. 161), that this affidavit is insufficient.

LITTLEDALE, J. Many cases may be put in which it may be said that money was received "for, and on account of," the plaintiff; but nevertheless it may not have been received to his use. The affidavit must allege the facts which constitute the debt.

WILLIAMS, J. concurred.¹

Rule absolute.

¹ COLERIDGE, J., was absent.

*The KING v. HENRIETTA LAVINIA GREENHILL. Jan. 29. [*624]

Where a person supposed to be improperly in custody is brought up on a habeas corpus the Court, if there appear no ground for restraint, will order that such person be a

liberty to go where he pleases, and will if necessary, give him the protection of an officer in going. But, if the party be a legitimate child, too young to exercise a discretion, the legal custody is that of the father; and, if the mother has possessed herself of the child adversely to him, and he claims it, the Court will oblige her to deliver it up.

Nor will this rule be departed from on the ground that the father has formed an adulterous connexion, which still continues, if it appear that he has never brought the adulteress to his house or into contact with his children, and does not intend to do so.

Semble, that the child would not be given into the father's custody if it appeared that in his hands it would be exposed to cruelty or to gross corruption.

On the 23d of October, 1835, Benjamin Cuffe Greenhill, Esquire, of Knowle Hall, Somersetshire, obtained a habeas corpus, commanding his wife, Henrietta Lavinia Greenhill, to produce the bodies of their three children before PATTERSON, J., at his house. The writ was obtained on an affidavit by Mr. Greenhill, stating that he had been residing with his said wife and children at Weymouth till the 23d of the preceding September, or thereabouts, when Mrs. Greenhill, in his absence, left the house and went to her mother's at Exeter, where she had ever since continued, and refused to return. That, after her departure, September 26th, her brother Captain Macdonald, at her instigation, went to Weymouth, broke up Mr. Greenhill's establishment there, and, without his authority, took and conveyed the said children, females, aged, respectively, five years and a half, four and a half, and two and a half, to the house of Mrs. Greenhill's mother at Exeter, where they had ever since been in the custody of Mrs. Greenhill, against the will of Mr. Greenhill; and that he, as their father, claimed the custody and possession of them as a right, which he would not in any way abuse. The children were brought to the house

[*625] of the learned Judge in obedience to the writ; but *their further attendance was dispensed with, it being stated by Mr. Chambers, Mrs. Greenhill's uncle, that they would be at his house in the immediate neighborhood, and would be produced in ten minutes, when it became necessary. And affidavits were put in on behalf of Mrs. Greenhill, in answer to that of her husband. She herself stated as follows:—The permanent residence of Mr. and Mrs. Greenhill was Knowle Hall. Mr. Greenhill was in the habit of leaving Mrs. Greenhill for short periods, during which the children were under her entire control. In the summer of 1835, Mr. Greenhill arranged that they should go, with the children, to Weymouth, for a month or two; and that Mrs. Greenhill and the children should proceed from thence to the house of her mother at Exeter, about the 1st of October. The object of the journey to Weymouth was amusement and health. They arrived there about July 11th, and occupied furnished lodgings. Mr. Greenhill had a pleasure-yacht, in which he frequently left Weymouth on short excursions. The last time of his leaving Mrs. Greenhill there was September 7th, when he sailed for Portsmouth, after which he went to London: and on September 24th, she received information as to his conduct, which rendered it necessary, in her opinion, to remove immediately, with her children, to her mother's house at Exeter. She accordingly left Weymouth, and, on September 26th, had her children conveyed to Exeter. They remained under her care, at her mother's house, till October 27; and she then, in obedience to the habeas corpus, brought them to London, where they resided, with her, at the house of her uncle, Mr. Chambers. Mrs. Greenhill further expressed her belief that, if her husband were permitted to have the [*626] custody and control *of the infants, their welfare and interests would be prejudicially affected thereby; and that her husband's mother, with whom it had been suggested that they might be placed, was, from circumstances which the affidavit set forth as to her temper and disposition, an improper person to have the charge of them. Mrs. Greenhill also stated that she had not herself done any act which could render her unworthy or unfit to have the custody of the children; and that her husband could at any time have, and had in fact had, access to them where they then were. By other affidavits it appeared that Mr.

Greenhill had, during the years 1834 and 1835, lived in continued adultery with a Mrs. Graham, cohabiting with her at various lodgings in London and at Portsmouth; the intercourse at the latter place having been still carried on after the arrival of Mrs. Greenhill and her children at Weymouth; that during such cohabitation Mr. Greenhill and Mrs. Graham had at times assumed the names of Mr. and Mrs. Greenhill, and Mr. and Mrs. Graham; that in the month of October, in which the habeas corpus was obtained, they were living together under the latter names at a lodging in London; and that in that month he had acknowledged to Mr. Chambers, the uncle of Mrs. Greenhill, that the adultery was still continuing, and had refused to part with Mrs. Graham while uncertain of a reconciliation with his wife. There was also an affidavit that Mr. Greenhill had, in the same month, gone with a female to a common brothel, where it was believed they had passed the night. Mrs. Greenhill's uncle deposed, from his knowledge of the "character, disposition, and conduct" of Mr. Greenhill, that he was not, in the deponent's opinion, a fit and proper person to have the *care and custody of the children; that, if they were intrusted to him, [*627] there was great danger that they would not be properly educated and taken care of; and that Mrs. Greenhill was in all respects a proper person to have the care and custody of them. The grandmother of Mrs. Greenhill deposed to the same effect, and that, if the children were placed with their father, there was great probability that they would be "brought into contact with a female of an abandoned and profligate character:" and she also stated that Mr. Greenhill's mother was an improper person to be intrusted with the children, being unkindly disposed both towards them, and towards Mrs. Greenhill.

After the suing out of the habeas corpus, and before its return, a petition, founded upon the above affidavits on behalf of Mrs. Greenhill, was presented to the Vice-Chancellor, praying that it should be referred to one of the Masters of the Court to report who was a fit and proper person to be the guardian of the said infant children, &c. The petition was heard, and dismissed, while the habeas corpus was depending before PATTESON, J. On the 10th of November, PATTESON, J., after taking time for consideration, ordered that Mrs. Greenhill should deliver up the children to her husband. In the then Michaelmas term, November 12th, that order was made a rule of Court. The rule was served on Mrs. Greenhill, November 12th, and the children demanded: but she refused to give them up. On the 13th a rule nisi was obtained for an attachment against Mrs. Greenhill for her contempt. In the same term, November 17th,

Wilde, Serjt., moved, on behalf of Mrs. Greenhill, for a rule calling on Mr. Greenhill to show cause why the *order of PATTESON, J., should not be set aside, and the rule, making it a rule of Court, discharged. The [*628] motion was grounded on an affidavit (among others) by Mrs. Greenhill, stating, in addition to facts which have been already mentioned, that the children had been always brought up under her personal superintendence and care, and that, without her personal attention, their health and comfort would suffer; that, according to her belief, the connexion between Mr. Greenhill and a female of immoral character still continued; that Mrs. Greenhill had had two interviews with him since she came to London in obedience to the writ, and that in neither did he pledge himself to put an end to such connexion; that, as she was informed and believed, he had taken a house for the said female for a term of years, and intended to reside with her permanently; that the children were kept under no restraint, were attended by the same nurse as when they were at Weymouth, and had never been withheld from their father, who, on the contrary, had been offered free access to them at all times; that Mr. Greenhill had always admitted the propriety of Mrs. Greenhill's conduct as a wife and mother; that he would not inform Mrs. Greenhill how he intended to dispose of the children; that Mrs. Greenhill had instituted proceedings (which were then depending) in the Ecclesiastical Court for a divorce and alimony, because the conduct of her husband was such that she could not with propriety reside longer with him, and

that she believed the habeas corpus to have been obtained for the purpose of affecting that suit; that she only desired permission to continue bestowing upon her children the same personal care and attention which they had hitherto received from her, and which was necessary to their welfare; *and that [*629] she had always been ready and willing, and offered, and did then offer, to reside in any place, save, under present circumstances, in her husband's own house, and to act with respect to the said children, and their management, education, and disposal, precisely as her husband might dictate. She further stated that she would consent even to relinquish the custody and control of the children, if, by the rule or other discretion of the Court, she might be assured of permission to give them her personal care and attention during their tender years. It appeared by another of the affidavits now put in, that Mrs. Greenhill's age was twenty-four and that of her husband twenty-eight.

Wilde, Serjt., in moving for the rule, stated the proposal of Mrs. Greenhill to be, that she should not part with the children, but that they should be placed where her husband should appoint, she having access to them for the purpose of giving them her care and attention, subject to his directions. The question raised by these proceedings is, not whether the father's right over his children be paramount, but whether the rights of the mother are to be wholly disregarded, so that she may not claim access even to infants within the age of nurture. The law cannot require that, if a husband makes his own house unfit for his wife's residence, his children shall, therefore, be deprived of the maternal care and protection. [Lord DENMAN, C. J. Has Mrs. Greenhill gone with the children to her husband, and made the proposal you now mention, and has it been rejected? PATTESON, J. All that appeared before me was, that she had left her husband's house, and the children in it; that her brother had gone to [*630] the house and *brought the children away; and that Mrs. Greenhill had then gone with them to Exeter, and had afterwards said she would not deliver them up.] The place she left was only a lodging-house, taken for a limited time; and she went from thence to the place which her husband had appointed. [PATTESON, J. At any rate she went much before the time.] None of the authorities go so far as to bear out the present motion. In cases where the child has been actually in the father's possession, this Court has declined to interfere, no doubt considering its power inadequate to alter such a state of things; but those cases differ from the present; and, in a case (that of Mr. Lytton, cited in *Rex v. De Manneville*, 5 East, 222), where the father had bound himself by an agreement in articles of separation to allow the mother access to the child, the Court would not suffer him to take it from the school at which it had been placed, without providing for the future access of the mother. The only instances in which the Court appears actually to have taken away the child from the mother are Sir William Murray's case, cited in *Rex v. De Manneville*, 5 East, 223, and *Ex parte M'Clellan*, 1 Dowl. P. C. 81. [PATTESON, J. In that case the child had been placed at a school by agreement between the father and mother; the mother persuaded the governess to let the child go to her for a few days, under a promise to restore it, and then kept it. I thought there was an absurdity in saying that, if the husband took the child by force, the Court would not remove it from his possession, and yet that it would not assist him in obtaining the possession, when he sought it by the legal course of [*631] a habeas corpus.] Where he actually has the custody, *the power of the Court is limited; where he has it not, the Court will exercise its discretion according to the circumstances. In *Rex v. Smith*, 2 Stra. 982, where a boy was brought up by habeas corpus at the instance of his father, for the purpose of having him delivered over by an aunt who kept him, the Court, overruling *Rex v. Johnson*, 1 Stra. 579, S. C. 2 Ld. Ray. 1333, refused to do more than order him to be delivered out of the custody of the aunt, and inform him he was at liberty to go where he pleased. And in *Rex v. Sir Francis Blake Delaval*, 3 Burr. 1484, Lord MANSFIELD states the law to be, that, "In cases

of writs of habeas corpus, directed to private persons, to bring up infants, the Court is bound, *ex debito justitiæ*, to set the infant free from an improper restraint: but they are not bound to deliver them over to anybody, nor to give them any privilege. This must be left to their discretion, according to the circumstances that shall appear before them." He then refers to the two cases in *Strange*, just cited, and a third, *Rex v. Clarkson*, 1 Stra. 444, and adds, "The true rule is, that the Court are to judge upon the circumstances of the particular case; and to give their directions accordingly." And, in the case then before the Court, in which a father had obtained a habeas corpus to bring up his daughter, Lord MANSFIELD said, that there was no reason for delivering her to her father, and the order was that she should be discharged from all restraint, and be at liberty to go where she would. In *Rex v. Wilson*, see p. 645, note (1), post, which came before this Court in 1829, on the application of a father, the Court referred it to the Master to see what was proper as to the *custody; and, in *Rex v. Dobbyn*, see p. 644, note (1), post, the Court refused to let [*632] the father have the custody of the infant. The object of the writ of habeas corpus is the liberty of the party detained; and the application ought properly to come from him, *Rex v. Reynolds*, 6 T. R. 497; *Rex v. Edwards*, 7 T. R. 745; though, where the party himself is of too tender years to decide upon the custody in which he ought to be, the law vests the discretion on that subject in the father. But, where he attempts to use that discretion, not in truth for the purpose of enforcing his own rights, but to take away those of the mother, the children being within the age of nurture, and no reason being shown for abridging the mother's rights, the Court will at least interpose so far as to leave the father such a qualified dominion only, as the circumstances require, and as may be consistent with the interests of the children themselves. The whole question is, whether the case be one in which the Court can use its discretion; and whether the rights of the husband be so far paramount to those of the wife, that she has no right to stand before the Court enforcing any claim. A rule nisi was granted.

In opposition to the rule, affidavits were put in on behalf of Mr. Greenhill, to the following effect:—Mr. Greenhill's solicitor, Mr. Browne, swore that, before the issuing of the habeas corpus, he had gone to Mrs. Greenhill, at Exeter, with Mr. Greenhill's sanction, for the purpose of effecting a reconciliation or arrangement, which, however, he had been unable to bring about, and had ultimately demanded, while at Exeter, that the children should be placed under his protection to be taken to Knowle Hall; that Mrs. Greenhill refused *this, and [*633] the habeas corpus afterwards issued: that Mr. Greenhill, in his communications with the deponent, had evinced great affection to the children, and that they, in an interview which the deponent had witnessed between them and their father, had shown a strong attachment to him: that, upon the service of the rule of Court of November 10th, for the delivery of the children by Mrs. Greenhill, she had refused to give them up, and expressed her determination not to live again in the same house with her husband: and that she had asked him what he meant to do with the children, to which he had replied that he should take them to Knowle, and that she might see them whenever she pleased. Mr. Greenhill, by another affidavit, denied that any arrangement had been made with his consent for Mrs. Greenhill to go from Weymouth to Exeter. He further stated that, in the beginning of October last, when informed of his wife's reasons for leaving Weymouth, he had expressed to her brother and uncle his contrition for what had passed, and had offered, if she would forgive him, to live with her wherever she wished, and to give up his intimacy with Mrs. Graham, and that he had made other attempts at reconciliation, without success. That the children, if taken out of his custody, would lose materially by family arrangements, which, to his knowledge and belief, would essentially affect their future interests: that his wife had no means of supporting them; that the children, if separated from him, would, as he believed, be brought up in detestation of him;

and that his mother was a very proper person to be intrusted with them : that he had (before Mr. Browne went to Exeter) proposed to Mrs. Greenhill's attorney that she should leave her mother's house and *live somewhere in [*634] or near London, in which case he had offered that she might have the children under her care, but this had not been acceded to : that he never contemplated for a moment depriving his wife of the privilege she had, as a mother, of seeing her children, and had repeatedly expressed himself to that effect : that Mrs. Graham had never seen either of the children or Mrs. Greenhill, nor had he ever taken either of the children near Mrs. Graham's residence, or Mrs. Graham to Knowle Hall or any other place where his children or wife were, nor had he entertained the thought of bringing his children or wife in contact with Mrs. Graham, having always loved his children, and been loved by them, with the warmest affection : and that he had never given his wife occasion to complain of any unkindness or want of affection in him towards them : that it was his intention to take them to Knowle, his own residence, where he proposed they should reside under the care of his mother, and where he had always been ready and willing that his wife should have free access to them, as he had frequently told her. Upon these affidavits, *Talfourd*, Serjt., in the same Michaelmas term (November 24th), was partly heard in opposition to the rule ; but, the Court suggesting that some agreement might perhaps be come to, the rule was enlarged to this term. From affidavits subsequently sworn by, and on behalf of, Mr. Greenhill, it appeared that Mrs. Greenhill had left Mr. Chambers's house with the children ; that Mr. Greenhill had since made unsuccessful attempts to discover where they were, and that, from information he had obtained, he believed that Mrs. Greenhill had taken them with her out of the kingdom.

*Sir John Campbell, Attorney-General, *Talfourd*, Serjt., and *Wightman*, now showed cause against the rule for setting aside the order of PATTESON, J.

The arguments urged against the rule in this and the preceding term were as follows :—The legal power over infant children is in the father, the mother has none ; 1 Bla. Comm. 453. It has been held, in the case of removal of paupers, that a bastard child, within the age of nurture, is not to be separated from the mother, see *Rex v. Hemlington*, Cald. 6. Note [2] to *Simpson v. Johnson*, 1 Doug. 9, and *Ex parte Ann Knee*, 1 New Rep. 148 ; but *Rex v. De Manneville*, 5 East, 221, shows that the principle of that ruling does not extend to the case of legitimate children, and that the custody of them belongs to the father. The doctrine of that case was recognised in *Ex parte M'Clellan*, 1 Dowl. P. C. 81, and in *Ex parte Skinner*, 9 B. Moore, 278 (where many cases on the subject are referred to), where *BEST*, C. J. (at the bar), having, as referee, then made an order, by consent of the parents, that the child should be placed with a third person, and the father having taken it from that person, the Court of Common Pleas held that they had no authority to interfere. In the cases which have been cited, of *Rex v. Smith*, 2 Stra. 982, and *Rex v. Sir F. B. Delaval*, 3 Burr. 1434, where the Court refused to do more than set the infants free from restraint, they were of sufficient age to exercise a choice as to the hands in which they should be : and, in the latter case, the Court, at the time of discharging the infant, suspected the father of being party to a conspiracy against her. In *Rex v. Johnson*, 1 Stra. 579, S. C. 2 Ld. Raym. 1333, the reason assigned for delivering the child to the guardian appointed by her father was, [*636] that she was *too young to judge for herself. *Blisset's Case*, Lofft's Rep. 748, is the only one reported, in which the Court has directly taken upon itself to overrule the father's claim where the infant was too young to form a choice. In *Ex parte Skinner*, 9 B. Moore, 278, *BEST*, C. J., after observing that the Court of King's Bench, on applications of this kind, generally "refer the parties to a Master in Chancery, who may ascertain whether there be sufficient property to provide for the support of the child, or whether it might be made a ward of that Court, or he might appoint a guardian to take care of

would give it to the father; the mother's application would not be attended to. Here the case is stronger; the children were, in effect, in the custody of the father, in a place selected by him; they have been removed, and he only seeks to bring them back. On the question which comes before us, whether or not the learned Judge's order should be set aside, I think we have here no right (and I do not say that we should have it in any case) to make an order about access to the children or interference with them. We can only discharge the rule.

*WILLIAMS, J. In this case, as it came before my brother PATTESON, [642] he was bound to decide, in point of law, with whom the custody of the children should be. In general, where the party brought up by habeas corpus is competent to exercise a discretion on this point, the Court merely takes care that the option shall be left free. In *Rex v. Sir F. B. Delaval*, 3 Burr. 1434, the party was of such an age; and the Court acted accordingly. But where the age is not such as to allow the exercise of a discretion, and there is a controversy as to the custody, the Court must decide; and here the learned Judge, having no doubt of the law (and I accede to his view of it), made the order in question, giving the custody to the father. Then is there anything shown which can induce us to suspend or set aside that order? It has been held, *Ball v. Ball*, 2 Sim. 35, that the fact of a father having formed an improper connexion is not of itself sufficient reason for separating his children from him. The same question was before my brother PATTESON, and is now before us for reconsideration. The right is in the father, and must take effect.

COLERIDGE, J. The single question before the Court is, whether or not this order shall be discharged. It is important to consider the circumstances under which the order was made. A habeas corpus issued, and was obeyed. The mother and children were before the learned Judge; but it was then arranged that, during the future attendance, the children's presence should be dispensed with. There was not, therefore, anything *special in the order ultimately made; it was only what the learned Judge might have said [643] verbally to the father if the children had been in attendance with the mother, "You are entitled to the custody of these children." The rule, then, is to be considered upon purely legal principles. A habeas corpus proceeds on the fact of an illegal restraint. When the writ is obeyed, and the party brought up is capable of using a discretion, the rule is simple, and disposes of many cases, namely, that the individual who has been under the restraint is declared at liberty; and the Court will even direct that the party shall be attended home by an officer, to make the order effectual. But, where the person is too young to have a choice, we must refer to legal principles to see who is entitled to the custody, because the law presumes that, where the legal custody is, no restraint exists; and, where the child is in the hands of a third person, that presumption is in favor of the father. But, although the first presumption is that the right custody according to law is also the free custody, yet, if it be shown that cruelty or corruption is to be apprehended from the father, a counter-presumption arises: that, however, is not raised here. The case, as it comes before us, is the same as if the parties, with the children, were on the floor of the Court, and we had to pronounce what was the rightful custody. The rule, therefore, must be discharged.

Rule discharged.

*The *Attorney-General* then moved that the rule for an attachment might be made absolute; and, no argument being offered in opposition, [644]

The rule was made absolute; but it was ordered that the attachment should lie in the office for a month.¹

¹ The reporters are indebted to Mr. Dealtry for the following notes of two cases referred to in the argument of *Wilde*, Serjt., ante, pages 681, 682.

The KING v. DOBBYN.

A father claiming from his wife the custody of their legitimate infant child on habeas corpus, the Court, on a representation by the wife of his profligacy and cruelty, referred it to a barister to determine as to the proper custody for the child, the wife (who was in contempt for disobeying the writ), and the husband, consenting to abide by such determination.

In Michaelmas vacation, 1817, Lord ELLENBOROUGH issued a summons, at the instance of William Augustus Dobbyn, calling upon Maria Philippa Dobbyn, his wife, to show cause why a writ of habeas corpus should not issue to bring before him the body of Philippa Dobbyn, their daughter, aged six years, for the purpose of her being delivered over to the father. The summons was attended before Mr. Justice HOLBORN, who ordered the writ to issue.

The defendant having neglected to make any return to the writ, Lord ELLENBOROUGH issued his warrant pursuant to the statute 56 G. 3, c. 100, to apprehend the defendant, in order that she might find bail for her appearance in the Court of King's Bench on the first day of the following Hilary term, to answer the contempt. She was apprehended under the warrant, and entered into a recognizance to appear accordingly.

On the first day of Hilary term, she appeared in Court, and was asked whether she would undertake to appear before a Judge at chambers, and bring the said Philippa Dobbyn with her, which she declined to do; whereupon she was examined upon interrogatories, and reported in contempt. The reasons alleged by her for not giving up the child were, that the time of the father was principally devoted to the gaming table and the society of women of infamous character; that he, having attempted the life of the defendant, was likely to do the same to the child; and that he was of a brutal disposition; that he had beat defendant with a stick, and desired the woman with whom she lived to turn her out of doors, declaring that she was not his wife, but his discarded mistress; that on one occasion, on his returning from the gaming table in a dreadful temper, he accused the defendant of inconstancy; she protested her innocence, but nevertheless he nearly strangled the defendant, and inflicted on her several violent blows, and exclaimed, "she was dead, he had murdered her;" that she exhibited articles of the peace against him,

*and he was bound over to keep the peace, in 2000*l.*; that he endeavored to [645] procure a divorce, but could not succeed, though she did not oppose it; that, although he could see the child whenever he wished it, he had only sent for her twice within the last three years and a half, when she was immediately sent; that she believed his only motive in claiming the child was a wish to give her, Mrs. Dobbyn, pain, and not affection to the child.

Easter term, 1818. The defendant was examined upon interrogatories, and reported in contempt. By consent, sentence was postponed till the next term. And it was referred to Mr. Taunton to determine in whose custody Philippa Dobbyn should be placed, or remain for the present to abide his further order. And it was also referred to Mr. Taunton to inquire into all matters in difference between the prosecutor and the defendant, touching the said Philippa Dobbyn, and to determine in whose custody the said Philippa Dobbyn should be permanently placed, and to regulate the access to be had by the prosecutor and defendant to the said Philippa Dobbyn, if he should adjudge it proper that both parents should have such access. And to make such further order respecting her as he should think fit, the prosecutor and defendant undertaking (by the rule) to pay obedience to such orders.

The KING v. WILSON.

Infant child in custody of the mother, brought up by habeas corpus at the father's instance. Ordered that the child remain with the mother; the father's access to be regulated by the Master.

HILARY term, 1829. Wife and child, daughter of three years old, brought up by habeas corpus sued out by the husband; the wife was asked if she was under any restraint; and she was told she was at liberty to go where she pleased; and it was referred to the Master to determine at what time and in what manner, and under what circumstances, the father should have access to the daughter; she in the mean time to remain with the mother.

[646] *HOLLINGSWORTH v. BRODRICK. Jan. 29.

HOLLINGSWORTH v. COLLINSON.

Two actions having been brought by the same plaintiff against different defendants, on the same policy of insurance, the Court consolidated them, after a declaration had

been delivered in one, and an appearance entered in the other, at the instance of the defendant in the latter action, though the plaintiff objected.

THESE were two of forty-eight actions brought by the same plaintiff on the same policy of insurance against several defendants. The policy was on the ship *Angerstein*, and all the actions were on the same loss. After appearances were entered, and before any declarations were delivered, a summons to consolidate the actions was served on the plaintiff. On the hearing at chambers, COLERIDGE, J., referred the matter to the full Court, and, in the mean time, ordered that the proceedings in all but one action should be stayed. A declaration had been subsequently delivered in *Hollingsworth v. Brodrick*. *R. V. Richards*, in this term, obtained a rule calling on the plaintiff to show cause why the two "actions should not be consolidated, or why the proceedings in the second mentioned cause should not be stayed."

From the affidavits in answer, it appeared that the expected defence was unseaworthiness; and that the premiums paid were at the rate of forty per cent., to return in proportion to the premiums currently paid on the voyages the ship might make during the time mentioned in the policy (which was twelve months, commencing 1st March, 1834); and that no return had been made by the defendants or any of the subscribers. It further appeared that an action had been brought by the plaintiff, in the Common Pleas, on a policy on freight, upon the same ship, on the same loss; in which the *defendant had pleaded un- [647] seaworthiness, and had paid the premium into court.

Maule showed cause in this term (January 28th).¹ It may be observed that this rule introduces a term, "consolidated," which has not been used before in these applications. It has hitherto been usual to express, at length, the intended effect: namely, that the other actions shall be stayed, on the consent of the defendants (not the plaintiff) to be bound by the event of the cause tried. And here the application is, to consolidate before declaration: but the practice has always been to refuse to consolidate till issue joined. [COLERIDGE, J. It was stated to me that, since the new rules, many judges have allowed a consolidation after declaration, and before issue joined.] In the late cases of *Doyle v. Anderson*, and *Doyle v. Stewart*, 1 A. & E. 635, an application was made for a consolidation rule to bind the plaintiff; and the hardship arising under the new rules, from the increase of expense to defendants, was pressed upon the Court in support of the application; but the Court refused to grant it, although the circumstances there were strongly in favor of the defendants. And that which judges have done by consent of parties constitutes no precedent for cases where the plaintiff resists. The declaration may be differently framed against different parties. When the general issue was almost invariably the defence, still the Courts withheld the rule till they saw what issue was joined, and whether it applied to all the cases: and, now that the defences are to be specially *pleaded, the principle applies still more strongly. Besides, the hardship [648] arising to the defendants, from the length of the several declarations, is much lessened, now that the declarations contain only one count. It is known that the defence in this case is unseaworthiness. Supposing that to be pleaded, the defendants would be required to pay into Court the premium which they have received, as has been done in the action in the Common Pleas; but the plaintiff would lose this security if the rule were to be made absolute as prayed.

R. V. Richards, contra. The law as to consolidating actions has gradually been engrafted on the practice of the Courts. The rule formerly was, to stay the proceedings unless the plaintiff consented to consolidate. It is true that, until the late rules of Court were made, the consolidation never took place before plea pleaded. That, however, was thought a hardship; and the practice at chambers has latterly been to consolidate at an earlier stage. The defendants are ready to submit to any terms which the Court may think necessary for giving the plaintiff the full and immediate benefit of the judgment in the first action, against the remaining defendants. [*Maule*. There will be a difficulty

¹ Before Lord DENMAN, C. J., LITLEDAL, WILLIAMS, and COLERIDGE, J.

as to the judgment, if the consolidation be made before declaration. [LITTLEDALE, J. Perhaps the parties might agree that the same declaration should be considered as delivered in all the cases.] The form might be easily settled hereafter. The proceeding in the Common Pleas, which has been cited, took place in an action on a policy upon freight; this is on a time policy. The rule may perhaps be different in the two cases.

[*649] *Lord DENMAN, C. J. We will confer with the other Judges.

Cur. adv. vult.

Lord DENMAN, C. J., now said, We think the consolidation ought to take place.

Rule absolute.¹

¹By consent, the following rule was drawn up. "It is ordered that all proceedings in the last-mentioned cause be stayed, until the trial of the first-mentioned cause, the defendant in the last-mentioned action hereby undertaking to be bound and concluded by the verdict found in the first action, if such verdict shall be to the satisfaction of the Judge who may try the same. And it is further ordered that, if the defendant pays the premium into Court in that action, the other defendant shall, within one week after such payment, pay the premium into Court in the other action under this rule, and that the plaintiff be at liberty to take the same out of Court; and, if he elects to accept such premiums in satisfaction of such action, that he be at liberty to proceed to tax his costs at any time either before or after the verdict in the first-mentioned action. And it is further ordered that, if the verdict be found for the plaintiff in the first-mentioned action to the satisfaction of the Judge before whom the same may be tried, then the defendant in the other action shall pay to the plaintiff the amount of the sum assured by him, or such proportion thereof as the verdict recovered bears to the sum assured by the defendant in that action, together with the costs up to that time, to be taxed by the Master, within a fortnight after the taxation of the plaintiff's costs in the action tried. And it is further ordered that, if the money be not so paid, the plaintiff shall be at liberty to file a declaration and sign judgment by default for the amount in the action in which the money is neglected to be paid, unless a Judge shall otherwise order. And it is further ordered that, if the defendant in the first-mentioned action to be tried pays the premium into Court, and the verdict is found for the defendant, the plaintiff, nevertheless, shall be at liberty to tax his costs, sign judgment, and issue execution in the other action for such costs, unless the defendant pays the same within a fortnight after the verdict in the action which shall be so tried as aforesaid."

[*650] *The KING v. The LIVERPOOL and MANCHESTER Railway Company. Jan. 29.

By the Liverpool and Manchester Railway Act it was provided that the purchase-money to be given by the Railway Company for lands, &c., taken, and the compensation they were to make for damage to lands, &c., and for detriment, injury, damage, loss, inconvenience, or prejudice, sustained by owners and occupiers, should be ascertained, in case of disagreement, by a jury, who should assess compensation for the damages to be sustained by any person being owner or occupier of or interested in such lands, &c., for detriment, &c., which should accrue to him by reason of the making of the railway, or of the execution of the company's power; such damages to be settled distinctly from the value of the lands. And every tenant at will, lessee for a year, and other person in possession of lands, &c., through which the railway was intended to pass, not having any greater interest than as tenant at will or lessee for a year, was to give up possession at six months' notice; but, where such tenant was required to give up possession before the expiration of his term or interest, the company were to make compensation for the value of the unexpired term or interest, to be settled, if necessary, by a jury.

The company gave notice as above, to a party whose lease had been several times renewed for terms of seven years, and whose landlord, at the time of the last renewal, had declined to renew for fourteen years, but assured the tenant that he would not be turned out at the end of the seven. The tenant afterwards laid out money in improvements. During the seven years the landlord sold his reversion to the company, and died: Held that the tenant had no interest for which the company were bound to make compensation under the act.

THE above company was incorporated by stat. 7 G. 4, c. xlix. (local and personal, public), and empowered thereby to make a railway from Liverpool to Manchester, and to take lands for the purposes of the act.

Sect. 45 enacts that all bodies politic, &c., before capacitated to sell, and the owners and occupiers of any lands, tenements, &c., through which the company's works are intended to be made, "may accept and receive satisfaction for the value of such lands, tenements, and hereditaments, and also compensation for the damages to be sustained in making or completing the said works," and "for and on account of the detriment, injury, damage, loss, inconvenience, or prejudice which may be sustained by such bodies," &c., or other persons, in such sums as shall be agreed upon, the amount of satisfaction and compensation to be settled in case of disagreement, by a jury; such jury to be summoned by the sheriff on warrant from the company.

*Sect. 47 enacts that, in ascertaining the sums to be paid for the purchase of any lands, &c., "the jury shall also ascertain and assess the [651] compensation and satisfaction to be made by the said company for any damages which shall or may at any time or times hereafter be sustained by any body or bodies," &c., "or by any person or persons respectively, being owner or owners or occupier or occupiers of or interested in such lands, tenements, or other hereditaments, for or by reason of the severing or dividing the same from other lands," &c., belonging to such bodies, persons, &c., "and for or on account of the detriment, injury, loss, and damage, or prejudice which shall or may accrue to or be sustained by such body or bodies," &c., "owner or owners, or occupier or occupiers, or other person or persons interested in such lands, tenements, or other hereditaments, or any of them, by reason of the making, using, repairing, or maintaining the said railway or tramroad, and other works and conveniences belonging thereto, or by reason or means of the execution of any of the powers given to the said company;" such damages and compensation to be settled separately and distinctly from the value of the lands, &c., to be taken and used as aforesaid.

Sect. 48 enacts that the said juries shall settle, "what shares and proportions of the purchase-money or compensation for damages which shall be assessed as aforesaid shall be allowed to any tenant or other person or persons having a particular estate, term, or interest in the premises, for such his, her, or their interest or respective interests therein." Sect. 55 vests the lands in the company on payment or legal tender of the purchase-money or compensation agreed upon or assessed.

*Sect. 56 enacts that every tenant at will, lessee for a year, and other person in possession of lands, &c., through which the railway is intended to [652] pass, not having any greater interest than as a tenant at will or lessee for a year, or from year to year, shall deliver up possession to the company at the expiration of six calendar months next after such notice as is there directed (whether such notice be given with reference to the time when the holding commenced, or not, and whether it be given before or after the time of the purchase by the company), or at such time as shall be required after the expiration of six calendar months: and, in case of refusal, it shall be lawful for the company to issue their precept to the sheriff to deliver possession, which he is by the same section required to do.

Sect. 57 is as follows:—"Provided also, and be it further enacted, that where any such tenant or lessee shall be required to deliver up the possession of any premises so occupied by him to the said company, or to any person or persons authorized by them to take possession thereof as aforesaid, before the expiration of the term or interest of such tenant or lessee as aforesaid in the said premises, the said company shall and they are hereby directed to make or tender unto such tenant or lessee, before they shall issue their precept or precepts to the sheriff to give up possession of the lands and premises in the occupation of such tenant or lessee as hereinbefore mentioned, satisfaction or compensation for the value of his unexpired term or interest in the said premises;" which satisfaction, &c., in case of difference, is to be ascertained in the same manner as any other satisfaction or compensation for lands, &c., to be made and assessed under this act.

[*653] *By stat. 2 W. 4, c. xlv., local and personal, public, for enabling the company to make a branch railway, &c., it was enacted that the powers, directions, &c., of the first-mentioned act, and of subsequent ones relating to the original railway, should be applicable and effectual for carrying the new act into execution. Certain premises, referred to in the act as intended to be taken and used, were described in a schedule; and among them were those now in question. The act received the royal assent May 23d, 1832.

In Michaelmas term last, a rule nisi was obtained for a mandamus to the company to issue their warrant for summoning a jury; pursuant to the first-mentioned act, for the purpose of assessing compensation and satisfaction to William Bathe and Benjamin Wraith for the detriment, injury, loss, damage and prejudice accruing to, and sustained and to be sustained by them, by reason of their premises, situate, &c. (on the line of the branch railway), being required to be taken, and taken for the purposes of that act, and of the act for making a branch railway. The grounds of motion were as follows:

Wraith, in 1804, took a lease of the premises from Benjamin Bromfield for seven years. At the expiration of the term he took from Bromfield a new lease for seven years of the same property, with some additional premises, at an advanced rent. He carried on business there as a manufacturer of plaster of paris, till 1816, when he was obliged to discontinue it, and his interest in the premises was sold for 400*l.* to his son and Bathe, who carried on the business there in partnership till 1819. The son then withdrew, and Wraith entered into partnership with Bathe, and continued the business *with him on the same [*654] premises till the time of this application. The lease was renewed twice, after 1816, by Bromfield, at the same rent; the last renewal was for seven years from February 2d, 1828, by indenture of February 1st, made between Bromfield and Bathe. The last renewal was negotiated by Wraith on behalf of his partner and himself. Bromfield at first agreed to grant a term of fourteen years, and a lease was engrossed accordingly; but he then objected to granting a lease for more than seven years, at the same time assuring Wraith and his partner that they would not be turned out at the end of the term: and they, confiding in this assurance, took a renewal for seven years. In the same confidence they expended above 300*l.* upon the premises after the renewal; part of the amount in 1832 and 1834. They had also laid out a considerable sum upon them, from 1816 to 1828. In or about 1833, the company contracted and agreed with Bromfield for the purchase of his reversion in the premises. On the 19th of August, 1834, the company gave Bathe notice to deliver up the premises to them at the expiration of six calendar months. Bathe and Wraith, in November, 1834, applied to the company for compensation, or that a jury might be summoned; but the company refused to comply with either demand, inasmuch as the lease would expire on the 2d of February, 1835. Bromfield died in August, 1834, having conveyed his reversionary interest to the company. Wraith in his affidavit, on which the rule was obtained, stated his belief that, if the act had not been passed, the premises would not have been sold by Bromfield, and would not have been wanted for any purpose but that of carrying on the business of the *then lessees, or a similar one, and that the lease would [*655] have been renewed on advantageous terms.

Wightman in this term¹ showed cause. The parties making this application have probably relied upon the cases in which writs of mandamus were granted against The Hungerford Market Company; *Ex parte Farlow*, 2 B. & Ad. 341, and *Rex v. The Hungerford Market Company*, *Ex parte Still*, 4 B. & Ad. 592, and *Ex parte Gosling*, 4 B. & Ad. 596. But those cases turned upon the construction of a very peculiar clause, section 19, in the Hungerford Market Act, to which the Court felt it necessary to give some operation. In the acts now before the Court no such clause is found. Sect. 47 of stat. 7 G. 4, c. xlix., does not extend so far; and the interests contemplated in sect. 56 and 57 must be

¹January 28th. The case, after being partly heard, stood over to the next day.

definite legal interests. Bromfield, on whose supposed assurance of a renewal these claimants rely, was dead when the compensation was demanded. They had notice, in May, 1832, by the schedule to stat. 2 W. 4, c. xlvii., that their premises would probably be required by the company.

Kelly, contra. The Court will construe an act of this kind liberally in favor of the claimants. In *Rex v. Hungerford Market Company, Ex parte Gosling*, 4 B. & Ad. 596, the probability of the renewal of a lease was held to be a subject of compensation, though there was no covenant for renewal. The nineteenth section of the act there contained the word "occupiers," and their interest was contradistinguished from that of termors losing part of *their term. Sect. 56 of the present act, after mentioning tenants at will and lessees [*656] for a year, provides for any "other person in possession." Sect. 48 provides for distributing the purchase-money or compensation to the tenant "or other person or persons" having a particular estate or interest. Sect. 45, after speaking of persons capacitated to sell, and owners, adds, "occupiers:" and the words "detriment, injury, damage, loss, inconvenience, or prejudice," are sufficient to cover this claim. Sect. 47, besides owners and occupiers, adds, "interested in such lands, tenements," &c. In order to satisfy all these words, persons having interests not strictly legal must be included.

Lord DENMAN, C. J. It certainly requires very comprehensive words to include such an interest as this, if interest it be. It is merely a hope of renewal on the old terms, which, if there has been an improvement, were not likely to be granted, where there would have been a competition. This is different from the case of a sale, and also from the case under the Hungerford Market Act, where the words antecedent to "good will" had exhausted the legal interests.

LITLEDALE, J. The words there were extensive enough; but here they are not so.

WILLIAMS, J. The words in the forty-fifth section, "detriment, injury," &c., are so placed in the clause as to be of no avail to the argument for the claimants. They show only what the compensation is to be given for, when the premises are to be the subject of compensation at all: but we must collect from other parts *whether these premises are so; and in my opinion they are [*657] not.

COLERIDGE, J., concurred.

Rule discharged.

The KING v. ARNOLD. Jan. 30.

Semble, that under the Municipal Corporation Act, 5 & 6 W. 4, c. 76, s. 85, the town clerk is not compellable to allow two burgesses at once to inspect the voting papers deposited with him after an election of town councillors, or to give more than one of the papers to one person at the same time; but that he is bound to allow any Burgess, who brings a list of his own, to compare it with the papers produced by the town clerk, and mark it according to what he finds there.

A RULE was obtained in this term, calling on Thomas Arnold, town-clerk of the borough of Poole, to show cause why a mandamus should not issue, commanding him, at seasonable hours, and on payment of the proper fees, to permit Samuel Colborne Scott and John Lankester, two of the burgesses of the said borough, either together or apart, to have the sight and inspection of all the voting papers delivered at the election held on the 26th day of December last, of councillors for the said borough, and which had been deposited with the said T. A. as such town-clerk, and also to permit the said S. C. Scott and J. Lankester, and each of them, either together or apart, to take copies or extracts of such voting papers or any of them, or any part of them, and to compare the same with the originals thereof, at their own proper costs and charges.

The rule was obtained on affidavits by Scott and Lankester, stating that, the mayor having, on the 28th of December, declared certain persons to be elected

councillors, Scott, Lankester, and others made several applications to the mayor, to the town clerk, who had since gone out of office, and afterwards to Arnold, the succeeding town clerk (appointed January 1st), for an *inspection [658] of the voting papers, but that they met with various delays : That, on the 4th of January, Scott went to Arnold's office at an hour appointed, and, having tendered a shilling according to the act, 5 & 6 W. 4, c. 76, s. 35, demanded liberty to inspect and take minutes from the papers : That Scott was peremptorily denied taking any minutes, and was also denied taking the whole of the voting papers into his hands, or the whole of the papers belonging to either of the wards of the said borough, or more than one paper at a time, which paper was to be returned before he was allowed to inspect any other. That, after having inspected in this manner all the papers which were thus handed out to him, and which were said to be the whole of the papers belonging to the southeast ward, Scott again demanded to be allowed to ascertain the number of voting papers, which was refused, but that Arnold's clerk at length consented to count them himself in the presence of Scott, when they were stated to amount in number to 165 in the southeast ward. That Scott and Lankester afterwards, January 14th, again demanded at Arnold's office to have a full inspection, together, of the papers, tendering a shilling, and stating their object to be to ascertain the number of votes given for each candidate ; but the answer given was, that the town clerk had made a rule not to allow the papers to be inspected by more than one person at a time : That Lankester stated, as a reason for being particular in the examination, that the mayor had not declared the number of votes at the election : That, the same answer being repeated, Lankester remained and received the first voting paper from Arnold's clerk, but, [659] upon his beginning to put marks in a paper of his own for the *purpose of ascertaining how the burgesses had voted, Arnold's clerk took the voting papers from him, saying that he was taking minutes, which could not be allowed. The deponents Scott and Lankester now stated that it would be impossible to form a satisfactory conclusion as to the votes unless they might see and minute from every voting paper ; and they added their belief that, on so doing, they should be able to show that the mayor's declaration as to the persons elected was unwarranted by the papers.

Sir John Campbell, Attorney-General, in moving, contended that the rule ought to be absolute in the first instance, and cited an anonymous case, 2 Chitt. Rep. 290, from 2 Chitty's Reports. But the Court¹ said that no reason appeared why the usual course should not be followed, and an opportunity given to answer the application ; and the rule was granted as above.

By the affidavits of Arnold and others in answer, it appeared that on the 4th of January, when the papers were delivered to Arnold, as the new town clerk, Scott and Lankester inspected them for several hours ; that, from the frequent applications made by burgesses to inspect the papers, and the length of time during which they remained in his office for the purpose, Arnold was obliged to appoint a limited period of the day (from 11 to 3) for such inspection, but that he had afforded every facility within that time, and had suffered Lankester and Scott to exceed it : that they had required him to give extracts or copies of some of the voting papers, which he had declined to do, being advised that [660] *the statute did not require it. Arnold admitted in his affidavit that he had not allowed any burgess inspecting the papers to take more than one into his hands at the same time, but said that he made this rule upon due consideration, in consequence of the great excitement on the subject of the elections, and as a necessary precaution for the security of the voting papers, lest any should be abstracted or otherwise improperly dealt with, or any spurious or new paper should be added ; and that with the like view he refused to allow an inspection by more than one burgess at the same time, as he conceived that his allowing all the papers to be placed in the hands of any one burgess at the same

¹ Lord DENMAN, C. J., LITTLEDALE, and WILLIAMS, Js.

time, or allowing more than one burgess to inspect them at a time, would create confusion, and probably much endanger the safety of the papers; but he at all times allowed every burgess who required it the fullest opportunity of inspecting every one of the papers. He further stated that he was willing to obey any direction which the Court might lay down for his guidance; that he suffered great inconvenience from the necessity of devoting his time and that of his clerks to the exhibiting of the papers for several hours each day; that applications had been made by several burgesses at a time, who kept possession of his office while the papers were under inspection by others: and that such applications were frequently made in an irritating manner, and so as to create annoyance and interruption of his business. Conduct of this description was ascribed to Scott and Lankester. It appeared that there had been a strong party feeling in Poole as to the election; and that, when the voting papers were delivered to the late town clerk on the 28th of December, the *mayor and other magistrates, in consequence of the number of persons collected, and of a riot [*661] which had previously occurred, and on application made to them, had placed special constables at the town clerk's office for the protection of the papers.

Sir *F. Pollock*, Sir *W. W. Follett*, *Erle*, *Barstow*, and *Butt* now showed cause. The town clerk has merely taken those precautions which were requisite for keeping the papers safe, which he was bound to use, being answerable for their secure custody, and which, in effect, best promoted the general convenience of the burgesses themselves. He had to use a discretion; and the Court will say whether he has exercised it reasonably or not. If he cannot limit the number of persons who shall inspect the papers together, he may be compellable to allow 500 at once to do so. No town clerk could keep a sufficient number of persons in attendance to conduct the business, under such circumstances. The act 5 & 6 W. 4, c. 76, s. 35, merely directs that, when councillors are elected, "the mayor shall cause the voting papers to be kept in the office of the town clerk during six calendar months at the least after every such election; and the town clerk shall permit any burgess to inspect the voting papers of any year, on payment of 1s. for every search." That clause gives no rule as to the number who shall inspect at a time, or the manner in which the papers shall be put into their hands; nor does it require the town clerk to give extracts or copies, or even allow them to be taken. That is in his discretion. Where the legislature has meant that copies of documents shall be given under this act, it is expressly so directed; as in sections 5, 15, *17, 93. And so, in several statutes, where an absolute privilege of taking extracts has been contemplated, it is given by [*662] specific enactments, as in the Turnpike Act, 3 G. 4, c. 126, s. 73; Vestry Act, 1 & 2 W. 4, c. 60, s. 31; Highway Act, 5 & 6 W. 4, c. 50, s. 40.

Sir *J. Campbell*, Attorney-General, and *Crowder*, contrâ. First, on ordinary principles, the burgesses have a right to inspect and take copies of the voting papers, unless something in the act prevents it. They are parties interested. The papers are like corporation books. Secondly, the statute expressly gives the power of inspection; that is conferred in order that the burgesses may see whether or not the mayor has made a true return; and it is necessarily incident to a power of inspection, given for such a purpose, that persons exercising it should be allowed to take memorandums. The inspection must be a useful inspection, such as will enable the burgesses, if necessary, to apply for a quo warranto. They cannot carry away in memory the substance of a great number of voting papers, so as to make affidavit of the contents. The act authorizes "any burgess" to inspect; and that, according to the rule of construction given in section 142, means several burgesses. [Lord DENMAN, C. J. Do you say that section 35 authorizes any number to inspect together?] Any number who can be supposed to go *bonâ fide*. If 500 offered themselves, or if any large number came and were behaving riotously, and mutilating the documents, the case might be different; here that case does not arise. It is favorable to expedition that two should go over the papers together. As to those clauses of the present act in

[*663] which the giving of extracts is expressly mentioned, *they necessarily mention it, as they fix a remuneration for the giving of such extracts or copies. And there is a great difference between furnishing them and permitting them to be taken. No inconvenience is specified as likely to result from the taking of extracts, or, at least, of memorandums. (They were then stopped by the Court.)

Lord DENMAN, C. J. It does not appear that the parties making this application have proceeded with any wish but that of obtaining information to which they were entitled. Nor is the town clerk charged with any improper motives; and he professes his willingness to abide by such directions as the Court may give. It is difficult to lay down any precise rule as to the law upon such subjects; and, whatever rule might be laid down, it is evidently necessary that, in transactions of this kind, there should be some spirit of mutual accommodation on both sides, even in the heat of political controversy. We do not, therefore, profess to enter into a strict inquiry what the town clerk may be bound to permit, or what he might be justified in refusing; but we will state what, at this moment, appears to us to be his proper course. We think the town clerk is not compellable to allow two persons at once to inspect the voting papers, or to give two of them to one person at the same time. For his duty, in these respects, we must look to the act of parliament. But we think that he is bound to allow any voter, who brings a list of his own, to compare it with the papers produced by the town clerk, and mark it according to what he finds there. The means of obtaining reasonable information will thus be secured; and, instead of particularly [*664] inquiring *into the fact, and finally disposing of the rule, it may perhaps be best to enlarge it for the present, in the hope that what we have said will be found sufficient for the direction of the parties.

LITTLEDALE, WILLIAMS, and COLERIDGE, Js., concurred. Rule enlarged.

The KING v. BRAME. Jan. 30.

The Court will receive, in support of an application for a quo warranto, the affidavit of a person who is himself estopped from being a relator, if the motion is made by a relator properly qualified; although the complete ground of the application appears only from the affidavit of the party estopped.

A RULE was obtained in this term, calling upon Benjamin Brame to show cause why a quo warranto information should not be exhibited against him, to show by what authority he claimed to be mayor of Ipswich. The rule was obtained on the affidavits of John Eddowes Sparrowe, gent., and John Field Wilkinson. Sparrowe had been town clerk from October, 1828, till December, 1835; and he stated in his affidavit the contents of the borough charters and records, the practice of the borough as to elections, the circumstances under which the mayor had been chosen, and the facts (affecting his title through that of the parties who had acted as bailiffs), by which, as it was alleged, the election of the mayor was rendered invalid. He also deposed that he had been applied to by Wilkinson's solicitor to make affidavit of the above facts, for the purpose of grounding the present application. Wilkinson, who was a free burgess of the borough, entitled to vote at elections of corporate officers, deposed, in his affidavit, to the circumstances of the election, but not to the specific facts invalidating the [*665] titles of the bailiffs and mayor; and he *stated that he had applied to Sparrowe, whom he believed to be well acquainted with the charters, usages and customs of the borough, and who had been present at the late elections, to depose to the matters above mentioned as contained in his affidavit, for the purpose of enabling him, Wilkinson, to move for an information in the nature of a quo warranto which he meant to prosecute as relator. By the affidavits in answer it appeared that Sparrowe had concurred, and acted and advised, as town clerk, in the proceedings now impeached as irregular.

Sir *John Campbell*, Attorney-General, and *Austin*, in showing cause against the rule, contended that, according to *Rex v. Slythe*, 6 B. & C. 240, Sparrowe could not become a relator, the irregularity, if any, having been within his knowledge when he concurred in the proceedings; and that the rule could not be granted on a statement resting mainly upon his information.

Maule (with whom were Sir *W. W. Follett*, *Kelly*, *B. Andrews*, *Swann*, and *O'Malley*), contra, contended that there was a relator, *Wilkinson*, who was not shown to be disqualified, and that no rule had ever been laid down by which a person, cognizant of the affairs of a corporation, was precluded from giving evidence in support of a relator's application, because estopped from becoming a relator himself: and they asked if it could be asserted that a stranger to a corporation might not, in support of a motion like the present, make affidavit as to the translation of a charter?

**Per curiam*.¹ No sufficient objection has been made to *Wilkinson* as a relator; and, as to *Sparrowe*, we find no authority for saying that [666] a person, who cannot himself be a relator, may not make affidavit in support of an application for a *quo warranto*. The rule was made absolute.

¹ Lord DENMAN, C. J., LITTLEDALE, WILLIAMS, and COLERIDGE, Js.

CRAVEN v. SANDERSON and Others. Jan. 30.

In prohibition by a party libelled in the Ecclesiastical Court for non-payment of a church rate, the plaintiff in his declaration alleged that the parish of W., of which he was a parishioner, was immemorially divided into four townships, the inhabitants of which had been immemorially liable to repair the parish church; that the rate was made for repairing the church, but was assessed upon three of the townships only, omitting H., the fourth; and that the defendants had libelled plaintiff, pretending that H. was not liable to such repair, by reason of some supposed law or custom, and had immemorially repaired a chapel of its own. Plea, that there was, and had been immemorially, a chapel in H., where the inhabitants received all divine rites and services, and which they repaired and maintained exclusively by a rate on H., and that from time immemorial no rate had been assessed on any person in H. for the repair of the parish church; without this, that the inhabitants of the four townships were liable to contribute to the repair of the parish church; conclusion to the country, and issue joined thereon. At the trial, the plaintiff proved that H. was a part of the parish of W.; and it appeared, on cross-examination by the defendants, that H. had its own church or chapel, and churchwardens, and had not, at least for twenty-five years, paid church rates to the parish. The Judge held that the defendants were entitled to a verdict on this evidence, for that, issue being joined on the traverse, the matter of inducement in the plea was admitted, and the issue confined strictly to the matter of the traverse:

Held, that the plaintiff, joining issue on this traverse, could not be taken to have admitted the previous allegations; that the traverse, if too general, was not immaterial; that the parties must be taken to have intended to put in issue the liability; and that the defendants, on whom the onus of proof lay, were to prove the matters in the inducement making up the fact traversed. Held, also, that the mere fact, of a district in a parish having kept up a chapel of its own without coming on the parish rates, did not show a custom in such district to maintain its chapel by rates levied on its own inhabitants; and that the traverse was therefore not proved. And the Court granted a new trial.

PROHIBITION. The declaration stated that, whereas the parish of Wakefield, in the county and diocese of York, now is, and from time whereof, &c., hath been, an ancient parish with a parish church belonging to the same; and, during all that time, hath been and is divided into certain townships, viz.: Wakefield, *Stanley-cum-Wrenthorpe, Alverthorpe-cum-Thornes, and Horbury; and [667] the inhabitants of the said townships have been, during all that time, and still are, liable to contribute to the repairs of the parish church: and whereas, in the vestry of the said parish church, on the 11th of August, 1831, the churchwardens and the inhabitants of the said parish, or the major part of

¹ Some allegations in the pleadings, as to certain district chapels, are omitted as not material here.

them, made a rate upon the parishioners, inhabitants of the said parish, for certain repairs of the said parish church, by which rate the parishioners, inhabitants of the township of Horbury, were not rated to the repairs of the said church; and the parishioners, inhabitants of the said townships of Wakefield, Stanley-cum-Wrenthorpe, and Alverthorpe-cum-Thornes, only, by the said rate, were rated to the said repairs, excluding Horbury and the parishioners, inhabitants thereof, from contribution of the said rate to the said repairs: and the said plaintiff before and at the time of the making of the said rate, and thence hitherto, has been and still is a parishioner, inhabitant in the township of Wakefield aforesaid; yet the said defendants, churchwardens of the said parish, well knowing, &c., but pretending that the parishioners, inhabitants of the said township of Horbury, are not liable to contribute or be rated to the repairs of the said parish church by reason of some supposed custom, prescription, or law of the land, and that the repairs of a certain chapel in Horbury aforesaid have been immemorially made by the parishioners, inhabitants of the said township of Horbury, only, and that the said rate, in respect of the said premises, was and is a valid rate, and intending to aggrieve, &c.: the declaration then set

[*668] *out the libel of the defendants in the spiritual Court, which alleged that the parish church of Wakefield wanted repairs, &c., the costs of which ought to be paid by a rate on the possessors and occupiers of houses, lands, &c., in the townships of Wakefield, Stanley-cum-Wrenthorpe, and Alverthorpe-cum-Thornes; that the said Michael Sanderson, &c. (the defendants in this action), after the requisite proceedings (which were set out), made, with the inhabitants, a rate for the repair, &c., of the said church; and that Craven (the plaintiff in this action) was thereby duly rated at the sum of, &c., for premises which he occupied in the parish of Wakefield; that Sanderson, &c., were the churchwardens of the said parish duly elected, sworn and admitted; and that the rate was then due. The plea to the libel was also set out, wherein the respondent alleged that the exemption of Horbury, if any, from liability to repair the parish church, ought to have been pleaded; and he denied that he was legally rated, or that the rate was due to the churchwardens as libelled. A further plea was set out, which it is not necessary to state. The declaration then set out the answer of the churchwardens, in which they insisted on the exemption of Horbury, and the liability of the other townships, and alleged that Horbury had a chapel with all parochial rites, which chapel had from time immemorial been repaired by the inhabitants of that township. The answer of Craven was added, in which he again denied that the three townships were liable in exclusion of Horbury, or that Horbury had exclusively repaired the last-mentioned chapel.

To the declaration in prohibition the defendants pleaded, that there now is,

[*669] and from time immemorial *hath been, a church or chapel within the township of Horbury aforesaid, at which the inhabitants of that township do receive and enjoy, and from time to time immemorial have received and enjoyed, all manner of divine rites and services, and that the costs and expenses of repairing the said church or chapel, and of providing necessaries for the performance of divine rites and services therein, are, and from time immemorial have been, exclusively paid and defrayed by rates and assessments upon the possessors and occupiers of houses, lands, and tenements, situate within the said township of Horbury; and that, from time whereof, &c., no rate or assessment for or towards paying or defraying the expenses of repairing the parish church of Wakefield aforesaid has been made, laid, or assessed upon any person for or in respect of any houses, lands, or tenements, situate within the township of Horbury aforesaid: Without this, that the inhabitants of the said townships of Wakefield, Stanley-cum-Wrenthorpe, Alverthorpe-cum-Thornes, and Horbury, in the said declaration mentioned, from time whereof, &c., have been or are liable to contribute to the repairs of the said parish church of the parish of Wakefield aforesaid, in manner and form, &c. Conclusion to the country. Similiter.

On the trial before Lord LYNCHURST, C. B., at the York Summer assizes,

1834, the plaintiff proved that the chapelry of Horbury was within the parish of Wakefield, and paid small tithes and mortuaries to the vicar. The parish clerk of Wakefield, who was called on behalf of the plaintiff, stated, on cross-examination, his belief that Horbury had a church to itself, and that, for twenty-five years, during which he had been clerk, no church rates for the parish had been collected in Horbury; he also *stated that the Horbury people did not attend the parish vestry; that there were in the parish of Wakefield six churchwardens for Wakefield township, one for Stanley, and one for Alverthorpe, but none for Horbury; and that churchwardens for Horbury were sworn in at the visitations, apart from the Wakefield churchwardens. The defendants called no witness. The Lord Chief Baron was of opinion that the issue was confined strictly to the matter contained under the traverse, that the inducement must be taken as admitted, and that the defendants' case on the issue was proved by the evidence for the plaintiff. He directed the jury accordingly; and the defendants had a verdict. In the ensuing term, *Alexander* moved for a rule to show cause why there should not be a new trial on the ground of misdirection; or why there should not be judgment non obstante veredicto. The ground for the latter part of the motion was, that the plea, if limited to the matter of the traverse, tendered no sufficient issue, as it did not then put in issue the material facts stated in the inducement, and particularly as it did not allege that all divine rites had been performed at the chapel at Horbury, which was necessary to discharge a district from the reparation of the mother church, 1 Burn's Eccl. Law, p. 353, 8th ed. tit. Church, vi. 8. A rule nisi having been granted,

Sir *F. Pollock*, Sir *W. W. Follett*, and *Joseph Addison*, showed cause in this term.¹ The issue is a proper one, and was proved on behalf of the defendants. The declaration alleges that the townships of Wakefield, *Stanley, Alverthorpe and Horbury have immemorially been, and still are, liable to contribute to the repairs of the parish church. The plea, after stating some matters of inducement, traverses that allegation. A mixed proposition of law and fact is directly alleged in the declaration and is denied in the plea: and upon that denial the plaintiff takes issue. Matter of law may be put in issue, if complicated with matter of fact; *Dawes v. Papworth*, Willes, 408. If the traverse had been immaterial, the plaintiff might have pleaded over to the inducement; Reg. Gen. Hil. 4 W. 4, General Rules and Regulations, 13, 5 B. & Ad. vi. But this was a material traverse; and, even if it be otherwise, the objection could be taken only by special demurrer; Com. Dig. Pleader (G. 22), 1 Wms. Saund. 14, note (2). Then the evidence, with the matter of inducement to the plea, which was admitted, entitles the defendants to retain their verdict.*

Alexander and *Hoggins*, contra. It lay on the defendants to take themselves out of the general rule of liability to repairs. The plaintiffs could not have passed by the traverse and pleaded to matter in the inducement, because the traverse was not wholly immaterial. It contained a mixed proposition of law and fact, the result of the several allegations in the former part of the plea, all of which led to one point. The whole substance of those allegations was put in issue by the replication, as in the instances, discussed in *Selby v. Bardons*, 3 B. & Ad. 2; S. C. in Error, *Bardons v. Selby*, 1 Cro. & M. 500, 3 Tyr. 430, where a plea involving several facts has *been held good as establishing only a single point of defence. Then the evidence fell short; for the defendants ought to have shown that the inhabitants of Horbury enjoyed the benefit of all ecclesiastical rites in their chapel, and that it was maintained by rates laid on that township. [COLERIDGE, J. You say that all the matters in the inducement are put in issue: can that be so, if there is a formal issue on a traverse which is not immaterial? If the traverse was merely a conclusion from the facts previously set out in the plea, should not you have traversed some part of those facts? LITTLEDALE, J. In *Selby v. Bardons*, 3 B. & Ad. 2; S. C.

¹ January 20th. Before Lord DENMAN, C. J., LITTLEDALE, WILLIAMS, and COLERIDGE, Js.

² Other points were discussed, but not decided upon by the Court.

in *Error, Bardons v. Selby*, 1 Cro. & M. 500, 3 Tyr. 430, all the introductory matters of the plea were put in issue by the manner in which they were pleaded. Here, the mode of pleading is different. In pleas where a traverse is led to by an inducement, facts stated in the introductory part may be very fit to be proved, with reference to the matter traversed; but they do not require to be proved as forming part of the inducement. Here, if the plaintiff wished to raise an issue on the matters which are stated in the inducement, he might have brought them into question by averring in his declaration the facts on which the supposed liability is grounded, instead of merely stating the liability. As the pleadings stand at present, I doubt if the issue on the traverse is not one of law, except that it is mixed up with the proceedings in the ecclesiastical court.]

Cur. adv. vult.

Lord DENMAN, C. J., now delivered the judgment of the Court. The plaintiff in prohibition complained of *a church rate laid on three only out [*673] of four townships, which compose the parish of Wakefield. The defendant claimed exemption for the fourth township (Horbury), in a plea alleging that it had a separate chapel of its own, and a custom to perform there all ecclesiastical rites, and to repair it by rates levied exclusively on its own inhabitants, and traversing the liability of all four to repair the parish church. Issue was joined on the traverse. On the trial at York before Lord LYNTHURST, the plaintiff contented himself with proving that the township of Horbury was locally situate in the parish of Wakefield. The defendant then argued, from evidence adduced by the plaintiff, that Horbury had a separate chapel where the rights were administered; and the learned Judge interposed with an observation to the plaintiff's counsel that the evidence appeared very strong to that effect. The plaintiff's counsel required proof of separate rates being laid; but the Judge then said that issue was joined on the liability traversed, and that all the inducement to that traverse was admitted by the plaintiff's taking issue on it.

The jury hereupon found a verdict for the defendants, which we are now required to set aside and grant a new trial, or give judgment for the plaintiff, non obstante veredicto. But we think it would be inexpedient to decide, in this motion, the questions of law that may be raised on the validity of the plea, because the course taken at the trial in regard to the evidence appears to us to have been incorrect. For the traverse of liability, if wrong as too general, cannot be called immaterial, since it was the very point on which the cause turned: and we do not see how the plaintiff, denying the traversed fact, can be [*674] supposed to have admitted all the *particulars in the inducement which are put forward as making up that general fact. If, on the other hand, the traverse was immaterial within the meaning of the 13th rule of Hilary term, 4 W. 4, 5 B. & Ad. vi., so as to authorize the plaintiff to pass over it, and select a single fact for denial, he ought to have taken that course. As the pleadings stand, both parties are content to meet on the question of liability; and the defendant, on whom the burden of proving the exemption of Horbury falls, because it is against common right, was bound to make out all that was necessary to that end. The least he could do to entitle himself to a verdict was to prove all the facts stated in his inducement. Now it is clear on consideration, though it struck my mind otherwise during the argument, that the mere fact of the chapel being kept in repair without coming upon the general rates of the parish is no proof of the custom to repair it by means of a rate levied in the township, because it may have been preserved and repaired by voluntary contribution of the parishioners or others. It follows that the defendant, who has obtained a verdict in favor of the exemption from church rates, without proving that part of his plea which avers the liability to chapel rates, cannot be allowed to keep that verdict; and the plaintiff is entitled to a new trial.

Rule absolute for a new trial.

*NICHOLSON v. JOHN REVILL the younger. Jan. 30. [*675]

In assumpsit on a promissory note, it was pleaded that, R. owing plaintiff 299*l.* plaintiff agreed with R., S. R., and defendant, that they should give plaintiff, and he should accept, their joint and several note for 299*l.* as a satisfaction and security for the debt, which was done. It was further pleaded that, the note being due, and the debt unpaid, and plaintiff having sued the three makers, it was agreed that the action should cease, and that the three makers should give their three joint and several notes for 52*l.* 18*s.* 8*d.* at thirteen months, and 110*l.* 13*s.* 4*d.* and 56*l.* 13*s.* 8*d.* at longer periods, as a satisfaction and security for 200*l.* parcel of the debt due from J. R., with interest; and the notes were so given. It was further pleaded that, the first note being due and unpaid, and the second (now sued upon) not yet due, S. R. agreed with the plaintiff to pay, and did pay him, 100*l.* in discharge of S. R.'s liability on the three last-mentioned notes, and plaintiff accepted the same in such discharge, and gave up to S. R. the first of the three notes, endorsed upon the note now sued upon a receipt of 47*l.* 1*s.* 4*d.*, on account, erased S. R.'s name from this note, and discharged him from further liability thereon. These facts being admitted, and it being answered that the last-mentioned transaction with S. R. took place without defendant's knowledge or consent, which was not denied:

Held, that the discharge of S. R. by the plaintiff discharged the defendant.

ASSUMPSIT. First count on a note made by defendant, January 1st, 1832, promising to pay plaintiff or his order, 25 months after date, 110*l.* 13*s.* 4*d.* Second count on a note of the same date made by defendant, promising to pay plaintiff or his order, 31 months after date, 56*l.* 13*s.* 8*d.*

Pleas. To the first count, that the note therein mentioned was a note made by defendant, Samuel Revill, and John Revill, defendant's father, and by them delivered to plaintiff, whereby they jointly and severally promised to pay, &c. : and that, after the making and delivery thereof, and before the commencement of this suit, to wit, &c., plaintiff, without defendant's knowledge or consent, struck out and erased the name of Samuel Revill on the note, and wholly discharged him from all liability thereon, and from payment of the sum therein mentioned or any part thereof: verification. To the second count, the like plea, and verification.

Replication to the first plea. That, before and at the times after-mentioned, J. R. the father was indebted to plaintiff in 299*l.* on an account stated, whereof defendant at the said times had notice; and thereupon, viz. *March 8th, 1826, in consideration of the premises, it was agreed by and between [*676] plaintiff, J. R. the father, Samuel Revill, and defendant, that plaintiff should accept, and the three other parties should give, their promissory note bearing date the day last-mentioned, whereby they jointly and severally promised to pay plaintiff or order on demand 299*l.* with interest, as and for a satisfaction and security of and for the said debt so due from J. R. the father to plaintiff: That the note was so given and accepted, in pursuance of the agreement, as and for a satisfaction and security, &c. : That afterwards, the note being payable and unpaid, and the debt still due, and an action on the note pending at the plaintiff's suit against J. R. the father, S. R., and defendant, viz. July 21st, 1832, in consideration of the premises, it was agreed, by and between plaintiff and J. R. the father, S. R., and defendant, that the action should cease, and that plaintiff should accept, and J. R. the father, S. R., and defendant should give their three promissory notes, viz., one promissory note of January 1st, 1832, whereby they jointly or severally promised, 13 months after date, to pay plaintiff or order 52*l.* 18*s.* 8*d.*, the promissory note mentioned in the first count and first plea, and the promissory note mentioned in the second count and second plea, respectively, as and for a satisfaction and security of and for 200*l.* parcel of the said debt due from J. R. the father to plaintiff, with interest from January 1st, 1832: That the said three notes were, on July 21st, 1832, made and given in pursuance of the agreement as and for a satisfaction and security, &c., and accepted by plaintiff accordingly: That afterwards, and when the time for payment of the first of the said three notes had long elapsed, the money due thereon

[*677] *not having been paid, and before the day of payment of the note mentioned in the first count and first plea, viz. on January 28th, 1834, the said Samuel Revill proposed to plaintiff to pay him 100*l.* in discharge of his liability on the three last-mentioned notes, which plaintiff agreed to accept, and thereupon, viz. on the day last aforesaid, the said S. R. paid plaintiff 100*l.* in discharge, &c., and plaintiff accepted the same accordingly; and thereupon plaintiff gave up to S. R. the first of the three last-mentioned notes, and endorsed on the note mentioned in the first count and first plea as follows, viz. "Received on account by Samuel Revill 47*l.* 1*s.* 4*d.*; this sum, with the amount of the first note, make 100*l.*:" And that, after such payment by S. R., plaintiff struck out the name of S. R. on the note in the first count and first plea mentioned, and erased the same therefrom, and discharged S. R. from any further liability on the last-mentioned note, and from any further payment on account thereof, which said striking out, &c., and discharging, &c., and the same supposed striking out, &c., as in the first plea mentioned. Verification. The replication to the second plea was the same, *mutatis mutandis*; only not stating any endorsement to have been made by plaintiff on the note.

Rejoinder to the replication to the first plea; that the three promissory notes in that replication mentioned were given for securing payment of sums together exceeding 200*l.*, viz. 220*l.* 5*s.* 8*d.*, and were so given by J. R. the father, and by S. R. and the defendant as his sureties, and have been held by plaintiff for securing part of the said debt of J. R. the father and interest thereon, as in the replication to the first plea mentioned, and for no other consideration or

[*678] *purpose: and that the proposal of S. R. in that replication mentioned was so made by him, and accepted and acted on by plaintiff, and the name of S. R. struck out from the note in the first count mentioned, and S. R. discharged from liability thereon, without the knowledge, privity, or consent of defendant. Verification. The rejoinder to the replication to the second plea was the same, *mutatis mutandis*.

Surrejoinder. To the first rejoinder: that, at the time of giving the three promissory notes, therein and in the replication to the first plea mentioned, the money satisfied and secured to plaintiff by the said note of J. R. the father, S. R., and defendant, in the said replication first mentioned, remained long overdue, and the debt due from J. R. the father to plaintiff, as in the said replication mentioned, remained wholly unsatisfied, and the action in that replication mentioned was pending, and the agreement therein secondly mentioned had been entered into: and that the existence of the said several circumstances, so in the said replication, and now again in this surrejoinder, above mentioned, were the consideration and purpose of the said three promissory notes in the said replication and rejoinder above-mentioned being given. Without this, that the said three notes were given by S. R. and the defendant as sureties of or for J. R. the father, and for no other consideration or purpose whatsoever, in manner and form, &c. Conclusion to the country. The surrejoinder to the second rejoinder was the same, *mutatis mutandis*.

Demurrer to each surrejoinder, assigning for cause, that the plaintiff has offered to put in issue a matter not properly issuable; has not denied, or confessed and avoided, the substantial matter in the rejoinder; and [*679] traversed a negative, and a matter not alleged in the rejoinder. Joinder in demurrer.

The demurrers were argued in this term.¹

Wightman in support of the demurrers. Where a note, to which several persons are parties, is altered in a material point without the consent of one party, he is discharged: *Perring v. Hone*, 4 Bing. 28, shows the extent to which this doctrine is carried. In the present case there is a material alteration in each of the notes. If the defendant, who is severally liable, be compelled to pay either of the notes, he has now no remedy against Samuel Revill for con-

¹ January 15th. Before Lord DENMAN, C. J., LITLEDALE and WILLIAMS, Js.

tribution, Samuel's name being struck out. The plaintiff has put it out of his own power to sue Samuel Revill, by the composition entered into between them, and the erasure of Samuel's name. The principle of contribution is, that the party seeking it has been obliged to pay money for which the party of whom he demands it was liable. But Samuel is no longer liable. If the present plaintiff recovers, and the defendant brings an action against Samuel for money paid to his use, he may deny that it was so paid, he having been released and his name erased from the note. [Lord DENMAN, C. J. The joint liability of Samuel and the defendant arises from their joint act in making the note. I do not see how it is affected, as between themselves, by Samuel's name being struck out.] In Co. Litt. 232 a, it is said, "when divers do a trespass, the same is joint or several at the will of him to whom the wrong is done, yet if *he release to one of them, all are discharged." And "If two men be jointly and [*680] severally bounden in an obligation, if the obligee release to one of them, both are discharged;" which last point is also agreed to in *Clayton v. Kynaston*, 2 Salk. 574.

G. T. White, contra. *Perring v. Hone*, 4 Bing. 28, is distinguishable, because there the alteration consisted in making a party liable severally who was not so before; here the note was several at first, or otherwise, at the election of the holder. The right to contribution is not affected as between the defendant and Samuel Revill. A release of the principal discharges the sureties; but a compromise between the creditor and one of the sureties does not discharge a co-surety; for he, if obliged to pay more than his proportion, may still have recourse for contribution to the surety who made the compromise; *Ex parte Gifford*, 6 Ves. jun. 805. The defendant here, if obliged to pay the amount of the notes, may take his remedy in equity against Samuel Revill, notwithstanding the erasure. Besides, the transaction in this case is not equivalent to a release. The plaintiff merely says, in effect, to Samuel Revill, that he will not, from thenceforward, sue him upon that note. Where there are two obligors, and the obligee covenants with one of them not to sue him on the bond, he may nevertheless sue the other, *Dean v. Newhall*, 8 T. R. 168, for such covenant does not operate as a release. But, further, by the second agreement stated in the replication, Samuel Revill and the defendant became principals. A suit was depending against them, in which they were *answerable for 299*l.*; [*681] in consequence of that they gave the notes in question, and thereby purchased a benefit to themselves in the suspension of the suit. Afterwards, Samuel Revill paid 100*l.* which was more than a third of the amount for which the threa had engaged themselves by the new notes. In *Collins v. Prosser*, 1 B. & C. 682, where the bond was several, it was held that tearing off the seal of one obligor did not discharge the others; and *BAYLEY and BEST, Js.*, in putting the case of a joint and several bond, went no farther than to say that an act which discharged one of the obligors on such a bond might discharge all. And, however this may be, removing the seal of a bond is very different from the mere erasure of a name on a note.

Wightman, in reply. It appears by the pleadings that the plaintiff accepted 100*l.* partly in consideration of notes not yet due. For that benefit to himself he discharged Samuel Revill. The transaction took place without the consent of the other parties to the notes. Samuel had no right to procure a release to himself, throwing upon the defendant, without his sanction, the onus of the notes remaining due; which would be the effect of the proceeding, if the defendant were held to continue liable. In *Cheetham v. Ward*, 1 B. & P. 630, the executors of Abraham Cheetham sued James Ward on a joint and several bond, given by the defendant and William Ward one of the plaintiffs; and it was pleaded that, after the making of the bond, Abraham Cheetham made William Ward his executor, and he proved and took upon himself execution, whereby the debt was *extinguished. The Court of Common Pleas, on the authority of a case in the Year-books (*Year-book Mich.* 21 Edw. 4, 81 B. pl. 33), [*682]

held that the discharge of one joint and several obligor, by making him executor, discharged both. In the case there referred to, it was said that a recovery against one obligor, and execution sued, would be a discharge to the others. And so of a discharge made to one of them. In the present case it is expressly stated by the replication that, after the payment of 100*l.*, the plaintiff discharged Samuel Revill from any further liability on the note remaining due. *Cur. adv. vult.*

LORD DENMAN, C. J., now delivered the judgment of the Court. After having stated the declaration and the defence pleaded, his Lordship said: We need not inquire what the effect of a demurrer to this plea would have been, because additional facts are brought to our knowledge by the subsequent pleadings. The replication to the first plea states (His Lordship then stated the replication and subsequent pleadings down to the surrejoinders).

To these surrejoinders the defendant demurs, and has contended that the traverse is immaterial, and that the facts appearing on the record entitle him to our judgment; and we are of that opinion. But we do not proceed on some of the grounds mentioned at the bar, such as the effect of the plaintiff's alteration of the instrument as making it void, or that the defendant thereby lost his right to contribution from the joint makers of the note; nor on any doctrine as to the relation of principal and surety. We give our judgment merely on the principle [*683] *laid down by Lord Chief Justice Eyre in *Cheetham v. Ward*, 1 B. & P. 630, as sanctioned by unquestionable authority, that the debtor's discharge of one joint and several debtor is a discharge of all. For we think it clear that the new agreement made by the plaintiff with Samuel Revill, to receive from him 100*l.* in full payment of one of the three notes and in part payment of the other two, before they became due, accompanied with the erasure of his name from those two notes, and followed by the actual receipt of the 100*l.*, was in law a discharge of Samuel Revill.

This view cannot perhaps be made entirely consistent with all that is said by Lord ELDON in the case *Ex parte Gifford*, 6 Ves. jun. 808, where his Lordship dismissed a petition to expunge the proof of a surety against the estate of a co-surety. But the principle to which we have adverted was not presented to his mind in its simple form; and the point certainly did not undergo much consideration. For some of the expressions employed would seem to lay it down that a joint debtor might release one of his debtors, and yet, by using some language of reservation in the agreement between himself and such debtor, keep his remedy entire against the others, even without consulting them. If Lord ELDON used any language which could be so interpreted, we must conclude that he either did not guard himself so cautiously as he intended, or that he did not lend that degree of attention to the legal doctrine connected with the case before him, which he was accustomed to afford. We do not find that any other authority clashes with our present judgment, which must be in favor of the defendant.

Judgment for the defendant.

[*684]

*MORRELL v. HARVEY. Jan. 30.

In pleading a surveyor's assessment, made on occupiers of lands, under stat. 13 G. 3, c. 78, sects. 30 and 45, it is necessary to aver that the assessment did not exceed 9*d.* in the pound on the yearly value of the lands; although the limitation as to value annexed to sects. 30 and 45 is contained in a distinct proviso; and although the form of an order of justices in Sched. No. 15 of the act, adapted to the above sections, makes no mention of yearly value.

REPLEVIN. Cognizance as constable of the hundred of East Barnfield, Kent, acting under a warrant of distress. The cognizance alleged that at the days and times, &c., plaintiff was the occupier of certain lands within the parish of Hawk-hurst, Kent, of large yearly value, viz. &c., and, being such occupier, was liable to be assessed towards the repairing of the highways, buying materials, &c., and paying the surveyor's salary, within the said parish, according to the statute,

&c., in respect of his said occupation, &c. It then went on to state an application by the surveyors of Hawkhurst, at a special session, for an order for making an assessment of 9*d.* in the pound on the occupiers of lands, &c., in Hawkhurst; that the justices, in special session, being satisfied by proof, &c., that the duty directed to be performed, and the money authorized to be collected and received, by stat. 13 G. 3, c. 78, had been performed, applied, and expended, according to the act, &c., and that notice had been given, &c., made an order that "an equal assessment, not exceeding the sum of 9*d.* in the pound, upon all and every the occupiers of lands," &c., within the parish of Hawkhurst, should be forthwith made, allowed, and collected, and the money applied in repairing the roads, buying materials, &c. : That the surveyors, by virtue of the order, made "an equal assessment, not exceeding the sum of 9*d.* in the pound, upon all and every the occupiers of lands," &c., within H., which was afterwards duly *allowed. [*685] And the cognizance further stated, "that, in and by such assessment so made as aforesaid, the said plaintiff was assessed for and in respect of the said lands, tenements, woods, tithes, and hereditaments, then in the occupation of him the said plaintiff, within the said parish of Hawkhurst, in a certain sum, viz. the sum of 45*l.* 18*s.* 4*d.*, being at and after the rate of 9*d.* in the pound, by such equal assessment so made as aforesaid : of all which said several premises," &c. (notice to plaintiff). Then followed allegations of the demand and refusal of the rate, proceedings thereon, and the issuing of the distress warrant, under which defendant acted. Demurrer, assigning several causes. (The only cause upon which the Court decided will sufficiently appear from the argument.) Joinder. The demurrer was argued in this term (January 26th).¹

Wightman, in support of the demurrer. By sect. 30 of the general highway act, 13 G. 3, c. 78,² justices are empowered, on application by the surveyor under the circumstances there mentioned, to order an equal assessment on all occupiers of lands within the parish, for buying material to repair the highways, and for some other purposes, such assessment to be levied as after mentioned : provided that no such assessment shall exceed 6*d.* in the pound of the yearly value of such lands. Section 45 enacts that if, on application, and proof given as there mentioned, the justices shall be satisfied that the highways cannot be sufficiently repaired by the means before prescribed, then an equal assessment upon all and every the occupiers of lands, &c., *within the parish, shall be made, collected, and allowed as the justices shall direct, and the money thereby raised shall be employed and accounted for, according to their orders, in repairing the highways, &c. But, by section 46, this assessment, and the assessment before mentioned, are not together, in any one year, to exceed 9*d.* in the pound upon the yearly value of the lands and tenements to be assessed.³ The cognizance states only that an equal assessment, not exceeding 9*d.* in the pound, was ordered to be made upon the occupiers of lands, not adding any reference to the yearly value ; and that the plaintiff was assessed in and by such assessment for his lands in Hawkhurst, in the sum of 45*l.* 18*s.* 4*d.*, being at the rate of 9*d.* in the pound, not stating upon what value. The authority to impose a tax must be strictly pursued, and should be shown, in pleading, to have been so. [LITTLEDALE, J. The order at special sessions for an assessment of 6*d.* in the pound, given in the schedule, No. 15, says nothing of yearly value : but that is merely the order to the surveyor to make an assessment ; the direction how he shall make it is given in the statute itself. Then, as the limitation with reference to yearly value is contained in a distinct proviso, there may

¹ Before Lord DENMAN, C. J., LITTLEDALE, WILLIAMS, and COLERIDGE, Js.

² Repeated by stat. 5 & 6 W. 4, c. 50.

³ 13 G. 3, c. 78, s. 46. "Provided nevertheless, that the assessment herein last before authorized, and the assessment hereinbefore authorized, for buying materials, making satisfaction for damages, erecting guide posts, and paying the surveyor's salary, shall not together, in any one year, exceed the rate of 9*d.* in the pound of the yearly value of the lands, tenements, woods, tithes, and hereditaments, so to be assessed."

be a question whether it forms such an exception as to come within the rule observed upon by LAWRENCE, J., in *Gill v. Scrivens*, 7 T. R. 31, and, if so, [*687] whether it be required to be noticed *by the party relying on the principal clause.] It cannot appear without reference to the proviso that the surveyor has performed his duty, because the proviso furnishes the rate at which the assessment is to be imposed, and the data on which it is to be calculated.

Channell, contra. The question is, not whether the assessment must be actually calculated on the yearly value, but whether that must appear by the assessment, as set out in the pleading. To ascertain this, sect. 45 must be referred to. [COLERIDGE, J. The assessment is made under sect. 30 as well. Sect. 45 does not authorize a rate for buying materials.] The validity of the assessment, as pleaded, must be determined, at all events, by reference to the two sections, and to the schedule, No. 15, which is framed upon the latter section, but applies to both. By sect. 45 the assessment is to be made and collected by such person and persons, and allowed in such manner, as the justices, by their order, shall direct. That order is the source of the surveyor's authority; its form is prescribed by the schedule, No. 15, and ought not to be departed from; and nothing is there said, but that "an equal assessment, not exceeding the sum of — in the pound," on all and every the occupiers, &c., shall be forthwith made. Besides, the proviso in sect. 46 is not an exception incorporated in the enacting clause which it qualifies; and therefore the defendant in this case was not bound to refer to it in his pleading.

Wightman in reply. The scheduled forms of this act were not meant to be so binding that the obvious construction of the enacting clauses should be overlooked. By sect. 69 they may be varied or added to according *to circumstances. Consistently with the order, as stated in this cognizance, the occupiers might have been assessed in respect of their personal ability; and the assessment, as pleaded, may have been on the gross value of the lands.

Cur. adv. vult.

Lord DENMAN, C. J., now delivered the judgment of the Court as follows:—The defendant justifies as bailiff of the hundred of East Barnfield in Kent, under a warrant of distress directed to him by two justices of the peace for levying a highway assessment. The cognizance avers that the two surveyors made application at a special sessions for an assessment of 9*d.* in the pound on all and every the occupiers, and that the justices of the peace ordered such assessment upon all the occupiers of lands, tenements, woods, tithes, and hereditaments to be forthwith made, and then proceeds to justify the taking, under a warrant of distress issued for nonpayment of it. The cognizance was demurred to for numerous causes, one of which we think good. The passage of the cognizance above selected makes the objection apparent; and we need give no opinion on any of the other points raised.

The act requires, by way of proviso, that the rate shall not exceed 9*d.* in the pound on the yearly value of the lands, &c., subject to be rated. The averment is that the assessment was made on the occupiers of lands, &c.; and that it did not exceed 9*d.* in the pound: but not (as the statute requires) that it does not exceed 9*d.* in the pound on the yearly value of such lands, &c. The averment, that it does not exceed 9*d.* in the pound, has of itself no meaning, but must be referred to something; and if, consistently with the ordinary use of words, [*689] *it can be referred to "lands," &c., which are mentioned immediately before, the statement will still be defective; for the meaning must then be the value of the lands, &c., and not their yearly value.

For this defect, without considering the others alleged, our judgment must be for the plaintiff.

Judgment for the plaintiff.

The KING v. The Justices of GLOUCESTERSHIRE. Feb. 1.

By stat. 2 & 3 W. 4, c. 64, s. 36, sched. (O), 30, Clifton is made a part of the parliamentary borough of Bristol, which is a county of itself. Except so far as that act operated, it was in the county of Gloucester: Held that, after the passing of the Corporation Act, 5 & 6 W. 4, c. 76, ss. 7, 8, the Gloucestershire justices had no longer the power to make an order for diverting a footway in Clifton, their jurisdiction, in such cases, being transferred to the justices of Bristol.

At the Quarter Sessions for the county of Gloucester, held 5th January, 1836, application was made to enrol and confirm an order of two justices of the county for diverting and turning a public footway in the parish of Clifton in the said county. There was no appeal against the order; and the necessary preliminaries under stat. 55 G. 3, c. 68, s. 2,¹ had been fulfilled. The proceedings (commencing with the precept of two justices to the high constable, giving notice of their intention to hold a special sessions for the purpose of viewing, &c., and directing the acting justices to be summoned) had all taken place subsequently to the 9th of September, 1835, on which day stat. 5 & 6 W. 4, c. 76 passed. Before that act, the parish of Clifton was part of Gloucestershire for all purposes except that of electing members of parliament; and the justices of Gloucestershire had at all times exercised jurisdiction over the county. The Court of Quarter Sessions refused the application, on the ground that, by stat. 5 & 6 W. 4, c. 76, the parish of Clifton was included within the county [*690] of the city of Bristol, and taken out of the jurisdiction of the county of Gloucester, from the passing of the said act.

On an affidavit of the above facts, *Greaves*, in this term, obtained a rule calling upon the justices of the city of Gloucester to show cause why a mandamus should not issue, commanding them to enter, as of the last general Quarter Sessions of the peace held in and for the said county, the said application, and to enter continuances thereon to the next general Quarter Sessions, for the county, and at such next Quarter Sessions, to hear and determine the said application. On a subsequent day of the term.

Sir J. Campbell, Attorney-General, and Maule, showed cause.* Stat. 5 & 6 W. 4, c. 76, s. 7, enacts that, after the passing of the act, "the metes and bounds of the several boroughs named in the first section of the said schedules (A.) and (B.) for the purposes of this act shall be the same as the limits thereof respectively settled and described" in the Parliamentary Boundary Act, stat. 2 & 3 W. 4, c. 64. Bristol is named in the first section of the schedule (A.) of stat. 5 & 6 W. 4, c. 76; and by stat. 2 & 3 W. 4, c. 64, s. 35, sched. (O.) 30, Clifton is included within the limits of Bristol. Then stat. 5 & 6 W. 4, c. 76, s. 8, enacts "that every place and precinct which shall be included within the [*691] *metes and bounds of any borough as hereinbefore provided, and none other, shall be part of such borough, and in those boroughs which are counties of themselves shall be part of such county and of none other." Bristol is a county of itself; and, therefore, without inquiring what would be the case where the borough is not a county of itself, Clifton is a part of the county of Bristol, and of no other. The words "and of none other" appear to have been inserted for the purpose of removing doubt on such a question as this. The magistrates of Gloucestershire have therefore no jurisdiction over Clifton since the 9th of September, 1835. The "purposes of this act," referred to in sect. 7, are all matters relating to municipal government; and no limitation can be supplied which is not expressed. By a proviso in sect. 8, if any place or precinct was previously liable to contribute to a rate for satisfying a debt to which the rate-

¹ Repealed by stat. 5 & 6 W. 4, c. 60 (see sects. 1, 84, 85), which came into operation on the 20th March, 1836, by sect. 119.

* See the form of the rule in *Rex v. The Justices of Suffolk*, 6 B. & C. 111.

² January 30th. Before Lord DENMAN, C. J., LITLEDALE, and WILLIAMS, Js. COLBRIDGE, J., was sitting in the Bail Court for PATTERSON, J., who was sitting at Nisi Prius in London.

payers of the borough were liable, the proportion, in a case of a difference arising, is to be assessed by a barrister appointed by the senior judge of assize for the county of which such place or precinct is thenceforward to be taken to be part. This shows that the legislature have specifically mentioned such cases as are not to be governed by the general enactment that the place is to form part of the borough: and, again, as they give the appointment to the judge of assize for the county of which the place is thenceforward to be a part, they assume that the place falls under the general jurisdiction of the borough to which it is attached. Again, the provision in sect. 8, for excepting the county jail, &c., shows that the enactment is perfectly general, saving only cases expressly excepted. A habeas corpus was lately granted by *PATTERSON, J., removing a prisoner, who [*692] was charged with a felony committed in Clifton, from Gloucestershire to Bristol, where he was tried.

Greaves, contra. Sect. 8 speaks of places and precincts included, "as hereinbefore provided," that is, by reference to sect. 7, "for the purposes of this act." The question, therefore, is merely what are the purposes of the act; and these must be collected from the whole act. The enactment in question applies as well to boroughs which are not, as to those which are, counties in themselves; no interpretation of it can therefore be adopted which introduces an absurdity in either case. By the preamble, it appears that the object of the act is to alter the charters by which the bodies corporate are constituted; but questions as to the local extent of the jurisdiction of county justices are not immediately connected with the chartered constitutions of bodies corporate as such. The clause cited from sect. 8, respecting the apportioning the rates in a particular case, shows that the incorporation was not to be made for all purposes; else there would have been a provision for cases in which the place was liable to the debts of the original county, such as, for instance, cases arising under the gaol acts, 4 G. 4, c. 64, and 5 G. 4, c. 85. By sect. 38, the new constitution of the boroughs is to come into force only on the first election of councillors: on the construction contended for on the other side, the places added to the boroughs would be without justices from the passing of the act to the first election; for the act contains nothing to enlarge the power of the borough justices in the mean time. Under sect. 62, no borough coroner can be appointed till [*693] a grant of a court of quarter sessions: if the district is incorporated for all purposes, it will be without a coroner in the mean time. Sect. 64 shows that, for some purposes, the county jurisdiction is preserved, and even enlarged. Sect. 79, in the provision as to recognizances to be taken by the borough constables, treats the boroughs as situate within the county, in the case in which there are no sessions of the peace: the places incorporated, therefore, are not universally and for all purposes out of the county; for the boroughs are not so themselves. Suppose a borough not to apply, under sect. 103, for a quarter session; if the borough be taken out of the county for all purposes, there will be no sessions at which the prisoners can be tried. Sect. 107 excepts out of the jurisdiction of the borough quarter sessions, all powers and jurisdictions formerly granted to any borough to try capital felonies, &c. Now an exception "is ever of part of the thing granted and of a thing in esse" (Co. Lit. 47, a); it follows that the power to try offences, granted to the quarter sessions, is, as to local extent, the power which the borough previously had: otherwise, since the borough never had capital jurisdiction out of the old precincts, the exception could not apply. By sect. 109, certain exceptions (including Bristol) from the operation of stat. 38 G. 3, c. 52, s. 10, are done away with; and, after May 1st, 1836, and until a quarter session is granted, Bristol will be within the general rule furnished by the act. But up to the first of May it will be under the former system; and how can this be applied to districts added to the borough, and taken from the county at large? They come under sect. 111; and, though Bristol is exempted from the provisions of stat. 38 G. 3, c. 52, the new part is not within the *exemption. Sect. 114 contemplates the [*694] connecting, for some purposes at least, of the county jurisdiction with

the borough. So does sect. 117; and Clifton falls under the case there contemplated: for before stat. 2 & 3 W. 4, c. 64, it did contribute to the county rates. In sect. 118, if the legislature had intended the courts of record to have jurisdiction over the added districts, it is scarcely probable that they would not have expressly so declared. Sect. 122, on the construction contended for on the other side, is unnecessary; for, if the borough and all the additions are taken out of the county for all purposes, the county has no jurisdiction within the borough. The eighth section, therefore, has not the general effect contended for on the other side. Hardships might, perhaps, be suggested on either construction: thus Bristol is excepted from the highway act, stat. 13 G. 3, c. 78, by sect. 85 of that act; and the argument on the other side would extend that exception to all the incorporated district.¹ *Cur. adv. vult.*

Lord DENMAN, C. J., now delivered the judgment of the Court.

We have gone through the act with great care; and the result is, that we find the transfer of jurisdiction, by the 7th and 8th sections, to be as complete as words can make it. With respect to the inconveniences which Mr. *Greaves* has suggested as likely to arise from this construction upon other sections of the act, they must *be decided upon when they come before the Court. We are, therefore, of opinion that Clifton is now a part of Bristol, and not [695] of the county of Gloucester; and the rule must consequently be discharged.

Rule discharged.

¹ As to the general rules for implying an exclusion of the jurisdiction of county justices, the following cases were cited on moving for the rule. *Talbot v. Hubble*, 2 Str. 1154; *Blankley v. Winstanley*, 3 T. R. 279; *Rex v. Sainsbury*, 4 T. R. 451; *Bates v. Winstanley*, 4 M. & S. 429; *Rex v. Charles*, 5 B. & Ald. 665. See *Rex v. Shepherd*, 2 A. & E. 298.

The KING v. The Justices of CUMBERLAND. Feb. 1.

On complaint against a party as a vagrant, for refusing to maintain his wife, the party charged, being called upon by the justices in petty sessions to show cause for his refusal, denied being married to the woman, and produced some evidence in support of such denial; and he threatened the magistrates with an action if they committed him. The complainants offered evidence of a *Gretna Green* marriage; but the justices refused to hear it, and dismissed the summons, saying that they would not, on this application, try a disputed marriage, alleged to have taken place out of the country, and that the parties ought to try it in the Ecclesiastical Court.

Held, that the justices could not, under these circumstances, refuse to hear the case through; and a mandamus was granted, requiring them to hear the complaint.

A RULE was obtained in a former term, calling upon the justices of Cumberland to show cause why a mandamus should not issue, requiring them to hear the complaint of the overseers of Wetheral, in the said county, against John Bowman, for refusing to maintain his wife and child. It appeared that the alleged wife, Sarah, having become chargeable to Wetheral, and Bowman refusing to maintain her, the assistant overseer obtained a summons against him, in pursuance of which he attended before two justices at the town hall of Carlisle, where Armstrong, the assistant overseer, preferred a complaint against him for the refusal to maintain, under stat. 5 G. 4, c. 83, s. 3. Bowman, on being called upon to show cause for his refusal, denied that Sarah was his wife, and stated that she had filiated the child upon him as a bastard; and he produced receipts signed and given to him by Armstrong, while assistant overseer of Wetheral, for money paid him by Bowman on account of the said child, which was described in the receipts as the child of Sarah Ashbridge. Armstrong did *not deny the receipts, but offered to prove a *Gretna Green* marriage, [696] of which the child was the issue, by the evidence of persons then present, namely, the alleged wife, a subscribing witness to the certificate of marriage, and a witness to subsequent cohabitation. The attorney who attended with Bowman said that, if the magistrates committed him, an action would be brought against them. The magistrates, under the advice of their clerk, refused to hear

the evidence in support of the marriage, and dismissed the summons, saying, that they thought the matter too important to be decided in this summary manner; that they would not try indirectly the validity of a marriage which was said to have taken place out of England and was disputed; and that this question ought properly to be tried in an ecclesiastical court.¹

[*697] *Alexander and W. C. Rowe* now showed cause. Supposing that the case has not been heard, the magistrates were not bound to proceed when there was reasonable fear of an action, and no indemnity was offered; *Rex v. Mirehouse*.² The act 5 G. 4, c. 83, s. 3, does not imperatively require justices to proceed on a complaint of this kind; the words are, "it shall be lawful for any justice of the peace to commit such offender." [Lord DENMAN, C. J. The justices here had begun to hear the complaint; were not they bound to hear all?] They exercised a discretion, which they had a right to use. And they have, virtually, heard the complaint. [Lord DENMAN, C. J. Then they stopped the party against whom they decided.] The receipts were not denied: then it appeared that there was a disputed marriage, which the parties might try in the ecclesiastical court. [COLERIDGE, J. What remedy could the overseers have in the ecclesiastical court?] In *Rex v. The Justices of Carnarvon*, 4 B. & Ald. 86, where the sessions, on the trial of an appeal, refused to hear the respondents' witnesses, this Court would not grant a mandamus to enter continuances and rehear the appeal.

Cresswell, contra, was stopped by the Court.

[*698] *Lord DENMAN, C. J. That was a very different case. It is quite clear that the justices have done wrong. They exercised their discretion in deciding at first to hear the case; then they were not right in refusing to hear the whole of the evidence offered. The rule must be absolute.

LITLEDALE, WILLIAMS, and COLERIDGE, Js. concurred. Rule absolute.

¹ *Armstrong*, in his affidavit, described the termination of the proceeding as follows:—"That the said John Bowman being called upon to answer the charge, Mr. Wannop, who appeared as his solicitor, denied that the said John Bowman was the husband of the said Sarah Newman Bowman, and alleged that they were never married; that the magistrates by the advice of their clerk thereupon refused to enter upon the case, or allow any evidence to be called to prove the marriage, stating that it was necessary in the first place, to establish the marriage in the Ecclesiastical Court. That this deponent was prepared to have proved the said marriage," &c. "That this deponent informed the magistrates that he was prepared with such testimony if they would allow it to be heard; but they positively refused, for the reason before stated, namely, that it was necessary, before such application could be made, to establish the marriage in the Ecclesiastical Court." The clerk to the magistrates stated in his affidavit, that Mr. *Saul*, the attorney for Wetheral, "proposed to call the said Sarah Newman Ashbridge to prove the marriage, but did not deny the fact of the said receipts having been given, or of the said order of bastardy, having been made, whereupon the magistrates, Thomas Atkinson and John Knubley Wilson, Esquires, under the advice of deponent, refused to receive such evidence, considering it a matter of too great importance to try indirectly the validity of a marriage which was alleged to have taken place out of England, and which they thought ought more properly to be brought before an Ecclesiastical Court than to be decided by magistrates at a petty sessions." He added his opinion, that the advice he had given was proper, "and that, if the said magistrates heard the evidence proposed to be offered by the said George Saul, they must still decline making any order upon the summons, on the ground of the doubtful nature of the question as to the validity of the marriage, and the consequent risk to which the magistrates would be exposed by reason thereof."

² 2 A. & E. 682. S. C., as *Rex v. The Justices of Somersetshire*, 1 Harr. & Woll. 82.

The KING v. The Marquis of DOWNSHIRE.

Justices in petty session having made an order for stopping a highway under a local act giving an appeal, and the time for appeal having elapsed, it cannot be contended, on a prosecution for obstructing such way, that the order was bad because the justices were not properly summoned to the petty session.

Under stat. 56 G. 3, c. 68, s. 2, enacting that "when it shall appear, upon the view of

any two or more" justices, that a highway is unnecessary, the same may be stopped by order of such justices, the order is not valid if it state only that the justices, *having viewed the public roads within the parish, &c. (in which the road lies), and being satisfied that certain roads after mentioned are unnecessary, do order the same to be stopped up*: and the objection may be taken on such prosecution, and at such time, as above.

By a local inclosure act, incorporating (so far as its provisions were not repugnant) the general inclosure act, 41 G. 3, sess. 2, c. 109, it was enacted that certain commissioners might set out and appoint highways over the lands to be divided, &c., within the parish, of E., or over any of the old inclosed lands in the parish, and divert or stop up any of the present public or private carriage-roads, highways, or footpaths in the parish, observing certain conditions: and that all ways and paths in the parish not so set out or continued should be stopped up and extinguished, and deemed part of the lands to be divided, &c.: provided that no roads through any old inclosures of the parish should be stopped up, diverted, or altered, without an order of two justices.

A road, A, through old inclosures in the above parish, opened into the waste, and, at such opening, joined another road, B, which formed a continuation of A, and ran entirely over waste land. No valid order was obtained for stopping road A. Road B was not set out or continued by the commissioners: Held, that this omission did not extinguish road A and create a consequent stoppage of road B: but on the contrary, that A remaining open for want of an order of justices, as a consequence, B remained open also.

Quere, if a road long used as a thoroughfare by the public be lawfully stopped at one end, whether the right of way over the remainder be gone. Per PATTISON, J., it is not.

INDICTMENT for obstructing and keeping obstructed divers horse and carriages, pack and prime ways, and footpaths in the parish of Easthampstead, Berks. Plea, Not guilty. By order of *PARKE, J.,¹ the prosecutor delivered particulars of the ways in question, which were nine in number: seven [*699] described generally as highways, and two described as footways. On the trial before PARKE, J., at the Berkshire Spring assizes, 1834, the following facts appeared. All the ways were ancient public ways.

Highway, No 1 (Bond's Lane), passed through old inclosures, and opened into land which, at the time of making the award after-mentioned, was part of the waste lands in the parish and manor of Easthampstead.

Highways 2 and 3, and 4, were continuations of Bond's Lane, passing over lands that were waste at the time last-mentioned. (Highway 3 diverged from highway 2: Bond's Lane branched into highways 2 and 4.)

Highways 5 and 6, the latter being a continuation *of 5, passed over [*700] lands that were waste at the time last-mentioned; these highways branched from highway 7, and formed a continuation of Hatch's Lane, which was a road passing through old inclosures, and not now in question.

Highway 7 passed out of Hatch's Lane, through old inclosures, and formed a continuation of Hatch's Lane to the northward; branching to the westward, into highway 5.

Footways 1 and 2 passed through old inclosures.

By stat. 1 & 2 G. 4, c. 32, private, "for inclosing lands within the manor

¹ The order was as follows:—

"The King on prosecution of William Makepeace, against the Marquis of Downshire. "Upon hearing Mr. Mascal, of counsel for the prosecutor, and Mr. Richards, of counsel for the defendant, I do order that, upon production of an affidavit by Mr. Handley" (the defendant's attorney), "that on reading the indictment he is unable to understand all the precise tracks indicted, the attorney or agent for the prosecutor shall, at the costs of the prosecutor, within one week after the delivery of a copy of Mr. Handley's affidavit to Mr. Jeyes" (the attorney for the prosecution), "deliver to the defendant's attorney a particular in writing, of the several highways, pack, and prime ways, and footways, for the obstruction of which the bill of indictment has been preferred and found; and that the prosecutor shall be precluded, at the trial of the indictment, from giving evidence respecting any other highways, pack and prime ways, and footways, than those named in the particular. The prosecutor, with his attorney and one surveyor, to be at liberty to go on the premises on some one day, having given the defendant or his attorney two days' previous notice of the time at which they will attend, and doing no unnecessary damage to the premises. Dated the 30th day of January, 1834. J. PARKER."

and parish of Easthampstead, in the county of Berks," for reciting that there were within the said manor and parish certain open and common fields and commons, heaths, and other uninclosed commonable lands and waste grounds, containing in the whole, &c., and that the Marquis of Downshire was lord of the said manor, and as such entitled to the soil of the said commons, heaths and other uninclosed commonable lands and waste grounds, that the Marquis and others were entitled respectively to parcels of the said open and common fields, and were or claimed to be entitled to or interested in the herbage upon, and certain rights of common over, the said open and common fields, and common or waste lands, or some part or parts of them; reciting also the general inclosure act, 41 G. 3, sess. 2, c. 109; and that the estates of the several parties lay intermixed, &c., and that if the common fields, commons, &c., were divided, allotted, and inclosed, they would be of greater value; it was enacted that certain persons should be commissioners for putting the act in execution in such manner, and with

[*701] such powers, &c., as were in this act after *contained, and with such of the powers, and subject to such of the rules, &c., contained in the recited act, as were not repugnant to, or altered, or otherwise provided for, by this act.

And by sect. 18, it was enacted:¹ "That the said commissioners shall, and they are hereby authorized and required in the first place, before they shall proceed to make any of the divisions and allotments, directed to be made by this act, to set out and appoint all and every such public carriage roads and highways, in, through, and over the lands and grounds hereby directed to be divided and allotted, or in, through, and over any of the old inclosed lands or grounds within the said parish, as they shall judge necessary, and to divert, alter, turn or stop up any of the present public or private carriage roads or highways, or footpaths, in, through, or over any part of the said parish of Easthampstead as the said commissioners shall think proper, provided the roads and highways to be set out and appointed by the said commissioners, shall be and remain thirty feet wide, at the least, and be set out in such directions, as shall upon the whole, appear to them most commodious to the public; and the said commissioners shall ascertain the same by marks and bounds, and prepare and sign a map, in which such intended roads shall be accurately laid down and described, and cause the same, when so signed, to be deposited with their clerk, for the inspection of all persons concerned; and as soon as may be afterwards, the said commissioners shall give notice;" (directions were then added for giving public notice of the

[*702] setting out of such roads *and depositing of such maps, and also notice of the general lines of such intended carriage roads;) "and shall also appoint, in and by the same notice, a meeting to be held by the said commissioners, at some convenient place," &c., "and not sooner than fourteen days from the date and publication of such notice, to take the same into consideration; and if any person who may be injured or aggrieved by the setting out of such roads, shall attend at such meeting, and object to the setting out of the same, then the said commissioners, together with any justice or justices of the peace, residing or acting in and for the division in which the said parish of E. is situate, and not being interested in the said division and allotment, shall hear and determine such objection, and the objections of any other such person to any alteration, that the said commissioners, with any such justice or justices, may in consequence propose to make; and the said commissioners, together with such justice or justices as aforesaid, shall, and they are hereby required, according to the best of their judgment, upon the whole, to order and finally direct how such carriage roads shall be set out, and either to confirm the said map, or make such alterations therein as the case may require. And all roads, highways, ways and paths, in through and over the said parish of E., or any part thereof, which shall not be set out, or finally ordered and directed to be set out or continued as aforesaid, shall be for ever stopped up and extinguished, and shall be deemed and taken as part of the lands and grounds to be divided and allotted by

¹ See the General Inclosure Act, 41 G. 3, sess. 2, c. 109, ss. 8, 11.

virtue of this act, and shall be divided and allotted accordingly: Provided always, that none of the present roads" in E. shall be shut up or discontinued, until the *roads intended to remain or be the public roads in future shall be set out as by this act directed, and properly formed and made safe and convenient for horses, cattle, and carriages: "Provided also, that no roads passing or leading through any of the old inclosures within the said parish, shall be stopped up, diverted, turned, or in any other way altered, without an order for that purpose, under the hands and seals of two of his Majesty's justices of the peace for the said county of Berks, not interested in the repair of such roads, in the manner and subject to appeal, and giving such notice as is directed by an act passed," &c., 55 G. 3, c. 68. [*703]

The commissioners set out a number of public carriage roads or highways, and likewise certain private roads, which were drawn out on a map, and the map, after notice given and a meeting held according to the act, was duly confirmed. Among the roads marked as private was Bond's Lane road, described by the commissioners as a "private occupation road or driftway of the width of twenty-five feet," except where it passed through old inclosures, leading from one to another of the public carriage ways newly set out as above stated. Part of this road was comprised in highway No. 1 (Bond's Lane), and part in highway No. 4, above described as a continuation of Bond's Lane over the waste. Three other roads (East Hampstead Park Lane Road, and Jennings's Hill Lane Road) were set out in like manner as private, and these were comprised in highway No. 7, above described. Highways 2, 3, 5, and 6, and footways, 1 and 2, were not set out.

*For the purpose of stopping certain of the above ways which passed through old inclosures (according to the proviso in sec. 18 of the local act), three justices, at a petty session holden March 23d, 1827, made the following order:—"Easthampstead Inclosure. We Augustus Shutz, Esquire, Thomas Garth, Esquire, and the Reverend Henry Ellis St. John, clerk, three of his Majesty's justices," &c., "at a special session held by us at," &c., "on this 23d day of March, 1827, in pursuance of the authority vested in us in and by an act," &c. (reciting the local act 1 & 2 G. 4, c. 32, and statutes 41 G. 3, sess. 2, c. 109, and 55 G. 3, c. 68); "or any of them, having particularly viewed the public roads and footway within the said manor and parish of Easthampstead hereinafter particularly described; and we not being interested in the repair of the said roads and footway, and being satisfied that the highways, bridleways, and footways intended to remain and be the public highways, bridleways, and footways in future within the said parish are continued, or have been set out and properly formed and made safe and convenient, according to the provisions and directions of the said first-mentioned act, and that the roads and footways hereinafter described are unnecessary to be continued, do order that the same public roads and footways be stopped up and extinguished, that is to say," Easthampstead Park Road, leading, &c. (describing its direction and termini as the commissioners had stated them in setting out this road as above mentioned; p. 703); Easthampstead Park Lane Road (describing it in like manner); Jennings's Hill Lane Road (describing it in like manner): footway, &c. (describing its course and *termini). "So that the same roads and footway may be divided and allotted pursuant to the directions of the said first-mentioned act of parliament. Given," &c. Signed by the three justices. [*705]

The roads were No. 7, of the highways, and the footway No. 2, of the footways, in question on this indictment. One of the magistrates summoned to the petty session was not served with the summons till March 20th. The order was confirmed, without appeal, at the quarter sessions, holden April 24th.

The commissioners executed their award, August 1st, 1827, specifying therein the several public carriage roads or highways and private roads set out and described by the said commissioners as above mentioned. And, after referring to two orders of justices, made in 1825 (of no importance here), the award pro-

ceeded as follows :—"And whereas, in further pursuance and execution of the said three several acts," &c., Augustus Schutz, &c., "three of his Majesty's justices of the peace for the said county of Berks, at a special session held by them in the parish of Easthampstead aforesaid, on," &c., "did order that the several public roads and footway therein and hereinafter described, be thenceforth stopped up and extinguished, that is to say" (then followed a description of the ways mentioned in the order of March 23d, 1827, in the words there used); "and whereas the said last-mentioned order at a general quarter sessions of the peace, holden at Newbury, in and for the said county of Berks, on Tuesday, the 24th day of April last, was confirmed, filed, and enrolled among the records of the said sessions: now be it further known that the said Thomas Chapman and Richard Crabtree, as such commissioners as aforesaid, do hereby [*706] *declare and award that the said several roads in the said three several orders, or either of them, particularly mentioned and described, shall be for ever stopped up and extinguished as public roads; and that the said three several last-mentioned roads, called Easthampstead Park Road, Easthampstead Park Lane Road, and Jennings's Hill Lane Road, shall be for ever hereafter for the exclusive use and occupation of the person or persons whose lands adjoin thereto on either side thereof, and that the said several footways in the said three several orders, or either of them, particularly mentioned and described, shall be for ever stopped up and extinguished."

The waste lands, over which highways 2, 3, and 4, and highways 5 and 6, passed, were allotted to the defendant.

The defence was, that highways, 1 to 6, and footway 1, were stopped by the award and the operation of the local act; that highway 7 and footway 2 were stopped by the order of justices; and that the stopping of these ways had an effect, in addition to that of the award and Inclosure Act, in extinguishing highways 5 and 6.

The jury found that all the roads which had been the subject of proof were ancient ways; and, under the learned Judge's direction, they returned a verdict of Not Guilty, leave being reserved to the prosecutor, by consent, to move to enter a verdict of Guilty.

Ludlow, Serjt., in Easter term, 1884, moved accordingly.¹ He contended, as to highway 7 and footway 2, that the order of justices was bad, because the [*707] *summonses to the magistrates to attend the petty session were not all delivered in proper time; and because it did not appear, by the order, that it was made upon view, as required by stat. 55 G. 3, c. 68. He took some other objections to the order, upon which the Court gave no opinion.² He further urged that part of the recital, made by the commissioners in their award, was unsupported by any further proof. *PARKE*, J., observed that the award was *prima facie* evidence of the facts recited in it; and no further notice was ultimately taken of this head of objection. As to highway 1 (Bond's Lane), and footway 1, he objected that, as they ran between old inclosures, they could not, by the local act, be stopped without an order of justices; and further, as to highway 1, that, although the commissioners had professed to set it out as a private occupation way, they had not allotted the soil, and that the new denomination they had given it did not, under the circumstances, deprive it of the character it anciently had, of a public highway. And, as to highways 2, 3, 4, 5, 6, he contended that if highways 1 and 7 were not legally stopped, these, being continuations of them, remained open likewise. A rule nisi was granted, against which

Jervis, *R. V. Richards*, and *Talbot*, showed cause in Trinity term, 1885.³

¹ Before Lord DENMAN, C. J., LITLEDAL, PARKE, and PATTESON, Js.

² One of these was, that several roads were stopped by the same order. See *Rex v. Milverton*, Mich. T. 1836, where it was held that such an order is bad.

³ Before Lord DENMAN, C. J., LITLEDAL, PATTESON, and WILLIAMS, Js. The case was argued, June 1st and 2d.

First, as to the objections to *the order of justices. It is contended [*708] that the summonses to attend the special session appear not to have been all served in reasonable time, and, therefore, that the quarter sessions ought not to have confirmed the order, on which point *Rex v. The Justices of Worcestershire*, 2 B. & Ald. 228, was cited. But no precise rule is there laid down as to the time at which service shall be deemed reasonable; nor can there be a general law on the subject. *Rex v. Sheppard*, 3 B. & Ald. 414, and *Rex v. The Justices of Surrey*, 5 B. & C. 241, were also cited: but, in the one case, the order did not purport to have been made at a special session at all; in the other, notices had not been served by the proper officer. Neither case is applicable. And the present objection, if available, should have been made the ground of an appeal: the justices in sessions are the proper persons to judge of it. By stat. 55 G. 3, c. 68, s. 4, which is incorporated by reference in sect. 18 of the present act, if there be no appeal, the order and proceedings are conclusive. On the objection, that the order does not sufficiently appear to have been grounded on the view of the justices, a later case of *Rex v. The Justices of Worcestershire*, 8 B. & C. 254, was cited. But there the words of the order were:—"We — having upon view found, or it having appeared to us;" the justices did not even assert that they had viewed. Here they say, "We — having particularly viewed the public roads and footway;" "and we, not being interested" — "and being satisfied that the highways," intended to be the public highways in future, are properly formed, do order, &c. Of the two analogous forms (xvi. and xviii.), *in the schedule to stat. 13 G. 3, c. 78, one, No. xvi., uses the words, "having upon view found;" but [*709] those particular words are not absolutely necessary; and stat. 55 G. 3, c. 68, gives no form of an order for stopping. The argument on the other side seems to assume that the view and the order must take place at once, and the order be worded accordingly; but that is not required.

The main question, however, is, whether the highways 1 to 6 are extinguished by the inclosure act and award. Now supposing that highway 1 (Bond's Lane) was not legally stopped, for want of an order of justices, it does not follow that highways 2, 3, and 4, which communicated with it, and ran over the waste, and were not set out as public roads by the commissioners, remained open also. This point arose in the case of *The Marquis of Downshire v. Makepeace*, tried at the Reading Spring assizes, 1832, where the present defendant brought trespass against the present prosecutor, and he pleaded a right of way on the same highways which are called 2 and 3 in this cause. LITTLEDALE, J., in summing up that case to the jury, adverted to the argument on behalf of the plaintiff, which was that, when the legislature gave power to the commissioners, generally, to stop up roads leading over the lands to be allotted, and empowered them also to stop up roads leading through old inclosures by an order of two justices, the restriction, as to the order of justices, must be confined in its effect to the roads actually within the old inclosures; and the learned judge added, "I must own that appears to me the right construction of the act; for it would come to this, that almost all the roads in the lands or commons to be inclosed would lead by one *means or the [*710] other into roads in the old inclosures, and the result would be, that there could scarcely be a road set out in the whole inclosure except by the concurrence of two justices; and therefore it appears to me the true construction of the act, that this power for stopping up roads in the old inclosures requiring the concurrence of two magistrates, is to be confined to roads of the old inclosures."¹ That argument applies both to highways 2, 3, and 4, and to highways

¹ From the note used by the defendant's counsel in opposing the present rule. A rule nisi was obtained for a new trial in *The Marquis of Downshire v. Makepeace* (the plaintiff having obtained a verdict); and, upon cause shown, Hil. T. 1833, the rule was discharged; but it does not appear that the Court decided the above point. PARKER, J., observed, upon the motion, that, according to the argument used, probably no road in the district could be stopped, since every highway would lead to some road passing through old inclosures.

5 and 6. They are extinguished by the award and inclosure act, independently of any circumstance affecting the condition of highway 1 (Bond's Lane) and highway 7, with which they respectively communicate.

Then, as to the highway 1 (Bond's Lane). Not only is the stopping of Bond's Lane unnecessary for the purpose of stopping roads 2, 3, and 4, but, on the other hand, admitting that Bond's Lane, so far as it passes through old inclosures, would not be stopped by the mere omission of it in the award, it is in effect stopped, because the roads on the waste, highways 2 and 4, which were the continuations of Bond's Lane, are extinguished as public ways by the award. Bond's Lane, then, becomes a mere cul de sac; and such a place cannot be called a highway. In *Wood v. Veal*, 5 B. & Ald. 454, ABBOTT, C. J. said, "I have [*711] great difficulty in conceiving that there can be *a public highway which is not a thoroughfare." *Logan v. Burton*, 5 B. & C. 513, is distinguishable. There a clause in a local inclosure act enabled commissioners to stop up old roads in the parish, "besides the roads which passed over the lands to be inclosed," provided it were not done without the concurrence of two justices; and this was held not to be confined to roads lying wholly without such lands; the Court being of opinion that, where a road passed partly through such lands and partly through others, the consent of two justices was requisite for stopping the latter portion; because otherwise, by stopping this, the whole might, in effect, be stopped without such consent. That, however, does not show that, because highway 1 (Bond's Lane) passes through old inclosures, therefore highways 2 and 4, which communicate with it, could not be stopped without an order of justices, and, being so stopped, produce a consequent stoppage of Bond's Lane. The powers given by the local act in that case were only an extension of the same powers which are conferred by sections 8, 10, and 11, of the general act, 41 G. 3 sess. 2, c. 109; here the authority of the commissioners is derived from the local act, 1 & 2 G. 4, c. 82, s. 18, which re-enacts the general inclosure act, but with alterations. It empowers the commissioners not only to set out and appoint highways over the lands to be inclosed (which is the authority given by the general act), but to divert, alter, turn, or stop up any of the present highways over any part of the parish; and it enacts that all highways in, through, or over the said parish, or any part thereof, which shall not be set out, or finally [*712] *ordered to be set out and continued as aforesaid, shall be for ever stopped up and extinguished. This last provision is independent of their direct power to stop: and the powers given by the clause affect the inclosed lands as well as those to be allotted, except so far as they are controlled by the proviso that no road between old inclosures shall be stopped, &c., without an order of justices. But here the road between old inclosures is not touched by the commissioners; only the continuation of it over the waste is stopped, by not being preserved, and, in consequence, Bond's Lane ceases to be a thoroughfare, and comes within the dictum of ABBOTT, C. J., in *Wood v. Veal*, 5 B. & Ald. 454. In producing that result, the commissioners do not overstep the particular limitation imposed by the proviso. Besides, this case cannot be assimilated to *Logan v. Burton*, 5 B. & C. 513, without contending that the highways which form the continuation of Bond's Lane over the waste are one and the same with it; but this would be like arguing that the whole road from London to the north of England was one with Portland Place. The same observations will apply to *Harber v. Rand*, 9 Price, 58, and *Thackrah v. Seymour*, 1 Cro. & M. 18, as to *Logan v. Burton*, 5 B. & C. 513. The effect of omitting to set out a formerly existing way, under the general inclosure act, was considered in *White v. Reeves*, 2 B. Moore, 23. [PATTERSON, J. Bond's Lane is found to have been formerly a public road. The commissioners have not omitted it in their award, but have assumed to make it a private way, or at least to treat it as such.] When the continuation over the waste was stopped, Bond's Lane became a cul de sac, and therefore [*713] *was as if it had never been public. Under those circumstances the commissioners set it out as an occupation road. Supposing that

they had not power to do so, they have not the less stopped it, as to the public, which they had authority to do. [PATTESON, J. It has been held that, where there never was a right of thoroughfare, a jury might find that no public way existed; but it has never been settled that, where there had been a public right of passing through, the right of way was abolished by stopping one end of the passage.] It is to be assumed that the stoppage is made legally. [PATTESON, J. That would not make the remaining passage not public. And here, if Bond's Lane was in effect stopped, it should have been allotted according to the local act.] That provision does not apply where the way is merely stopped by operation of law. [PATTESON, J. The commissioners have thought this a private road, and treated it as such; and it now turns out to be public. We must deal with it as we can, under the circumstances.]

Then, as to footway No. 1. That is extinguished by the award and local act, not being set out. It is true that no order of justices was obtained for stopping it, and that it passes through old inclosures: but the proviso, that no "roads" passing through old inclosures shall be stopped without such order, applies only to horse and carriage roads. A distinction is made between footpaths and roads in the beginning of sect. 18, where the commissioners are authorized to "set out and appoint all and every such public carriage roads and highways" over the lands to be allotted, or through the inclosed lands, and to divert, alter, turn, or stop up "any of the present public or private carriage roads *or highways, or footpaths," "provided the roads and highways to be set out by the [*714] said commissioners shall be and remain thirty feet wide at the least." The same kind of distinction runs through the rest of this section. [PATTESON, J. Acts of parliament are so loosely worded that an argument from the use of one word in one part of a clause, and another in another, has not much weight with me. I should take "road," here, to mean anything over which the public has any right to go. LITLEDALE, J. The last proviso in the section requires an order in the manner directed by stat. 55 G. 3, c. 68, which does extend to footpaths.]

Ludlow, Serjt., Sir *W. W. Follett*, and *Maclean*, contrà. First, as to the order of justices for stopping highway 1, and footway 2. The lapse of time may perhaps be an answer to the objection on the insufficiency of the summons. [Lord DENMAN, C. J. We are all of opinion that the order cannot be questioned at this distance of time, unless it be defective on the face of it, or there distinctly appear a want of jurisdiction: see *Rex v. The Justices of Cambridgeshire*, ante, p. 111.] Then, as to the allegation of view. It is true that *Rex v. The Justices of Worcestershire*, 8 B. & C. 254, differs from this case, because there the fact of view was only stated alternatively. But BAYLEY, J., says there that "the justices have no jurisdiction to stop up the highway, unless they pursue the power given to them by the legislature;" and that they ought "to show on the face of the order that they have had a view, and that it had appeared to them *on view* that the highway was unnecessary. They ought either to use the words *of the act of parliament, or other words [*715] of equivalent import." Here, so far as can be collected from the order, the justices may have viewed the road, but have been satisfied by other evidence that it was unnecessary.

Then, as to the other highways. It is said that Bond's Lane was made a cul de sac. If by that process it was stopped, it has been stopped without an order of justices; and, as the road lies through old inclosures, the proceeding is void. The commissioners could not do indirectly what they might not do directly. And, if it was not stopped, the public has still a right to use it. *Wood v. Veal*, 5 B. & Ald. 454, is no authority; there the question was, whether the public had acquired a new right by dedication: here the public has clearly had the right; and the question is, whether the proceedings adopted had taken it away. At least the public might continue to go as far as the point where the stoppage is said to have taken place. If the effect of extinguishing the roads over the waste

be to stop Bond's Lane altogether, it follows that those roads could not legally be extinguished. This was the view taken of a similar case by the Court of Exchequer, in *Thackrah v. Seymour*, 1 Cro. & M. 18, where Lord LYNDBURST observed, that "no power was given to the commissioners to stop up the part of the way passing over the old inclosures; yet, if they stopped up the part which led over the waste lands, they would thereby, in effect, stop up the way which passed over the old inclosures." [WILLIAMS, J. It is difficult then to say what effect could be given to the power of stopping roads over the waste; for there can scarcely be a road confined to the waste, and not leading somewhere else.

[*716] *LITLEDALE, J. According to the argument, a consent of justices would be necessary for almost every road that is stopped or discontinued.] The power to stop without an order of justices was probably meant to apply to private roads over the waste, which often have no communication with the roads passing between inclosures; and to public tracks, also running over the waste, and merely connecting the greater highways. But if highways actually leading through old inclosures may be stopped incidentally, by extinguishing those highways over the waste which are continuations of them, the whole traffic of the district may be intercepted, notwithstanding the provisos in the acts of parliament, by the mere silence of the commissioners in their award. This appears to have been the view taken by the Courts of Exchequer and King's Bench of the cases of *Harber v. Rand*, 9 Price, 58, and *Logan v. Burton*, 5 B. & C. 513; and the difference relied upon, between the General Inclosure Act and the local act here in question, is not sufficient to distinguish those cases from the present.

Then, as to footway No. 1. The words "highways" and "roads," in sect. 18 of the local act, are loosely employed; but it is expressly said, that "all roads, highways, ways, and paths," not set out or continued under this act, shall be stopped up and extinguished; and in the final proviso, requiring an order of justices, "roads" is used as a nomen generalissimum, including every kind of way before mentioned. There is no reason that the protection given by the proviso for the public benefit should not extend to footpaths. The proviso refers to stat. 55 G. 3, c. 68, which includes every description *of way. And [*717] *Thackrah v. Seymour*, 1 Cro. & M. 18, shows that, under the General Inclosure Act, if a footway runs partly through old inclosures and partly over waste, the mere silence of the commissioners in their award will not extinguish such a way.

Cur. adv. vult.

Lord DENMAN, C. J., in this term (January 26th) delivered the judgment of the Court.

This was an indictment against the defendant for obstructing certain footpaths and highways in the parish of Easthampstead, in the county of Berks, tried before my brother PARK at the Spring assizes at Reading, 1834, when a verdict was found for the defendant, with liberty for the prosecutor to move this Court to enter a verdict of Guilty as to all or any of the said roads which, upon the evidence, should not appear to have been legally stopped.

The roads were nine in number; that is to say, Nos. 1 and 2 footways (as laid down in the plans both of the prosecutor and defendant, which agreed), and numbers from 1 to 7 inclusive, highways, the former (No. 1) being called in the evidence, and upon the plans, Bond's Lane, the latter (No. 7) being called in the report "the road to the North," and, by the plans also appearing to go in that direction. Into No. 1 highway (Bond's Lane) ran the roads over certain commons, before their inclosure designated by the Nos. 2, 3, and 4, in both the plans respectively; and into No. 7, or "the road to the North," ran the Nos. 5 [*718] and 6, also passing over commons, and also laid down *in the plans of the prosecutor and defendant. As to the roads generally, they were found by the jury, or admitted by the defendant's counsel, to have been public; that is to say, the two first mentioned to have been public footways, and the seven last mentioned to have been public highways. The burden therefore of showing that they ceased to be such, or, in other words, had been legally stopped, clearly lay upon the defendant.

For this purpose, as to No. 2 footway and No. 7 highway, a certain order of justices, bearing date 23d of March, 1827, was relied upon; and as to the Nos. 5 and 6, before described as leading into No. 7, that they were virtually stopped by the same order. As to the rest, viz.: No. 1 footway and No. 1 highway (Bond's Lane), and Nos. 2, 3, and 4, leading into it, certain acts of commissioners, under statute 2 G. 4, session 1821, entitled "An Act for inclosing lands within the manor and parish of Easthampstead, in the county of Berks" were relied upon. Indeed it was, by some of the counsel for the defendant, contended that what had been done under the above-cited act was effectual for stopping *all* the roads; and that the order of justices, as to those to which is applied, was *ex abundanti cautela* only, and superfluous.

It may therefore be convenient perhaps, first, to consider the last-mentioned ground of defence, applicable to all. By the act in question (ps. 12 and 13), commissioners are empowered to make new roads, and also, "to divert, alter, turn, or *stop up* any of the present public or private carriage roads, or highways, or footpaths" over the said parish of Easthampstead, as they shall think proper. They are also directed to prepare *and sign a map, describing [719] the roads, and to give certain notices therein prescribed; and to hold a meeting for the purpose of hearing objections and complaints, in which they are to be assisted by a justice or justices of the peace for the division in which the said parish of Easthampstead is situate: the said commissioners and such justice or justices to have power to confirm or alter the said map. Then comes the clause upon which reliance on behalf of the defendant is placed: "And all roads, highways, ways, and paths in, through, and over the said parish of Easthampstead, or any part thereof, which shall not be set out, or finally ordered and directed to be set out and continued as aforesaid, *shall be for ever stopped up and extinguished*, and shall be deemed and taken as part of the lands and grounds to be divided and allotted by virtue of this act." It has therefore been argued that, as none of these roads have been set out and continued, they are at once extinguished. We think, however, it is unnecessary to do more than to refer to the proviso contained in the very clause which confers the above-mentioned powers upon the commissioners, for the purpose of showing that the argument has no weight:—"Provided also, that no roads passing through any of the *old inclosures* within the said parish, shall be *stopped up*, diverted, turned, or in any other way altered, *without an order* for that purpose under the hands and seals of two of his Majesty's justices of the peace for the said county of Berks;" which is to be subject to appeal in the manner directed. We consider this to be decisive; and that, consequently, as to No. 1 footway, and No. 1 highway (Bond's Lane), which are uncovered by any such order, they still exist in point of law as a foot and highway *respectively, passing as they do undoubtedly according to *both* the plans, through *old inclosures*. It is scarcely [720] necessary to add, that the force of this proviso seems to have been felt, or else why was an order of justices procured for Nos. 2 and 7 (foot and highway) respectively?

We are next to consider the effect of No. 1 highway (Bond's Lane) existing still, so far as Nos. 2, 3, and 4 highways, leading into it, are concerned. We call them highways, because, as has already been observed, they were found or admitted to be so, subject, of course, to the effect of the proceedings which we have already noticed. Their leading over commons is clearly a circumstance wholly immaterial as to their character of public highway or not; and assuredly they may, and indeed must, be such, if, in the direction leading from Bond's Lane, they terminate (as in Bond's Lane they do) in an ancient and public highway; the consequence therefore seems to be, and we think is, that Bond's Lane still remaining in law a highway, those above mentioned (2, 3, and 4) remain so likewise. It seemed at first as if another course (laid down upon the prosecutor's plan) had been intended to be substituted for, and to supersede, the last-mentioned roads, Nos. 2, 3, and 4. It is obvious, however, that this cannot

be, for there is no *public* communication between that course which we are noticing and Bond's Lane, that communication (such as it is) being expressly laid down as a *private road*.

We are, lastly, to examine the effect of the order of justices, above adverted to, by which (independent of the supposed stoppage by their not being continued [721] as roads by the commissioners) No. 2 footway, and *No. 7 highway, are supposed to have been legally stopped, or, in other words, we are to examine the validity of the order of justices. That order is (His Lordship here read it). Now, in ascertaining how far this order can be sustained, or not, it is to be premised that it must be made "upon view" of the justices. So says the statute; and accordingly we consider that an inquiry is not open to us, whether any other mode of proof be sufficient to inform and satisfy them. Actual inspection is to be the foundation of their jurisdiction; and perhaps a knowledge of the state of the country (necessary and commodious passage and communication, &c.) may be better so acquired, than otherwise: so it is written, however. Now, upon this subject of the *jurisdiction* of justices of the peace, we are not aware that there is any material distinction of this Court between the mode of construction of an order of justices, and a conviction by them, whatever favorable intendment may be made in support of the former, when once the essential point of jurisdiction is established. See the case of *Rex v. Hulcott*, 6 T. Rep. 588, upon this point. This point, therefore, being (as we conceive it is) perfectly clear, the question is, whether the original allegation of a *particular view* does necessarily, or by fair construction, extend over the whole order up to the passage which directs the stoppage: or, rather, does not the statement of "being satisfied," &c., stand wholly independent of the original allegation of view? Whatever might have been the inference, if the recital had been continued in an unbroken chain from the beginning to the end, the case is otherwise [722] wise here. The clause containing *the original and material allegation of a "view" is separated in a very marked manner from that wherein the *satisfaction* of the justices, and the grounds of it, are contained. It would be a very violent and forced construction, as we think, to refer the grounds of the procedure by the justices *to the view*, in the earlier part of the order, rather than to some other means, by which their judgment was influenced, and themselves "satisfied," as declared in the subsequent part of that order. We think that it does not, by any fair or reasonable inference (and such only ought we to apply) follow, that the motive, operating upon the justices, was the view only. They might, consistently with a fair and reasonable construction of the order, have been influenced by *other* proof. If so, the justices never obtained jurisdiction over the subject, and their order cannot be supported, see *Rex v. The Justices of Cambridgeshire*, ante, p. 111. And that is our opinion; and, therefore, No. 2 footway, and No. 7 highway, stand in the same position as the other roads, respecting which we have already pronounced our opinion. We have only to add that, the effect of the order of justices being removed, Nos. 5 and 6 (branches, if they may be so called, of No. 7, because leading into it) are in the same situation, with respect to No. 7, that No. 2, 3, and 4, are with respect to No. 1 highway, Bond's Lane. It is not necessary, therefore, to repeat the reasons which induce us to arrive (as to them) at the same conclusion.

The result therefore is, that a verdict must be entered for the Crown, as to all the roads above particularly specified.

Verdict to be entered for the Crown.

[*723] *The KING v. The Inhabitants of EDGE LANE. Feb. 1.

Where trustees are authorized to make a turnpike road from A. to C., the entire road must be completed before the public can be compelled to repair any part. Although the road from A. to B. (an intermediate point) has been finished between twenty and thirty years, and repaired from time to time by the public; and although the road at point B. joins another public road which is complete.

INDICTMENT for not repairing a highway. On the trial before GURNEY, B., at the Lancaster Spring assizes, 1833, a verdict was found for the Crown, subject to a special case, by which the following facts appeared: The road indicted was made under an act, 45 G. 3, c. vii. (local and personal, public), for making and maintaining a road from Hollinwood to Featherstall, in the county of Lancaster, and branches to communicate therewith. That act was repealed by stat. 7 & 8 G. 4, c. lv. (local and personal, public), for making and maintaining a road from Hollinwood to Littleborough, and other roads communicating therewith. And that act was repealed by stat. 11 G. 4 and 1 W. 4, c. xcii. (local and personal, public), for improving and maintaining the road from Werneth to Littleborough, and other roads communicating therewith. The operation of the two last-mentioned acts was to alter the course of road contemplated in the original act, by substituting Littleborough for Featherstall as a terminus in one direction, and Werneth for Hollinwood in the other; and by making a corresponding change of line near the two extremities of the road, the new line to Littleborough commencing at New Hey, and that to Werneth near Dryclough. The act, 7 & 8 G. 4, c. lv., contained a clause, directing that it should be put in execution, among other things, for improving, repairing, &c., the roads leading from *Dryclough through Shaw, New Hey, &c., to Rochdale. The act 11 G. 4 and 1 W. 4, c. xcii., contained a clause declaring that it [724] should be put in execution, among other things, for improving, repairing, &c., the road leading from Dryclough, through Shaw, to New Hey. The road containing the portion indicted was part of the line of road so described in the two last-mentioned acts. The whole of this line of road was properly made and completed in 1806, from which time hitherto it has constantly been open to and travelled over by the public, and used as a public road between Dryclough and New Hey, at both of which places it joins other lines of public roads. Many houses, and some cotton mills, have been erected at the sides of it; and during the whole of this period, until the middle of 1832, the necessary repairs have from time to time been done to it by or at the expense of the respective parishes, townships, or divisions through which the road passes; and this road forms a communication between the several places through which it passes and the public roads at Dryclough, Shaw, New Hey, and Rochdale. Many of the new lines of road and the branch roads mentioned in the acts of parliament are still unfinished; but some have been finished. The want of repair was admitted; and Edge Lane was a district repairing its own *highways. A plan, [725] which was agreed upon, formed part of the case. It appeared by the plan, that two parts of the line of road finally contemplated between Werneth and Littleborough, viz., the portion at one extremity, from Dryclough to Werneth, and the portion at the other extremity, from New Hey to Littleborough, were unfinished. The question for the Court was, whether the defendants were liable to repair the portion of road indicted. The case was argued this term.¹

Wightman, for the Crown. The defence to this indictment is grounded on *Rex v. Cumberworth*, 3 B. & Ad. 108. But that was the case of a single line of road, part of which was unfinished. Here the acts of parliament contemplate not one line, but a system of roads, including several distinct lines and branches of road. He then contended that, in point of fact, and by the construction of stat. 11 G. 4 and 1 W. 4, c. xcii., referring to the intended lines between New Hey and Littleborough in one direction, and Dryclough and Werneth in the other, these two lines were distinct roads. He relied in particular on a clause, where, in imposing tolls, "the line of road from Werneth to Dryclough," "the line of road from Dryclough to Shaw," "the line of road from Shaw to Littleborough," &c., were treated as separate roads.² The non-completion of one in-

¹ January 27th. Before Lord DENMAN, C. J., LITTLEDALE, WILLIAMS, and COLERIDGE, J.

² The clause referred to was as follows:—"That it shall not be lawful for the said trustees," &c., "to demand or take the respective sums or tolls aforesaid, at any greater number of gates than is hereinafter mentioned, for or in respect of the same horses," &c.

[*726] dependent road *cannot excuse the inhabitants of the district from repairing another. The decision in *Rex v. Cumberworth*, 3 B. & Ad. 108, proceeded on the authority of the previous case, *Rex v. Hepworth*, 3 B. & Ad. 110. Lord TENTERDEN, in giving judgment, said that, if there had been no previous decision, he should have had some doubt; he then, however, allowed it to be a wholesome doctrine, "that trustees who are empowered to make a road from one place to another, should be bound to make the whole of that road" before they call on the public to repair any part of it. That may be admitted. The whole question here is, whether, in point of fact, an entire highway has been brought into this district: if it has, the incidents of a highway follow, and, among them, the liability of the inhabitants to repair; *Rex v. Netherthong*, 2 B. & Ald. 179. "The road leading from Dry Clough through Shaw to New Hey" is clearly mentioned in stat. 11 G. 4, & 1 W. 4, c. xcii. as a road by itself. The doctrine adverted to in *Rex v. Cumberworth*, 3 B. & Ad. 108, that, to charge a district with repair of a highway, the inhabitants must be shown to have adopted it, was overruled in *Rex v. Leake*, 5 B. & Ad. 469. See stat. 5 & 6 W. 4, c. 50, s. 23; but it is a circumstance, which distinguishes the present case from *Rex v. Cumberworth*, 3 B. & Ad. 108, that the road from Dry Clough to New Hey has been made almost thirty years, and the inhabitants of the adjacent *districts have from time to time repaired it.

[*727] Perhaps it may be contended that, although the defendants have repaired, they are at liberty to show that they have done so under a mistake, as was attempted in *Rex v. Haslingfield*, 2 M. & S. 558. But the mistake to be so set up must be of fact, not of law; and there is no ground here for alleging a mistake of fact. In *Rex v. The Justices of the West Riding*, 5 B. & Ad. 1003, it was held by two of the judges, on the construction of a turnpike act, that the making of branch roads was not a condition precedent to the main road becoming public; but the decision of those learned judges turned upon the use of the word "respectively" in the act, and may not, therefore, be available here.

Blackburne, contra contended, in the first place, that, in stat. 11 G. 4, & 1 W. 4, c. xii., one entire line of road was contemplated, from Werneth to Littleborough, in support of which argument he relied upon the recitals of the several local acts, and the situation of places as shown by the plan. The rule is that, where a special authority is delegated by statute to particular persons, to do acts by which the estates of individuals are affected, the power must be strictly pursued. That principle was acted upon in *Rex v. Cumberworth*, 3 B. & Ad. 108, the authority of which case is not disputed. It is evident from the judgment of Lord TENTERDEN there, and from those of the other judges, that they did not ground their decision merely on *Rex v. Hepworth*, 3 B. & Ad. 110. And the point in question was not decided in *Rex v. Hepworth*, 3 B. & Ad. 110, only, but in other cases, not reported, before BAXLEY, J., and HULLOCK, B.

In *Blakemore v. The Glamorganshire Canal Company*, 1 Mylne & [*728] Keen, 162, Lord ELDON says, "When I look upon these acts of parliament, I regard them all in the light of contracts made by the legislature, on behalf of every person interested in anything to be done under them; and I have no hesitation in asserting that, unless that principle is applied in construing statutes of this description, they become instruments of greater oppression than anything in the whole system of administration under our constitution. Such acts of parliament have now become extremely numerous; and, from their

"passing or repassing once through all the toll-gates," &c., "along the whole line of each of the respective roads to be amended, improved, or made by virtue of this act," "(that is to say) at no more than one gate on the whole line of road from Werneth to Dry Clough, and at no more than one gate on the whole line of road from Dry Clough to Shaw, and at no more than two gates on the whole line of road from Shaw to Littleborough, and at no more than two gates on the whole line of road from Shaw to Rochdale, and at no more than one gate on the whole line of road from Goats to Grains, and at no more than one gate on the whole line of road from Bent Green to Middleton."

number and operation, they so much affect individuals, that I apprehend those who come for them to parliament, do, in effect, undertake that they shall do and submit to whatever the legislature empowers and compels them to do; and that they shall do nothing else:—that they shall do and shall forbear all that they are thereby required to do and to forbear, as well with reference to the interests of the public, as with reference to the interests of individuals.” He then proceeded to discuss the provisions respecting tolls, in stat. 11 G. 4, & 1 W. 4, c. xcii., contending that the clauses relied upon for the prosecution had not the effect of distributing the line from Werneth to Littleborough into several roads, the expressions cited being meant to mark the intervals at which toll gates should be erected; and he pointed out other clauses which spoke of the line of “road from Werneth to Littleborough.”

Wightman, in reply. It has not been shown on the other side whether, according to the argument for the defendants, the road from Dry Clough to New Hey was public or not when the last act passed. It had been *used and repaired. Were the parties who used it trespassers, and the repairs [*729] unauthorized? And, if the road continues in its present state, can the proprietors of the lands resume possession? As to the clauses with respect to tolls, which treat the whole line of roads as one, that may be done for some purposes, as with a view to mortgaging the tolls; but the argument for the Crown is supported if the particular roads in question be recognised as distinct for any single purpose.

Cur. adv. vult.

Lord DENMAN, C. J., now delivered the judgment of the Court. After stating the nature of the indictment and the proceedings at the trial, his Lordship said: “It appears that in 45 G. 3 (sess. 1805), an act passed, “for making and maintaining a road from Hollinwood, in the township of Chadderton, to Featherstall, in the township of Huddersfield, in the county palatine of Lancaster, and for making and maintaining several branches of road to communicate therewith.” The principal line of road therefore is, by the title of the act, described to be from Hollinwood to Featherstall. And, moreover, in the preamble, it is recited that the said principal line with certain branches (four in number), which it is not necessary particularly to describe, would be “a great benefit and advantage to the inhabitants of the adjacent country,” which is described as being, and is well known to be, “very populous and manufacturing,” Oldham and Todmorden, amongst others, being specified. This act was repealed by another passed in the 7 & 8 G. 4 (sess. 1826–7), which somewhat varied the line at the Hollinwood terminus, and substituted Littleborough for Featherstall as the terminus at the other extremity. The variation, however, in this particular, is but trifling *(as appears by the plan forming part of the case); and the direction of the line to Littleborough leads to the same tract of country [*730] as the original one to Featherstall. The second act above described was repealed by an act of 11 G. 4, and 1 W. 4 (sess. 1830), which made Werneth the terminus instead of Hollinwood, but left the rest of the line to Littleborough substantially the same, so far as the question before us is concerned.

It follows from this short statement that the original purpose of communication, as expressed in the first-mentioned act, is continued into the last, which is the existing act. It further appears that, at each extremity, parts of the road, which, together, amount to very near half of the whole line, have not been made. And the question is, whether this indictment against the inhabitants of Edge Lane, which is situated about the middle of the line, can be supported.

The state of authority upon this question supersedes, in our opinion, the necessity for much discussion. We would observe, however, that the remarks of Lord ELDON in the case of *Blakemore v. The Glamorganshire Canal Navigation*, 1 Mylne & Keen, 162, considering his high authority and undoubted caution, have great weight. We also think that, where powers are entrusted by the legislature for an avowed and precise object, the pursuit and performance of that

object should be rigidly watched. It by no means follows that the act of parliament for making the roads could have been obtained if the communication had been less, and, in consequence, the accommodation to the public, than that avowed and professed by the preamble of the original act. These observations, [*731] however, and others of a similar import, *are rendered superfluous, because they are expressly the foundation of a judgment of this Court, with the reasons for which we are satisfied, and by which we mean to abide. In the case of *Rex v. Cumberworth*, 1 B. & Ad. 108, a certain part, and, compared with the present, a small part, of the projected road was incomplete; and for that reason an indictment against the inhabitants of Cumberworth for not repairing a portion of the line, was held not sustainable. We think that, in the present case, the like consequence should follow, and that judgment must be for the defendants.

Judgment for the defendants.¹

¹ See the next case.

The following case, decided in Michaelmas term, 1836, may conveniently be added here.

The KING v. The Inhabitants of the Lower District or Division of
CUMBERWORTH and CUMBERWORTH HALF.

(Case of the Branch Road.)

Where trustees under a turnpike act are empowered to make a road from A. to B., and a branch from that road to C., the public are not compellable to repair the main road, though complete in its whole extent, till the branch is finished.

INDICTMENT against a district in certain parishes for not repairing a highway leading from the township of Clayton West, in the West Riding of Yorkshire, towards and unto the township of Denby, in the same riding, into, through, and over a district called the lower division of Cumberworth, &c., in the several parishes, &c. Plea, Not Guilty. At the trial before PARKE, B., at the York Spring assizes, 1835, the following facts appeared.

[*732] *By stat. 6 G. 4, c. xxxviii. (local and personal, public), "for making and maintaining a turnpike road from Wakefield, to join the Shepley Lane Head turnpike road in Denby Dale, in the parish of Penistone, with certain branches, all in the West Riding of the county of York;" it was recited in the preamble, That "the making and maintaining a turnpike road from a certain street called Market Street in the town of Wakefield, in the West Riding of the county of York, through the several townships of Wakefield, Alverthorpe-cum-Thornes, Crigglestone," &c., "Cumberworth, Cumberworth Half, and Denby, or some of them, and within the several parishes of Wakefield," &c., "and Penistone, or some of them, all within the said West Riding of the county of York, to and into and communicating with a certain turnpike road, called the Shepley Lane Head turnpike road, at or near a place called Heartcliffe, in the said township of Denby, in the parish of Penistone aforesaid, and a certain branch or diversion from and out of the said road, commencing in the said township of Crigglestone, and in the parish of Sandal Magna aforesaid, extending from thence to the Calder and Hebble navigation, opposite to the Navigation Inn, within the said township of Horbury, and parish of Wakefield aforesaid; and also another branch or diversion, from and out of the said road, commencing in or near a certain close called Pikeley, belonging to Thomas Richard Beaumont, Esquire, and Diana his wife, lying in the said township and parish of Emley, in the riding aforesaid, extending from thence in a southwestwardly direction through the same townships of Bretton (otherwise West Bretton), Clayton West, and High Hoyland, in the said several parishes of Sandal Magna, Silkstone, and High Hoyland, or some of [*733] *them, in the said Riding, terminating on the common highway in the said last-mentioned town of High Hoyland; and also another branch or

diversion from and out of the said road from or from near the said close called Pikeley, to the highway leading from Emley to Bretton (otherwise West Bretton), near to a place called Bentley Grange, all in the said township of Emley; and also the erecting, making, and maintaining such bridge or bridges over the river Calder, and also over the cut or canal called the Calder and Hebble navigation, and other brooks and streams on the line of the said intended road and branches or diversions, as may be necessary for continuing and uniting the said road and branches or diversions, and the several parts thereof respectively; and the widening, extending, and improving such of the bridges already erected over the said navigation and brooks and streams as are in the line of the said road and branches or divisions respectively, will be a great advantage and accommodation to the inhabitants of the manufacturing towns and places in the neighborhood, and to the public at large." Certain persons named were then appointed "trustees for making and maintaining the said roads and bridges; and for otherwise putting this act in execution;" and it was enacted, that "the said roads and bridges shall be called the Wakefield and Denby Dale turnpike road." Various powers and directions were given for carrying the act into execution.¹ The main line, from Wakefield to the Shepley Lane Head turnpike road, was the same which was in question in the former case of *Rex v. Cumberworth*, 3 B. & Ad. 108. *After the preferring of the indictment in that case, [*734] the whole of the above-mentioned line was made and put into good repair, and was used by the public; but the branch from Pikeley Close to the highway in High Hoyland remained unmade. This branch was to have diverged, at an acute angle, from the main line above-mentioned, between Wakefield and the Shepley Lane Head road. It lay entirely out of the way from either of those termini to the other. It would have been the proper way for a person going from Wakefield to High Hoyland, but not for one going to High Hoyland from the Shepley Lane Head road. A witness stated that the branch, if made, would be used by few persons; chiefly by Hoyland people, who would travel it in going from Hoyland to Wakefield. The portion of road complained of lay on the main line. That line had been repaired by all the districts through which it passed, except the district indicted.

On the trial, *Rex v. Hepworth*, 3 B. & Ad. 110, and *Rex v. Cumberworth*, 3 B. & Ad. 108, were cited for the defendants; and it was contended that the doctrine, there laid down as to a road of which the main line was incomplete, applied equally to the case in which a road was to be made with branches, and one of these was unfinished. *Rex v. Mellor*, 1 B. & Ad. 32, and a case not named (probably *Rex v. The Paddington Vestry*, 9 B. & C. 456), were also referred to. The learned judge, in summing up, stated that he was not disposed to go the length of saying that all the roads contemplated by the act ought to have been made before the principal road in question could be repairable by the public; and he observed that the act *required bridges to be made, [*735] and other works executed in various places, and that it would be unreasonable to say that the road in question should be no road till every one of these was performed; but he said that, in order to charge the defendants, the principal road ought to have been fairly made by the trustees, and complete at some one time, from one end to another: and he put it to the jury whether or not they were satisfied that this had been done. The jury found that the road had been sufficiently made in the first instance; and a verdict of Guilty was taken, but leave reserved to move to enter a verdict of acquittal. A rule nisi was obtained accordingly in the following term.

Cresswell and *J. L. Adolphus*, now showed cause. It is not necessary here to contest the doctrine of the former case of *Rex v. Cumberworth*, 3 B. & Ad. 108, though it may be observed that in that case the judgment proceeded, in some degree, on the now exploded doctrine of adoption. And upon that decision a difficult question arises, whether, if the road has been long used by the

¹ Some of the clauses will be found shortly noticed in the argument, and need not be further stated.

public with the owner's acquiescence, the public can be excluded from it, and held liable as trespassers if they attempt to use it for the future, merely because the trustees have not done all upon the line of road which they ought to have done. Lord TENTERDEN, in *Rex v. Cumberworth*, 3 B. & Ad. 108, relied much on the ruling of HULLOCK, B., in *Rex v. Hepworth*, 3 B. & Ad. 110; but the learned judge there meant only to lay it down that, if the proceedings which had been taken were relied upon, under the circumstances of that case, as a dedication to the *public, the local act was an answer. The decision in *Rex* [*736] *v. Edge Lane*, ante, p. 723, was expressly grounded on that in *Rex v. Cumberworth*, 3 B. & Ad. 108, and carries the law no farther; since the Court, in *Rex v. Edge Lane*, ante, p. 723, considered the unfinished portion of road, not as a branch, but as part of the line which included the piece of road indicted. In *Rex v. The Justices of the West Riding*, 5 B. & Ad. 1003, LITTLEDALE and TAUNTON, Js., who thought that the road might be certified as complete before the branches were made, relied upon the word "respectively" in the local act; but that word would not have been sufficient ground for such an opinion if the learned Judges had not considered that, where there is a main line of road with branches, the branches may be treated as distinct and subsidiary. Here, the main line is described in the preamble of the act, by its course and termini, as a road by itself; then the branch in question is described in the same manner, as a complete road, "commencing in or near a certain close called Pikeley, extending from thence, &c., through, &c., "terminating on the common highway in the said last-mentioned town of High Hoyland;" and the other branches are marked out in the same manner. And, in fact, as to the particular branch in question, a person travelling the indicted road from Wakefield to the Shepley Lane Head road can have nothing to do with the branch, which lies wholly out of his way, diverging from his road, and terminating at a place which lies at a distance on one side of it. Then the question is, one complete and independent road having been made by the trustees, whether the public is [*737] exempt from repairing such road, *because another complete and independent road continues unmade. [COLERIDGE, J. Do you say that, if a branch were made, but not the main line, that branch would be repairable by the public?] It is not necessary to argue that; probably the branches would not be accessible, or would be of little use to the public, without the main line, though the main line is not so dependent on the branches. It is true that the act, in sect. 1, says that the roads and bridges there mentioned shall be called, "The Wakefield and Denby Dale turnpike road;" but that describes only the subject-matter of the trust; the several highways, as such, cannot be included under the general name, for by what termini could the main line and branches be described as one road? And the "roads" are referred to in many parts of the act, as distinct things. It will be contended that the trustees are under an implied engagement to complete the branch road before any repair of the main line can be enforced. But the condition precedent, in truth, is only that the trustees shall have completed that road upon which they demand that the repairs shall be done. An implied undertaking must be the reasonable result of the circumstances in which the parties are placed relatively to each other; as in some of the instances given in 1 Vin. Abr. Actions of Assumpsit (M). Here, the trustees obtain power to burden the public with a road. There is an implied undertaking that they shall first make that road, not some other road, or a bridge, in respect of which the act of the trustees does not burden them. The duty to be required of the trustees is correlative to the obligation they seek to impose on the public: nor is there anything indefinite in either, because the [*738] trustees acknowledge *themselves bound to make a certain road marked out in the act of parliament by termini as the complete main line, or branch, before they require such main line or branch to be repaired. And this view of the obligation is consistent with all that is said by the Court in the former case of *Rex v. Cumberworth*, 3 B. & Ad. 108. The preamble of the act states that the making of a turnpike road, and of certain branches, will be

an advantage to the towns and places in the neighborhood, and to the public at large: but that must be taken distributively, and not as implying that every neighborhood and portion of the public has an interest in every part of the work, and a right to insist on its being completed. Very serious inconvenience would arise if, under an act like this, requiring works of great extent and variety to be done, neither repairs could be enforced, nor tolls collected, as long as it could be alleged that a culvert was not made, or a bridge not properly widened, at whatever distance from the place where the dispute arose. There is, in fact, scarcely any district subject to a turnpike act, in which roads are not opened to the public before everything required by the act has been done. The dictum of Lord ELDON, in *Blakemore v. The Glamorganshire Canal Company*, 1 Mylne & Keen, 162, cited in *Rex v. Edge Lane*, antè, p. 727, 728, referred to a canal act, and is not properly applicable to a turnpike act. A canal is a private speculation; and an act establishing it may be strictly a bargain between adventurers and the public: but (as is explained by the judgment of this Court in *Bussey v. Storey*, 4 B. & Ad. 109, the object of a turnpike act is to furnish the public with an additional mode of discharging an *obligation, which the public itself must by some means provide for in all places, namely, that of [*739] maintaining highways.

J. B. Greenwood, contra. It is a general rule, to construe acts of this kind rigidly, as contracts made with the public by the parties obtaining them. Such a rule of construction was lately acted upon in the case *In re The London and Greenwich Railway Company*, 2 A. & E. 678. The words of Lord ELDON, which have been referred to, are applicable here. (He then read the passage, antè, p. 727, 728.) By sections 7 & 8 of the present act, the trustees are empowered to erect toll-gates where they shall judge necessary on the "said roads," and to take tolls at such gates; and by sect. 13 the trustees are forbidden to take more than three full tolls in respect of the same horse, &c., for passing or repassing, at any time or times in any one day, through all or any of the toll-gates "along the whole line of the said roads." The trustees may now place their gates so as to take the full tolls; but a person paying three full tolls could not pass along the whole of the roads contemplated by this clause, the part now in question remaining unfinished. The act, sect. 22, recites that "the line of the said new road might be made more conveniently," if two diversions were made, which are then described; and the trustees are empowered, "in case they shall think proper," to make such diversions. No such discretion is allowed as to the branches. The argument, that several parts of the set of roads comprised in the act are, for some purposes, described as distinct roads, *was used, but [*740] without success, in *Rex v. Edge Lane*, antè, p. 723. In *Rex v. The Justices of West Riding*, 5 B. & Ad. 1003, the word "respectively" was insisted upon by those who contended that the main road might be certified before the branch roads were finished. There is no equivalent expression in the present act. If the wording of this act had been similar to that of the act in question there, it might, perhaps, have been contended, in the present case, that the preamble should be taken distributively; but here the whole set of roads is comprised under the one denomination of "The Wakefield and Denby Dale turnpike road." It may be assumed in this case that many parties may have consented to the act being passed, on the faith that the branch roads, as well as the main line, would be completed. A like consideration weighed with the Court in *Rex v. Edge Lane*, antè, p. 723. (He then read the passage in the judgment of the Court in that case, beginning, "We also think that, where powers," and ending, "original act;" antè, page 730.)

Lord DENMAN, C. J. I think that it is necessary to adhere to the decisions in *Rex v. Cumberworth*, 3 B. & Ad. 108, and *Rex v. Edge Lane*, antè, p. 723. Distinctions may be drawn, and striking ones, for the purpose of showing that lines of road, under circumstances like the present, may form separate public roads. But great inconvenience must arise if it be held that, in such cases, each portion of road can be made a subject of distinct consideration. It is safer to

say that the trustees have their powers given to them in respect of the whole undertaking mentioned in the act, and that that must be *completed. [*741] It is said here that the whole of the main line was completed; but in *Rex v. Cumberworth*, 3 B. & Ad. 108, there was a line of road made between certain roads; that is, from Market Street, Wakefield, to a point where the new road intersected another public highway; and that was held not sufficient. Here, one line of road is completed; but the branches may be more important than the main line, and may have been the inducement to the public to agree in the act being passed. I think that, if any part of the work contemplated is undone, we must consider the whole undone.

PATTESON, J. I also think that we must adhere to *Rex v. Cumberworth*, 3 B. & Ad. 108. I am afraid of introducing such distinctions as have been suggested. In all these acts there is a bargain with the public; and, under such an act as the present, unless the trustees make all the roads, they do not complete their bargain. To hold otherwise would lead to a great deal of litigation and many inconvenient distinctions.

WILLIAMS, J. The completion of the line of roads, and of all its parts, must be considered a condition precedent to the charge of repairs being thrown upon the public. We cannot say upon what terms parties may have been induced not to oppose the introduction of this act. Though a benefit might result from the main line, yet the inducement to acquiescence may have been the additional advantage to be derived from the branches.

COLERIDGE, J. I am of the same opinion. The principle on which this case [*742] was argued for the prosecution *was taking at first sight; but, when I ask whence the trustees can derive the right to burden this district, or to appropriate any person's land, except from complying with all the terms of the act, I cannot find that the principle will carry me on. To determine such a question we must resort to the broad ground, that acts like this are bargains made on behalf of the public, not on the great line of road merely, but on every part of the roads. It is contended that the trustees have done enough to warrant them in imposing this burden in respect of the main road: but the branches may have been the very consideration upon which consent was given to the making of the main road. The original road for which that was substituted may have been very good, but the neighboring districts may have forborne to oppose the making of a new one, on the faith that these branches would be added; and great hardship might be inflicted if trustees could stop, after having performed a part of the works contemplated, and say that enough had been done. We must consider the bargain comprised in this act of parliament as an entire thing: the trustees must do all that it requires them to do, before they can throw the burden of repair on any part of the public. Rule absolute.

[*743]

*REGULA GENERALIS.

HILARY TERM, 6 W. 4.

28d January, 1836.

WHEREAS, by the act of the 3d and 4th of W. 4, c. 42, s. 43, it is enacted that none of the several days mentioned in the statute passed in the sessions of parliament holden in the 5th and 6th years of the reign of King Edward the Sixth, intituled "An Act for keeping Holidays and Fasting Days," shall be observed or kept in the Courts of common law, or in the several offices belonging thereto, except Sundays, the day of the Nativity of our Lord, and the three following days, and Monday and Tuesday in Easter week; It is HEREBY ORDERED, that henceforth, in addition to the said days, the following, and none other, shall be observed or kept as holidays in the several offices belonging to the said Courts, viz.: Good Friday and Easter Eve, and such of the five days following as may not fall in the time of Term, but not otherwise; the birthday

of our lord the King; the birthday of our lady the Queen; the day of the Accession of our lord the King; Whit Monday, and Whit Tuesday.

DENMAN,	W. BOLLAND,
N. C. TINDAL,	J. B. BOSANQUET,
ABINGER,	E. H. ALDERSON,
J. A. PARK,	J. PATTESON,
J. LITLEDALE,	J. GURNEY,
S. GASELEE,	J. WILLIAMS,
J. PARKE,	J. T. COLERIDGE.

***REGULA GENERALIS.**

[*744]

HILARY TERM, 6th W. 4.

(Read in Court, February 1st, 1886.)

WHEREAS, by the statute 4 H. 4, c. 18, it was enacted, "That all the attorneys shall be examined by the Justices, and by their discretions their names put on the roll, and they that be good and virtuous, and of good fame, shall be received, and sworn well and truly to serve in their offices;" AND WHEREAS, by the statute 3 Jac. 1, c. 7, s. 2, it was enacted, "That none shall from henceforth be admitted attorneys in any of the King's Courts of Record, but such as have been brought up in the same courts, or otherwise well practised in soliciting of causes, and have been found by their dealings to be skilful and of honest disposition; and that none be suffered to solicit any cause or causes in any of the courts aforesaid, but only such as are known to be men of sufficient and honest disposition;" AND WHEREAS, by a rule made in Michaelmas term, 1654, in the Courts of K. B. and C. P., it was ordered that the Courts "should once in every year, in Michaelmas term, nominate twelve or more able and credible practisers to continue for the ensuing year to examine such persons as should desire to be admitted attorneys, and appoint convenient times and places for the examination; and the persons desiring to be admitted were first to attend with their proofs of service, then repair to the persons appointed to examine, and, being approved, to be presented to the Court and sworn;" AND *WHEREAS, by the stat. 2 G. 2, c. 23, s. 2, it was enacted, "That the Judges, [*745] or any one or more of them, should, and they were thereby authorized and required, before they should admit such persons to take the oath, to examine and inquire by such ways and means as they should think proper, touching his fitness and capacity to act as an attorney: and if such Judge, or Judges respectively, should be thereby satisfied that such person is duly qualified to be admitted to act as an attorney, then, and not otherwise, the said Judge or Judges, of the said courts respectively should, and they were thereby authorized to administer to such persons the oath thereafter directed to be taken by attorneys: and, after such oath taken, to cause him to be admitted an attorney of such court respectively." AND WHEREAS, in order to carry the last-mentioned statute more fully into effect, it is expedient annually to appoint examiners, subject to the control of the Judges in manner hereinafter mentioned.

1. IT IS ORDERED, That the several Masters and Prothonotaries for the time being of the Courts of King's Bench, Common Pleas, or Exchequer, respectively, together with twelve attorneys, or solicitors, be appointed by a rule of court, in Easter term in every year, to be examiners for one year; any five of whom (one whereof to be one of the said Masters or Prothonotaries) shall be competent to conduct the examination; and that from and after the last day of next Easter term, subject to such appeal as hereafter mentioned, no person shall be admitted to be sworn an attorney of any of the courts, except on production of a certificate, signed by the major part of such examiners, actually present at and conducting his examination, testifying his fitness and *capacity to act as [*746] an attorney—such certificate to be in force only to the end of the term next following the date thereof, unless such time shall be specially extended by the order of a Judge.

2. IT IS FURTHER ORDERED, That the examiners so to be appointed shall conduct the said examinations, under regulations to be first submitted to and approved by the Judges.

3. AND IT IS FURTHER ORDERED, That, in case any person shall be dissatisfied with the refusal of the examiners to grant such certificate, he shall be at liberty to apply for admission by petition in writing to the Judges, to be delivered to the clerk of the Lord Chief Justice of the Court of King's Bench, upon which no fee or gratuity shall be received; which application shall be heard in Serjeant's Inn Hall, by not less than three of the Judges.

4. AND WHEREAS the hall or building of the Incorporated Law Society of the United Kingdom in Chancery Lane will be a fit and convenient place for holding the said examination, and the said society have consented to allow the same to be used for that purpose; IT IS FURTHER ORDERED, That, until further order, such examinations be there held on such days being within the last ten days of every term, as the said examiners or any five of them, shall appoint: and that any person not previously admitted an attorney of any of the three Courts, and desirous of being admitted, shall, in addition to the notices already required, give a term's notice to the said examiners of his intention to apply for examination, by leaving the same with the secretary of the said society at their [*747] said hall, which notice shall also state his place or places of residence, *or service, for the last preceding twelve months, and in case of application to be admitted, on a refusal of the certificate, shall give ten days' notice, to be served in like manner, of the day appointed for hearing the same.

5. AND IT IS FURTHER ORDERED, That three days at the least before the commencement of the term next preceding that in which any person, not before admitted, shall propose to be admitted an attorney of either of the Courts, he shall cause to be delivered at the Master's or Prothonotary's office, as the case may be, instead of affixing the same on the walls of the Courts, as now required, the usual written notices, which shall state in addition to the particulars now required, his place or places of abode, or service, for the last preceding twelve months; and the Master or Prothonotary, as the case may be, shall reduce all such notices as in this rule first mentioned into an alphabetical table or tables under convenient heads, and affix the same, on the first day of term, in some conspicuous place within or near to, and on the outside of each Court.

6. AND WHEREAS it is expedient that, upon the readmission of attorneys, the Judges should have further means of inquiring as to the circumstances under which persons applying to be readmitted discontinued to practice, and as to their conduct and employment during the time of such discontinuance, IT IS FURTHER ORDERED, That at the time of giving the usual notice of the intention to apply for such readmission, the party shall cause to be filed the affidavit on which he seeks to be readmitted with the Master or Prothonotary, as the case may be; which affidavit shall contain, in addition to the particulars now required, a statement of his place or places of *abode during the last preceding year; and such person shall also, at the same time, cause to be left a copy of such affidavit with the clerk of the Lord Chief Justice of the Court of King's Bench; and the rule for the readmission of such person shall be drawn up on reading such affidavit, and also an affidavit of such copy having been left in compliance with this rule.

DENMAN,
N. C. TINDAL,
ABINGER,
J. A. PARK,
J. LITLEDALE,
S. GASELEE,
J. PARKE,

W. BOLLAND,
J. B. BOSANQUET,
E. H. ALDERSON,
J. PATTESON,
J. GURNEY,
J. WILLIAMS,
J. T. COLERIDGE.

IN THE EXCHEQUER CHAMBER.

(ERROR FROM THE KING'S BENCH.)

GEORGE JAMES and Another v. PLANT.

Estates, A. and B., formerly distinct, became vested in coparceners. Before that time, a right of way had been enjoyed from A. over B., and, after the unity of seisin, the way always continued to be used. The parceners, for the purpose of making partition, conveyed to a releasee to uses the messuages, tenements, lands, &c. (of which the estates consisted), and all houses, outhouses, ways, easements, &c., to the said several messuages or tenements, lands, &c., belonging or appertaining, or therewith usually held, used, occupied, or enjoyed: to have and to hold the messuages, &c., called A., with the buildings, lands, &c., thereunto belonging, and their appurtenances, to the releasee to the use of S. in fee; habendum, as to estate B., in similar terms with respect to the parcels, to the releasee to his own use in fee, in order that he might become tenant to the præcipe in a recovery.

Held, that the deed sufficiently showed an intention that a right of way (which way was admitted to have been used up to the time of the deed) from the high road over B. to A. and back, for the convenient use of A., by the occupiers of A., should pass to the uses limited as to A.

That by the word "appurtenances," in the habendum as to A., interpreting that clause with reference to the other parts of the deed, the way in question did pass.

And that the releasee to uses, having no estate in A., had not such a seisin of the soil as would extinguish the right of way by unity of seisin.

TRESPASS for breaking and entering certain closes.

Plea, that the closes in which, &c., were parcel of a certain farm, lands, and premises called Woodseaves House Farm, mentioned in the after-stated indenture, and that, before the making of that indenture, Thomas Smallwood and Maria his wife (in right of Maria), and Elizabeth Hector, were seised respectively in fee each of an undivided moiety of and in Woodseaves House Farm, and also of and in the messuages, tenements, and premises after-mentioned to have been bargained, sold, and released to Thomas James, and called respectively Park Hall and Park House: and, being so seised, afterwards, viz. November 10th, 1812, by indenture of release between Smallwood and his wife of the first part, Elizabeth Hector of the second, Thomas Huxley of the third, and Richard Spearman of the fourth, of the date last mentioned, for the making a partition of the messuages, *lands, &c., after described, and for barring all estates tail, reversions, &c., of and in the message or tenement after described, called Woodseaves Farm, and the lands and hereditaments thereunto belonging, and the allotment, &c., also after described, and for conveying and assuring all the said messuages, lands, &c., to the uses and on the trusts after declared, and in consideration of 10s., the said T. S., and Maria his wife, and Elizabeth Hector, did, according to their respective estates, grant, bargain, sell, alien, and release to Huxley (in his possession then being by a bargain and sale, &c.) all that message or tenement called by the name of Park Hall, with the outbuildings and several parcels of land thereunto belonging and then occupied therewith, situate, &c., containing, &c.; and also all that other message or tenement called by the name of Park House, with the buildings and several parcels of land thereunto belonging and then occupied therewith, situate, &c., containing, &c.; which two last-mentioned messuages or tenements, lands, &c., were purchased by Brooke Hector of and from Richard Whitworth, Esq., and, on the decease of the said B. H. intestate, descended to the said Maria and Elizabeth his two daughters and co-heiresses; and also all that other message or tenement called by the name of Woodseaves House Farm, with the outbuild-

ings and the several parcels of land thereunto belonging, and then occupied therewith, situate, &c., containing, &c.; which last-mentioned messuage and premises were purchased from certain persons (in the plea mentioned) by Thomas Adams, and were, by settlement made on the marriage of the said Brooke Hector with Elizabeth his late wife, daughter of the said Thomas Adams, limited, after her decease, and in default of her *male issue by [*751] B. H., to the use of all her daughters by B. H. in tail general; and also all that allotment, &c. (an allotment of waste under an inclosure act): "And all houses, outhouses, edifices, buildings, barns, stables, cowhouses, yards, gardens, orchards, ways, paths, passages, waters, watercourses, hedges, ditches, mounds, fences, trees, woods, underwoods, and the ground and soil thereof, easements, profits, privileges, advantages, emoluments, hereditaments, rights, members, and appurtenances whatsoever, to the said several messuages or tenements, lands and hereditaments hereinbefore described belonging or in anywise appertaining, or therewith usually held, used, occupied, or enjoyed, or accepted, reputed, deemed, taken, or known as part, parcel, or member thereof; and the reversion and reversions, remainder and remainders, &c., and all the estate, right, title, &c., of Thomas Smallwood and Maria his wife, and Elizabeth Hector, and each of them, of, in, to, or out of the said premises, &c.: "to have and to hold the said messuages or tenements called Park Hall and Park House, with the buildings, lands, and hereditaments thereunto belonging, thereby before granted and released, and expressed and intended so to be, and every part and parcel thereof, with their and every of their appurtenances," to Huxley and his heirs, to the uses and on the trusts after declared: "and to have and to hold the said messuage or tenement called Woodseaves House Farm, with the buildings, lands, and hereditaments thereunto belonging, and the said allotment," &c., before respectively granted, "and every part and parcel thereof, with their and every of their appurtenances," to Huxley, his heirs, and assigns, to the use of Huxley, his heirs, and assigns, to the intent that he *might become tenant [*752] to the præcipe in a recovery to be suffered as was after mentioned.

The plea then stated a covenant in the said indenture by Smallwood, on behalf of himself and his wife, to levy a fine of their moiety in Park Hall and Park House, with the premises thereto belonging, and before mentioned to have been purchased by Brooke Hector, to Spearman and his heirs; and that it was agreed between the parties to the indenture, that a recovery should be suffered of Woodseaves House Farm, with the buildings, &c., and appurtenances thereto belonging, and also of the said allotment with the appurtenances, in which recovery Spearman should recover against Huxley, and Thomas and Maria Smallwood and Elizabeth Hector should be vouchees: and that the uses of the fine of the said messuages, &c., and premises, before granted, and the uses of the said recovery were declared respectively to be, as to "the whole of the said messuages or tenements called Park Hall and Park House, with the buildings, lands, hereditaments, and appurtenances thereunto respectively belonging," and also the said allotment with its appurtenances, to such use, &c., and for such estate and interest as Smallwood should by deed appoint, &c.; and in default of such appointment, &c., to the use of Smallwood and his assigns during his life; and, from and after the determination of that estate in Smallwood's lifetime, to the use of Spearman, his heirs and assigns, during Smallwood's life, in trust for Smallwood and his assigns; and, from and after the determination of that estate, to the use of Smallwood, his heirs and assigns: and, as to "the said messuage or tenement called Woodseaves House Farm, with the buildings, lands, hereditaments, and [*753] appurtenances thereto belonging," to *the use of Elizabeth Hector, her heirs and assigns for ever.

The plea then stated a recovery suffered of Woodseaves and the allotment, and a fine levied of a moiety of Park Hall and Park House, according to the above indenture.

The plea went on to state, "that, long before and at the time of the making

of the said indenture of release, and of the levying of the said fine and suffering the said recovery, the occupiers for the time being of the said messuage and premises called Park Hall had always been used to have and enjoy a certain way from a certain public King's highway in the parish of," &c., "into, through, over, and along the said closes in which, &c., towards and unto Park Hall aforesaid, and so back again into, through, over, and along the said closes in which, &c., unto and into the said public King's highway, for themselves and their servants, on foot, and with cattle and carts and other carriages, to go, return, pass and repass in and along the said way, every year and at all times," &c., "for the convenient use and occupation of Park Hall aforesaid; and the said way had, before and at the time of the making of the said indenture of release, and of the levying of the said fine and suffering the said recovery, been always held, used, occupied, and enjoyed therewith."

The plea then stated that, after the fine and recovery, by indenture, to which Smallwood, Spearman, and others were parties, Spearman and others bargained, sold, and released to Thomas James, in fee, the said tenements and premises, with the appurtenances, called Park Hall, and all houses, outhouses, easements, &c., thereto belonging or therewith held, used, occupied, or enjoyed. And that *Thomas James died seised in fee: whereupon his estate in the tenements [*754] and premises descended to William James, as heir-at-law, from whom the present defendant George James deduced title. And the defendant James pleaded that he, as the owner and occupier of Park Hall aforesaid, before and at the said several times when, &c., was and still is entitled to such way as last aforesaid; and he, in virtue of such his alleged title, and the other defendant as his servant, justified the trespasses complained of.

The plaintiff demurred to this plea, assigning for cause, "that it does not appear that the said supposed way in the said plea mentioned was in any manner granted or reserved to the said defendant George James or any person under, by, or from whom he claims, or that he hath any claim or title to the same." The defendants joined in demurrer; and on argument, in Michaelmas term, 1833, the Court of King's Bench gave judgment for the plaintiff, *Plant v. James*, 5 B. & Ad. 791.

Error was brought on the judgment; and the case was argued after Trinity term, 1835.¹

Sir *W. W. Follett*, for the plaintiff in error. It appears by the pleadings that the occupiers of Park Hall had an ancient right of way over the Woodseaves estate, to the high road; that that right was lost by unity of seisin, but that the actual user of the way continued down to the time when the indenture of November, 1812, was executed. The object of the agreement of partition was, that one daughter of Brooke Hector should take *the Park Hall estate, the other the Woodseaves, each estate as it was then used. The question is [*755] whether, as to Park Hall and the way from it over Woodseaves, an execution of that intent can be collected from the deed. The whole property, including both Park Hall and Woodseaves, is conveyed to Huxley, with all "easements, profits, privileges, advantages, emoluments, hereditaments, rights, members, and appurtenances whatsoever, to the said several messuages and tenements, lands and hereditaments" before described, "belonging or in anywise appertaining, or therewith usually held, used, occupied, or enjoyed." If Park Hall by itself had been so conveyed, there is no doubt that the way now claimed would have passed. Where a right of way has existed, from one man's estate over the estate of another, and the two properties have centered in the same person, and he again conveys away that estate to which the easement has belonged, the general rule is that, if he merely grants such estate "with the appurtenances," the right of way is not revived; but, if he grants it with all easements, &c., "therewith used and enjoyed," that operates as a revival. But other words, if clearly intended to have

¹ June 18th. Before TINDAL, C. J., LORD ABINGER, C. B., PARK, BOSANQUET, and VAUGHAN, Js., and ALDERSON, B.

such an effect, may operate in the same manner. In Bro. Abr. Extinguishment et Suspencion, pl. 15, it is said that if a way be extinct by unity of possession of the land from which, &c., and the mill to which, &c., and the whole descend to coparceners, and, upon partition, one of them has the land, and the other the mill and the way reserved to it, the way is revived, *tamen videtur*, that it is a new way. See 11 Vin. Abr. Extinguishment, (C) pl. 9. In *Whalley v. Tompson*, 1 B. & P. 371, a way [*756] had been enjoyed from *close A. over close B., the same person being seised of both. He devised his estate in close A. "with the appurtenances;" and it was held that the right of way did not thereby pass, for that the word "appurtenances" in the will had nothing to operate upon. The words of the will there did not testify the intention to pass the right of way. But, "if a man seised of Blackacre and Whiteacre, uses a way through Blackacre to Whiteacre, afterwards grants Blackacre, with all ways, &c., this way through Whiteacre shall pass to the grantee;" Com. Dig. Chimin (D. 3). In *Clements v. Lambert*, 1 Taunt. 205, where common appurtenant to a messuage had been extinguished by unity of possession, the party seised conveyed the messuage with all commons and appurtenances thereto belonging or in anywise appertaining; and this was held not to convey a new right of common; but it seems admitted there that, if the deed had contained such words as "used with the said messuage," the common, if shown to have been in fact so used, would have passed. *Morris v. Edgington*, 3 Taunt. 24, unless denied to be law, is decisive in favor of the plaintiff in error. There a man demised part of his premises, with certain rights of ingress, &c., and "all other ways and easements to the said demised premises belonging and appertaining;" and these latter words were held to pass a right of way on the grantor's own premises, which the grantor had himself used for access to the premises demised, *MANSFIELD, C. J.*, relying upon the intent of the grantor as shown by the circumstances of the case. The principle, that in such a case the intent must be consulted, was recognised in *Barlow v. Rhodes*. 1 Cro. & M. [*757] 439, S. C. 3 Tyrwh. 280. *Now, in the present case, after the grant of all ways and easements to the several messuages, &c., appertaining or therewith usually held, the habendum follows, to have, &c., "the said messuages or tenements called Park Hall and Park House, with the buildings, lands, and hereditaments thereunto belonging, thereby before granted and released," &c., "and every part and parcel thereof, with their and every of their appurtenances." It is clearly intended here, by the word "appurtenances," to convey the right of way in question to the uses pointed out as to Park Hall and Park House. It would otherwise be unmeaning to convey to Huxley by the previous clause the "ways" to the several messuages, &c., appertaining. He could not take them. Whatever vested in him by that clause was to pass immediately to the *cestui que use*, not to be held by him for a moment. The intention was, that Park Hall, and all that belonged to it, should pass to one family, and Woodsaves to the other; and that intention must prevail, though the words employed in the habendum itself are not strictly proper for the grant of a revived right of way.

R. V. Richards, contra. No intendment can be made against a grantor, or in favor of a grantee, in this case, because both the parties interested are in the situation of grantors. The object of the deed was to make the two estates entirely separate; and there is no ground for supposing an intention to revive an incumbrance or easement for the benefit of Park Hall, at the expense of Woodsaves. The words of conveyance to Huxley, "and all ways, easements," &c., are only general and usual words of conveyance; they could not carry to [*758] *the releasee a right of way, properly so called, over his own land: and, in the subsequent clauses, by which the estate is divided, no such words are used, nor is any intention shown but that of passing whatever strictly belonged to each farm. If the previous clause did not carry a right of way to Huxley, there is nothing in the subsequent clauses to which a different operation can be ascribed. An entire partition was contemplated. [TINDAL,

C. J. The partition would be complete, though the proprietor of one estate retained an easement over the other. Lord ABINGER, C. B. There had been an immemorial way from Park Hall over Woodseaves; the intention may have been only to make the two estates separate, as they were before.] The way does not appear to have been a way of necessity, or material to the use and enjoyment of the Park Hall estate: and, after the unity of possession, it was as if it had never existed. In *Morris v. Edgington*, 3 Taunt. 24, it was clear that some way was intended to pass; and the question was, what passed. The observations of BAYLEY, B., in *Barlow v. Rhodes*, 1 Cro. & M. 449; 3 Tyrwh. 287, referred to by the Court of King's Bench when giving judgment in *Plant v. James*, 5 B. & Ad. 794, apply to this part of the subject. [ALDERSON, B. If the general words of conveyance to the releasee to uses had been repeated in the clause limiting the uses as to Park Hall and Park House, would not the way in question have passed?] In that case it would. [ALDERSON, B. Is not the same thing done, more compendiously, by the present mode of conveyance? Lord ABINGER, C. B. Suppose no recovery had been necessary, and the coparceners had simply conveyed *Park Hall and Woodseaves, with the ways, &c., thereto [*759] belonging, to a trustee, who was to re-convey to two parties; and he had re-conveyed the respective estates with the appurtenances, to those parties, not specifying the ways. Must not the former deed have been looked at, to see what he meant to convey? The whole would have been considered as one conveyance. ALDERSON, B. Why should any way have been conveyed to the releasee to uses, unless it was intended to go to some one through him?] All the estate goes to him, and the ways are included: but there is no reason that the way insisted upon should pass to either cestui que use. The party claiming is bound to show that the deed is clear in his favor. The words relative to a right of way are used in that part of the deed where they cannot have the operation now contended for, and omitted in the clause which points out what the cestui que use of Park Hall and Park House is to have.

Sir W. W. Follett, in reply. The word "appurtenances," in the clause limiting the uses as to Park Hall, refers back, and embodies the several matters (ways, easements, &c.) enumerated in the previous clause. There could have been no doubt as to the effect of the word, if Park Hall alone had been conveyed in the form here used; and it can make no difference in the construction, that Park Hall and Woodseaves are both conveyed by the same deed. And it is a material circumstance that, in the earlier clause, the conveyance is of the ways, easements, &c., "to the said several messuages," &c., belonging. This is not noticed in the judgment of the Court of King's Bench. It is said in that judgment (p. 796) that the right of *way could not pass, because, [*760] "the soil itself of both estates passed;" and the words "all ways used, occupied, and enjoyed with the lands," could not "create a right of way de novo in the very lands the freehold of which was granted by the same sentence in the deed." That would be true, if the freehold of the two estates had vested in the releasee; but that was not so: at the moment when the deed was executed, the two estates passed each to the person to whose use it was conveyed; the cestui que use of Park Hall had the same estate, and at the same time, as if there had been no release to an intermediate party. Rights of way are conveyed by this deed, for some purpose; they cannot remain in the releasee; and, unless upon the construction suggested for the plaintiff in error, it does not appear what becomes of them. *Cur. adv. vult.*

TINDAL, C. J., now delivered the judgment of the Court.

This case comes before us upon a writ of error, brought on a judgment of the Court of King's Bench, given for the plaintiff below, upon a demurrer to the defendants' plea, that Court having in effect determined, by their judgment, that the right of way, under which the defendants below have justified the trespasses complained of, did not pass under the indenture of release, the fine, and the recovery, set out in the defendants' plea.

There will be no necessity for us to enter into the discussion of the principles of law, upon which the judgment of the Court below has proceeded; with [*761] respect to which principles there is no difference in opinion *between this Court and the Court of King's Bench. We all agree that, where there is a unity of seisin of the land, and of the way over the land, in one and the same person, the right of way is either extinguished or suspended, according to the duration of the respective estates in the land and the way; and that, after such extinguishment, or during such suspension of the right, the way cannot pass as an appurtenant under the ordinary legal sense of that word. We agree also in the principle laid down by the Court of King's Bench, that, in the case of a unity of seisin, in order to pass a way existing in point of user, but extinguished or suspended in point of law, the grantor must either employ words of express grant, or must describe the way in question as one "used and enjoyed with the land" which forms the subject-matter of the conveyance.

But, agreeing thus far with the Court below, we feel ourselves compelled to differ from it in the application of these principles to the present case. For we think the intention of the grantors to pass the way in question to the owner of the Park Hall estate appears from the deed itself, and that there are words contained in that deed sufficient to carry such intention of the parties into effect.

It appears from the recitals in the deed that, at the time of its execution, that is, on the 10th of November, 1812, the Park Hall estate, in respect of which the right of way is claimed, was vested in the two sisters, Maria the wife of Thomas Smallwood, and Elizabeth Hector, as coparceners in fee, claiming by descent from their father Brooke Hector; and that at the same time the Woodseaves House estate, which comprises the land over which the way extends and [*762] which came from their *mother, was vested in them, as tenants in common in tail general, under a settlement made upon their mother's marriage with their father Brooke Hector.

There can be no doubt, therefore, as before observed, but that any right of way, which before the unity of seisin of these two properties might have belonged to the Park Hall estate, over the lands of the Woodseaves House Farm, became suspended in law from the moment when such unity of seisin commenced; and that such suspension of the right would continue until the unity of seisin should cease by the determination of the estate tail.

It appears, however, from the averment in the plea, which is admitted by the demurrer to be true, that, long before and at the time of the making of the said indenture, &c., the occupiers for the time being of the Park Hall estate had "always been used to have and enjoy a certain way," therein described, over the closes in which, &c., and back again, "for the convenient use and occupation of Park Hall aforesaid;" and that such way had, before and at the time of the making of the said indenture, &c., "been always held, used, occupied, and enjoyed therewith." And that this was the very same way in dispute between the parties, is evident, as well from the fact that the defendants justify under it, as also because the plaintiff has not new assigned the trespasses as having been committed out of and beyond this way so described in the plea.

It appears therefore judicially to the Court that the way in question is a way that has always existed for the convenient use and enjoyment of Park Hall, and has always been held and occupied and enjoyed therewith; that is, not only before the unity of seisin of the land and way over it, but since and during such [*763] unity of *seisin, and notwithstanding the legal effect of it, and indeed up to the very time of the execution of the deed.

This being so, the reasonable inference must be that, in a deed making a partition between the two sisters, it was the intention of the contracting parties that each sister should take the whole of the estate allotted to her as her share, in the same plight and condition, as to all its conveniences and means of enjoyment, as it was held and occupied at the time such partition was made; and that no reason can be suggested, *a priori*, for supposing that a way which had

been always found useful and convenient for the enjoyment of the Park Hall estate, and which, for that purpose, had been always held and enjoyed by the tenants of Park Hall, and which continued so to be up to the very time of the partition made, should after the partition cease to be held and enjoyed for the same purpose by that sister to whom Park Hall was allotted. Indeed, so strong is that inference, that authorities are not wanting to show that, where a way has been extinguished by the unity of seisin of two estates, by the partition of the two the way is revived. Thus it is laid down as law, in 1 Jenkins's Centuries, Ca. 37, that "a way is extinguished by unity of possession, and is revivable afterwards upon a descent to two daughters, where the land through which, &c., is allotted to one; and the other land to which the way belonged, is allotted to the other sister; and this allotment, without specialty, to have the way anciently used, is sufficient to revive it;" and to the same point is the authority of Bro. Abr., title Extinguishment, 15, with this difference only, that he adds "*tamen videtur que est novel chimin.*"

But, independently of this general inference of intention, resulting from the object of the parties being *that of effecting a partition, we think the intention of the parties, that the way should pass, is to be inferred more [*764] particularly from the frame and texture of the deed itself.

For the grantors convey to Huxley, the grantee, the lands comprised in Park Hall, and the lands comprised in Woodseaves House Farm, and all ways, paths, "passages," &c., "to the said several messuages," lands, and hereditaments "belonging or in any wise appertaining, or therewith usually held, used, occupied, or enjoyed, or accepted," &c., "as part, parcel, or member thereof." Huxley therefore takes, under the latter words, the way in question, which, according to the allegation in the pleadings, was held and enjoyed with Park Hall: and we can assign no object for which this way could have been granted to him, except it was intended to pass it through him with the land itself, upon the several uses which are subsequently declared as to Park Hall.

Upon the first head, therefore, we think the intention of the grantors to pass this way sufficiently appears; and that the only question is, whether there are words in the release sufficient, upon their legal construction, to pass such right of way. Now the deed of release, after describing the premises intended to be conveyed in the terms before adverted to, proceeds in the habendum thus:—"To hold the said messuages or tenements called Park Hall and Park House, with the buildings, lands, and hereditaments thereunto belonging, thereby before granted and released, and expressed and intended so to be, and every part and parcel thereof, with their and every of their appurtenances," unto the said Thomas Huxley and his heirs, to such uses as are therein declared. The deed then contains a covenant, on the part *of Smallwood, that he and his wife would levy a fine of the Park Hall and Park House estate, and that [*765] the said fine so to be levied "of the said several messuages or tenements, lands, hereditaments, and premises thereby before granted and released, or expressed or intended so to be," should enure, and that the said Thomas Huxley and his heirs should stand seised of all the same messuages or tenements, lands, hereditaments, and premises, and every of them, and of every part thereof, with the appurtenances, to the several uses, &c., thereafter declared of and concerning the same respectively (that is to say), as to, for, and concerning the whole of the said messuages and tenements called Park Hall and Park House, with the buildings, lands, hereditaments, and appurtenances thereunto respectively belonging, to the use of such person, &c. And we think that the word "appurtenances," where it occurs in that part of the habendum which relates to the Park Hall estate, and, again, where it occurs in the declaration of the uses of the fine, is not confined to that which is in legal strictness an appurtenant, such as an easement, the enjoyment whereof has never been interrupted by unity of possession or extinguished by unity of seisin, but that it will let in and comprehend the right of way which has been "usually held, used, occupied or en-

joyed" with the Park Hall and Park House estate, as above expressed in the operative part of the deed itself, that is, the very way which is now in dispute. The deed itself forms a glossary for the word, by which glossary it is to be interpreted. (See the cases to this point well collected in the argument of counsel in the case of *The Marquis of Cholmondeley v. Lord Clinton*, 2 B. & Ald. 637.)

[*766] *It has been urged in argument that, even, if the word "appurtenances" is capable of receiving a more enlarged meaning from the context, yet the way in and over the lands of the Woodseaves estate did not and could not pass by those general words, for the soil itself of both the estates passed to the same trustee. But to this it appears to us to be a sufficient answer, that, whilst the Woodseaves lands are conveyed to Huxley to the use of him and his heirs, to the intent that he may suffer a common recovery, *no estate* whatever is conveyed to him in the Park Hall estate, but he is a mere releasee to uses only. And, with respect to such releasee, it is a known doctrine that, since the statute, he takes no interest whatever in the land; that on his account it can neither escheat nor be forfeited; nor is it subject either to dower or curtesy on account of his momentary seisin. And we know of no authority, and without it there is no reason for holding, that such momentary seisin of the land shall operate to extinguish a right of way by unity of seisin.

We therefore think we only construe the deed so as to carry into effect the manifest intention of the parties, when we hold the words of it to be sufficient, when explained by the context, to carry the right of way in dispute to the grantees of the Park Hall and Park House estate; and we think ourselves justified in such construction according to the well known principle, "*benignè faciendæ sunt interpretationes chartarum, ut res magis valeat quam pereat.*"

On these grounds we give judgment of reversal.

Judgment reversed.

END OF HILARY VACATION.

C A S E S
ARGUED AND DETERMINED
IN THE
COURT OF KING'S BENCH,

AND
UPON WRITS OF ERROR FROM THAT COURT TO THE EXCHEQUER
CHAMBER,

IN
Easter Term,

IN THE SIXTH YEAR OF THE REIGN OF WILLIAM IV.

The Judges who usually sat in Banc this term were,

LORD DENMAN, C. J.,
LITTTLEDALE, J.,

PATTESON, J.,
COLERIDGE, J.

REGULA GENERALIS.

EASTER TERM, 1836.

(Read in Court, Monday, April 18th.)

IT IS ORDERED, That the several Masters and Prothonotaries for the time being of the Courts of King's Bench, Common Pleas, and Exchequer, respectively, together with Thomas Adlington, Jonathan Brundrett, George Frere, James William Freshfield, James Hall, *Bryan Holme, William Lowe, Edward Rowland Pickering, Samuel White Sweet, William Tooke, [*768] Richard White, and Edward Archer Wilde, gentlemen, attorneys, be and the same are hereby appointed examiners for one year now next ensuing, to examine all such persons as shall desire to be admitted attorneys of all or either of the said Courts, from and after the last day of this present term, and that any five of the said examiners, one of them being one of the said Masters or Prothonotaries, shall be competent to conduct the said examination in pursuance of and subject to the provisions of the rule of all the said courts made in this behalf in Hilary term last past.

Signed,

DENMAN,
N. C. TINDAL,
ABINGER,
J. A. PARK,
J. LITTTLEDALE,
J. VAUGHAN,
J. PARKE,

W. BOLLAND,
J. B. BOSANQUET,
E. H. ALDERSON,
J. PATTESON,
J. GURNEY,
J. WILLIAMS,
J. T. COLERIDGE.

REGULATIONS

Approved by the Judges in Easter term, 1836,

For the Examination of Persons applying to be admitted as Attorneys of the Courts of King's Bench, Common Pleas, or Exchequer, pursuant to the Rule of Court made in Hilary Term, 1836.

WHEREAS, by a rule of the Courts of King's Bench, Common Pleas, and Exchequer, made in Hilary term, 1836, it was ordered that the several Masters [*769] and *Prothonotaries, &c. [reciting Rule Hil. T. 6 W. 4, antè, p. 744].

And whereas, by a rule of all the said Courts made in this present Easter term, it was ordered, that the several Masters and Prothonotaries for the time being of the said courts respectively, together with Thomas Adlington, &c. [reciting Rule of this term, antè, p. 767];

In pursuance of the said Rules, the following regulations for conducting the said examinations have been submitted to, and approved by, the Judges of the said Courts:

I. That every person applying to be admitted an attorney of any of the said courts, pursuant to the said Rules, shall, within the first seven days of the term in which he is desirous of being admitted, leave, or cause to be left, with the secretary of the said Incorporated Law Society, his articles of clerkship duly stamped, and also any assignment which may have been made thereof, together with answers to the several questions hereunto annexed, signed by the applicant, and also by the attorney or attorneys with whom he shall have served his clerkship.

II. That, in case the applicant shall show sufficient cause, to the satisfaction of the examiners, why the first regulation cannot be fully complied with, it shall be in the power of the said examiners, upon sufficient proof being given of the same, to dispense with any part of the first regulation that they may think fit and reasonable.

III. That every person applying for admission shall also, if required, sign and leave, or cause to be left, with the secretary of the said society, answers in [*770] writing, to such other written or printed questions as shall be *proposed by the said examiners touching his said service and conduct; and shall also, if required, attend the said examiners personally, for the purpose of giving further explanations touching the same; and shall also, if required, procure the attorney or attorneys with whom he shall have served his clerkship as aforesaid, to answer, either personally or in writing, any questions touching such service or conduct, or shall make proof to the satisfaction of the said examiners of his inability to procure the same.

IV. That every person so applying shall also attend the said examiners at the hall of the said society, at such time or times as shall be appointed for that purpose, pursuant to the said rule, as the said examiners shall appoint, and shall answer such questions as the said examiners shall then and there put to him, by written or printed papers, touching his fitness and capacity to act as an attorney.

V. That, upon compliance with the aforesaid regulations, and if the major part of the said examiners, actually present at and conducting the said examination (one of them being one of the said Masters or Prothonotaries), shall be satisfied as to the fitness and capacity of the person so applying to act as an attorney, the said examiners so present, or the major part of them, shall certify the same under their hands in the following form, viz.:

In pursuance of the rules made in Hilary and Easter terms, 1836, of the Courts of King's Bench, Common Pleas, and Exchequer, we, being the major part of the examiners, actually present at, and conducting the examination of A. B., of, &c., do hereby certify, that we have examined the said A. B. as

required by the said *rules, and we do testify that the said A. B. is fit and capable to act as an attorney of the said courts. [*771]

DENMAN,	W. BOLLAND
N. C. TINDAL,	J. B. BOSANQUET,
ABINGER,	E. H. ALDERSON,
J. A. PARK,	J. PATTESON,
J. LITLEDALE,	J. GURNEY,
S. GASELEE,	J. WILLIAMS,
J. VAUGHAN,	J. T. COLERIDGE.
J. PARKE,	

QUESTIONS AS TO DUE SERVICE,

To be answered by the Clerk.

- I. What was your age on the day of the date of your articles?
- II. Have you served the whole term of your articles at the office where the attorney or attorneys, to whom you were articulated or assigned, carried on his or their business? and, if not, state the reason.
- III. Have you at any time during the term of your articles been absent without the permission of the attorney or attorneys to whom you were articulated or assigned? and, if so, state the length and occasions of such absence.
- IV. Have you, during the period of your articles, been engaged or concerned in any profession, business, or employment, other than your professional employment as clerk to the attorney or attorneys to whom you were articulated or assigned?
- V. Have you, since the expiration of your articles, been engaged or concerned, and for how long time, in any and what profession, trade, business, or employment, other than the profession of an attorney or solicitor?

QUESTIONS AS TO DUE SERVICE,

To be answered by the Attorney.

- I. Has A. B. served the whole term of his articles at the office where you carry on your business? and, if not, state the reason?
 - II. Has the said A. B., at any time during the term of his articles, been absent without your permission? and, if so, state the length and occasions of such absence.
 - III. *Has the said A. B., during the period of his articles, been engaged or concerned in any profession, business, or employment other than his professional [*772] employment as your articulated clerk?
 - IV. Has the said A. B., during the whole term of his clerkship, with the exceptions above mentioned, been faithfully and diligently employed in your professional business of an attorney or solicitor?
 - V. Has the said A. B. since the expiration of his articles, been engaged or concerned, and for how long time, in any and what profession, trade, business, or employment, other than the profession of an attorney or solicitor?
- And I do hereby certify that the said A. B. hath duly and faithfully served under his articles of clerkship (or assignment, as the case may be) bearing date, &c., for the term therein expressed, and that he is a fit and proper person to be admitted an attorney.

In the Common Law Courts, at the Judges' Chambers, and at all the Law Offices, the following notice was posted up:—

Examination of Attorneys under the Rules of Hilary and Easter Terms, 1836.

The articles of clerkship and answers to questions touching the due service and good conduct of persons applying to be admitted attorneys, are to be left with the secretary of the Incorporated Law Society, at the hall in Chancery Lane, within the first seven days of term (viz. between the 28d and 30th of May inclusive).

The first examination will take place at the hall of the Incorporated Law Society, on Saturday the 4th of June, and commence at ten o'clock in the forenoon. The applicants are required to attend in the hall at half past nine on the day of examination.

Application for further information may be made to the secretary.

17th May, 1836.

R. MAUGHAM.

[*773] *Ex parte CHAPMAN, Esquire. *April 15.*

The Court will not grant a criminal information for calling a magistrate a liar, accusing him of misconduct in reference to his having absented himself from an election of clerk to the magistrates, and threatening a repetition of the same language whenever such magistrate came into the town, unless there appear an intention to provoke a breach of the peace.

*Sir John Campbell, Attorney-General, on behalf of John Chapman, Esquire, a magistrate of the borough of Bridgewater, moved for a rule to show cause why a criminal information should not issue against John William Trevor and his son. The son had held the place of clerk to the magistrates of the borough, up to February last, when the other magistrates, in Mr. Chapman's absence, elected another person to fill the office. Trevor, the father, subsequently complained in violent terms to Mr. Chapman of the transaction, and repeatedly called him a liar, and, in the presence of several persons, said that he was unfit to be a magistrate, and added that he should hear the same every time he came into the town. It was also sworn that Trevor, the son, had stated that Mr. Chapman had absented himself from the election on purpose. [Lord DENMAN, C. J. How could you frame an indictment on these facts?] They would support a charge that the two conspired to defame Mr. Chapman's character as a magistrate. There is at all events evidence for a jury, that the words were spoken of him in his character of magistrate; and it may, therefore, be laid as a misdemeanor, independently of the conspiracy. It certainly is not alleged that there was an intent to provoke a breach of the peace.

Lord DENMAN, C. J. I think it would not be proper to grant this rule. I do not see my way clearly enough *to treat this as a misdemeanor. I [*774] recollect a case where a rule was granted for words spoken against a magistrate, which was afterwards discharged, because they appeared to be spoken with reference, not to his conduct as a magistrate, but to his voting as an elector to some office. In the present case I at first thought the tendency of the words had been to provoke a breach of the peace.

PATTESON and COLERIDGE Js.,¹ concurred.

Rule refused.

¹ LITLEDAL, J. was absent on the Western circuit.

HOPKINS v. JAMES CROWE. *April 16.*

A hired driver of the cabriolet, having brought home the horse apparently much ill-used by him, the owner's son (in the owner's absence) called in a policeman, and told him that the driver had ill-used the horse. The policeman said that, if the complainant charged the driver with cruelty to the horse, he would take him into custody; the complainant said, "I do;" and the policeman apprehended the driver, under stat. 5 & 6 W. 4, c. 59, s. 9.

Held, that the complainant must be considered, not as a party giving information to the officer in consequence of which he was arrested, but as a principal causing the arrest to be made; and that he was not entitled to notice of action, which the statute requires to be given to persons sued for anything done in pursuance of it.

TRESPASS for assaulting and seizing plaintiff, compelling him to go to a station-house of the police, and imprisoning him there. Plea, Not Guilty. On the trial before Lord DENMAN, C. J., at the sittings in Middlesex after last term, it appeared that the defendant's father, Robert Crowe, a proprietor of cabriolets, had employed the plaintiff as a driver: that the plaintiff one night, at a late hour, having been out with a cabriolet and horse belonging to Robert Crowe, brought the horse home much distressed, and apparently ill-used: that the defendant, who was sitting up (in the absence of his father), called in a policeman and [*775] said to him, "Here is a man who has brought me home no money, and has ill-used my horse; I shall give him in charge:" that the policeman said he could have nothing to do with the money, but that, if the defendant charged the plaintiff with cruelty to the horse, he would take him into custody:

that the defendant said, "I do," and the policeman thereupon took the plaintiff to the station-house, where the defendant charged him before the inspector with ill-using the horse. Sir *F. Pollock*, for the defendant, submitted that, if he had a *bonâ fide* intention to act under the statute 5 & 6 W. 4, c. 59, sects. 2 and 9, he was entitled to notice of action under sect. 19:¹ and further, that the acts done by him were justified by sect. 9. The Lord Chief Justice held that the defendant, not being the owner of the horse, was not within the protection of the act, or entitled to notice, if he had directed the constable to apprehend the plaintiff. His Lordship refused to put the question of **bonâ fides* to the jury, but told them that, if the defendant had not directed the constable to apprehend, but had merely given him information, he was entitled to a verdict. The jury found for the plaintiff, damages 5*l*. [776]

Sir *F. Pollock* now moved, by permission, for a rule to show cause why a nonsuit should not be entered. The defendant might reasonably suppose that he was acting under the statute; and he was therefore entitled to notice. If he had been the owner, he would himself have been warranted in apprehending the plaintiff. But any person may give information to an officer for the purpose of causing an offender against the act to be apprehended; and the defendant, though not present at the ill usage, was justified, by what he saw, in making a charge against the plaintiff. If, in so doing, he did not use sufficient caution and particularity, he was still acting in pursuance of the statute, and entitled to the protection of notice, even if he was not altogether justified. *Pratt v. Hillman*, 4 B. & C. 269, where the defendant, having proceeded erroneously under the Building Act, 14 G. 3, c. 78, was held entitled to notice under that act, is a similar case in principle. [PATTESON, J. The persons justified by sect. 9 of this act are a constable or the owner, acting upon view or information given as is there pointed out. It is not under the statute that persons are enabled to give information; any one might do that at common law.] At least, if a party give it, but without sufficient particularity, he is not, therefore, liable to an action for false imprisonment. [PATTESON, J. Your argument would come to this, that the action ought to have been for maliciously charging the plaintiff.] The **question* is, whether the defendant really intended to act under the statute. The word "information" must be taken in the popular, [777] not the legal sense.

PATTESON, J.² This case is very clear. It was proved that the defendant not only told the officer something which he professed to know, but took upon himself to direct the officer to apprehend the plaintiff. He made the officer his servant for that purpose; and he is, therefore, liable in trespass. Then is he entitled to the protection of the statute? Section 9 of stat. 5 & 6 W. 4, c. 59, extends only to an officer, or the owner of an animal ill treated, acting upon view or information. The defendant was neither officer nor owner. It is said, that he was, nevertheless, entitled to the protection of notice, because he acted *bonâ fide*. But to what extent would such a rule go? For example, by a late

¹ Stat. 5 & 6 W. 4, c. 59, s. 2, imposes penalties (to be recovered on conviction before a justice) upon persons wantonly and cruelly ill-treating any horse, &c.

Sect. 9, is as follows:—"And for the more easy and effectual apprehension of all offenders against this act, be it further enacted, That when and so often as any of the said offences shall happen it shall and may be lawful to or for any constable or other peace officer, or for the owner of any such cattle or animal, upon view thereof, or upon the information of any other person (who shall declare his, her, or their name or names and place or places of abode to the said constable or other peace officer), to seize and secure by the authority of this act, and forthwith and without any other authority or warrant to convey any such offender before any one justice of the peace within whose jurisdiction the offence shall have been committed, to be dealt with according to law."

Sect. 19, enacts, that in all actions "for anything done in pursuance or under the authority of this act," fourteen days' notice in writing of such action and the cause thereof, shall be given to the defendant, who may plead the general issue and give this act and any other matter in evidence; and, if notice of such action shall not have been given in manner aforesaid, the jury shall find a verdict for the defendant.

² LITTLEDALE, J., was absent. See page 774, *antâ*.

act as to game, persons trespassing on lands may, in certain cases, be arrested by the occupier of the land or his servant, or other persons having certain authorities; and, in actions for anything done in pursuance of that act, notice of action is required, and other restrictions are imposed, 1 & 2 W. 4, c. 32, ss. 31, 47. According to the argument used to-day, a person not being owner or occupier of the lands, nor otherwise authorized, but thinking himself entitled to act, might arrest a trespasser, and, if sued, insist upon the protections of the statute. In *Pratt v. Hillman*, 4 B. & C. 269, the defendant was the party described by section 42 of the Building Act, 14 G. 3, c. 78, and having the right to proceed under that clause, though he had taken a wrong step; he was consequently entitled to *notice under section 100 of the same act. The [778] defendant here is not the person described by stat. 5 & 6 W. 4, c. 59, s. 9.

COLERIDGE, J. It is not necessary to infringe upon the case of *Pratt v. Hillman*, 4 B. & C. 269, or upon many others which show that, where a person has actually proceeded under a statute giving the kind of protection here claimed, he is entitled to the benefit of such statute, if he bona fide intended to act in pursuance of it. Here, the defendant is not brought within the act. If he had been a mere informer, sued as having given a defective or overcharged information, he might have been protected, according to the argument used to-day: but he was a principal, making an arrest by the hand of the police officer.

LORD DENMAN, C. J. I think that a verdict contrary to that given would have been wrong. The words used by the defendant were, in effect, a direction to the officer to arrest; and the defendant was not the description of person authorized by the statute to arrest, or entitled to protection according to the cases which have been referred to. The ninth section applies only to an owner or peace-officer himself seeing the nuisance of cruelty committed, or having information of it from another person, as directed by the statute. But the information meant is not the kind of communication made in this case: it is to be a substitute for view. To say, "I charge this person with cruelty to the horse," is giving no information. Rule refused.

[779] *In the Matter of HANCOCK. April 16.

The Court allowed an attorney to be admitted without a full term's notice, where all the other requisites had been complied with, and it appeared to be essential to his interests in his profession, that he should sail for India before the regular time of notice would expire. The application was made on the second day of the term, and admission was ordered to be on the last day of the same term.

Sir W. W. Follett applied that George Hancock might be admitted an attorney of this Court on the last day of this term, without giving a full term's notice. It appeared that G. H. had served his time under articles, that he had intended to leave England about the end of next Trinity term, for the purpose of practising as an attorney in the superior courts at Bombay; for which purpose it was essential that he should be admitted in a superior court in this country: that his brother (from circumstances mentioned in the affidavit) was obliged to proceed to Bombay speedily, and had taken his passage on board a ship which was under an engagement to the East India Company to sail on the 9th of May next (last day of Easter term), and that the brother would, during the voyage, instruct G. H. in the Hindostanee language, which would be of great service to him in his profession. Other circumstances were stated, showing that it was important to G. H. in his profession, to accompany his brother on the voyage; and it was further stated that the brother would be obliged to quit Bombay immediately on his arrival. Notices had been affixed at the King's Bench Office, at the Judges' chambers, and on the outside of the Court, and had been left

with the secretary of the Incorporated Law Society, stating the usual particulars, and also the intention to make this application. The application had been made before PATTESON, J., at chambers; but the learned Judge doubted whether he had *the requisite power at chambers. Sir W. W. Follett now referred to Ex parte Hulme, 4 Dowl. P. C. 88. [*780]

Per Curiam.¹ Ordered, that the said George Hancock be sworn, enrolled, and admitted, an attorney of this Court, on the last day of this term, upon producing all the necessary documents for that purpose.

¹ Lord DENMAN, C. J., PATTESON, and COLERIDGE, Js.

In the Matter of RIDLEY. April 18.

A party applying, on the first day of Easter term, to be admitted an attorney in that term, had affixed his notices in a name which he had taken since the expiration of his articles, having served in another name, to which his notices did not refer. The Court allowed him to be admitted, after affixing notices in both names for the rest of Easter term.

ON the first day of this term^a W. H. Watson applied for the admission of an attorney during the term. After the service under his articles, he had, in May 1835, changed his name from that which he bore during the service, to Ridley, and had always been known and done all acts since by that name. He had subsequently fixed up his notices under the name of Ridley, without any reference to his former name. There did not appear to be any reason to suppose that he had not acted bonâ fide. W. H. Watson contended that this was a compliance with the rule of T. 31 G. 3, 4 T. R. 379, which uses only the word "name."

Cur. adv. vult.

This day, Lord DENMAN, C. J., said that the party might fix up notices stating both names, to remain during the whole of this term, and, if no caveat was then entered, he might be admitted at the end of the term.

^a Before Lord DENMAN, C. J., PATTESON, and COLERIDGE, Js.

*In the Matter of PRANGLEY. April 18.

[*781]

Three days' notice must be given to the Master, under the rule of Hil. 6 W. 4, by persons applying to be admitted attorneys, exclusive of the day on which the notice is given, and of the first day of the term to which it relates.

NOTICE had been given to the Master, by Prangley, on the 12th of this month, of his intention to apply for admission as an attorney in next term. The Master received the notice, but was doubtful as to its validity, term beginning on the 15th, and the rule of H. 6 W. 4, s. 5, Antè, 747, requiring three days' notice at the least before the commencement of the term. The case was mentioned to the Court, at the Master's suggestion, on the first day of this term, by

Steer, who contended that the notice was given in good time, and referred to the rule H. 2 W. 4, VIII. 3 B. & Ad. 393, as showing that one day should be taken inclusively and the other exclusively, and stated that the applicant had acted bonâ fide upon such a construction of the rule H. 6 W. 4. [Lord DENMAN, C. J. We will confer with the other Judges.] *Cur. adv. vult.*

Lord DENMAN, C. J., now said, In the present case we will consider the three days, one inclusive and the other exclusive, as a sufficient notice: but in the future there must be three clear days, at the least, between the day on which the notice was given, and the first day of the term to which it relates.

[*782] *DOE on the Demise of OGLE and Others v. VICKERS. *April 18.*

V. mortgaged land in fee to O.; afterwards, and while V. remained in possession, S. claiming by a title anterior to the mortgage, brought ejectment against V., and a verdict was taken against him by consent, subject to arbitration as to what lease S. should grant to V. S. granted a lease to V., in pursuance of the award made. Held, that V. could not set up such lease as an answer to an ejectment brought by O.

EJECTMENT for land in Shropshire. On the trial, at the last Shrewsbury assizes, before WILLIAMS, J., the lessors of the plaintiff proved that in 1824 the defendant executed a mortgage to them, of the lands in question, in fee. Subsequently, the Earl of Shrewsbury and the Earl of Berwick brought ejectment against the defendant, who was still in possession, each for one undivided third part of the lands, claiming by title anterior to the mortgage; and, on the trial in 1829, a verdict was taken by consent for the plaintiff, subject to the award of a barrister, who was to direct what lease the then lessors of the plaintiff should grant to the defendant. The arbitrator awarded that a lease, on certain terms, should be granted to the defendant, of the two-thirds, by the Earl of Shrewsbury and Berwick, which lease was afterwards executed, and was unexpired at the time of the present action. The defendant had now suffered judgment as to one undivided third, and contended that the plaintiffs could not recover the other two undivided third parts, as the defendant held them by a title acquired subsequently to the mortgage, and upon which the mortgage could not operate. The learned Judge was of opinion that the defendant was not entitled to insist upon this lease, as against the mortgagees, and directed a verdict for the plaintiff.

[*783] **Talfourd*, Serjt., now moved for a rule to show cause why the verdict should not be set aside for misdirection, and a new trial had. The defendant must be considered as having acquired a fresh title since the mortgage. The mortgagees have only such title as the defendant had before the lease. The doctrine of estoppel is inapplicable here; though, perhaps, a court of equity might regard the defendant as trustees for the lessors of the plaintiff in the present case, on the ground that he was bound to perfect his title for his mortgagees; or, probably, he might be ordered to assign the lease to them. But, in point of law, he stands in the same situation as if he had been actually evicted, and had bought the land from the party evicting.

Lord DENMAN, C. J. He mortgages the land as his own; then ejectment is brought against him by a third party, in which he consents to a verdict, and takes a fresh lease from that party: what effect can this have as between himself and his mortgagees?

LITTLEDALE, J. If he found that the Earls of Shrewsbury and Berwick had a title superior to his own, it was his duty to get a good title. He cannot set up such a title, after he has obtained it, as an answer to this ejectment.

PATTESON and COLERIDGE, Js., concurred.

Rule refused.

¹ See *Doe dem. Hurst v. Clifton*, 809, post.

[*784] *DOE on the several Demises of JOHN MEE and THOMAS LEIGH, of JOHN MEE, of THOMAS LEIGH, and of JANE LIGHTFOOT MEE, v. MARY LITHERLAND, RICHARD MEE, JAMES LEIGH, and GEORGE LIGHTFOOT. *April 18.*

Ejectment against T., the tenant in possession, and L., who came in to defend as landlord. The lessor of the plaintiff having proved his title against L., the latter set up the title of the tenant T., who had paid rent to the lessor of the plaintiff as tenant from year to year. In order to show the determination of T.'s interest, the lessor of the plaintiff produced an admission signed by T. after the commission day of the assizes, whereby he acknowledged having attorned to L., upon L.'s executing a writ of possession in a prior ejectment. Held, that this admission was evidence against L. as well as T.

EJECTMENT for premises in Lancashire. On the trial before Lord DENMAN, C. J., at the last Liverpool assizes, it appeared that both parties claimed under William Lightfoot, who died in 1824, entitled to the residue of a term of 999 years, leaving John Mee and Thomas Leigh his executors and devisees in trust. The defendants Mary Litherland, Richard Mee, and James Leigh, held the premises as tenants to William Lightfoot, up to and at the time of his death, and had paid rent to him accordingly; and, since his death, they had paid rent to John Mee and Thomas Leigh up to August, 1835. The demises were laid in October, 1835. The lessors of the plaintiff proved their title to the leasehold interest; and, in order to show the determination of the interest of the three first named defendants, the plaintiff produced an admission, signed by the three after the commencement of this action and the commission day of the assizes, that they had attorned to the fourth defendant, George Lightfoot, who had obtained judgment against them in ejectment, and had taken out a writ of possession. On this evidence the Lord Chief Justice directed a verdict for the plaintiff, reserving leave to the defendants to move to enter a verdict for them.

**Crompton* now moved accordingly. It was necessary to show a title as against all four of the defendants; but, as against George Lightfoot, there [785] was no evidence of the determination of the interest of the other three defendants. An actual disclaimer, after the commencement of the action, would not make a forfeiture of which advantage could be taken in this action; *Doe dem. Lewis v. Cawdor*, 1 Cr. M. & R. 398; S. C. 4 Tyrwh. 852. The admission may be evidence of a disclaimer antecedent to the demise, as against the parties making it; but such an admission is no evidence against George Lightfoot. In *Doe dem. Grubb v. Grubb*, 10 B. & C. 816, there was a distinct act implying a disclaimer antecedent to the action; but in this case there is only an admission of such disclaimer, which admission was after action brought, and was made for the purpose of the cause. It was not evidence against George Lightfoot. The case here stands as if George Lightfoot were the sole defendant; in that case the admission of third persons would not be evidence as against him. [Lord DENMAN, C. J. How does George Lightfoot defend?] Probably as landlord; the other three are the tenants in possession.

Lord DENMAN, C. J. Assuming that, George Lightfoot must stand or fall by the title of the tenants: if they have no right he has none; and if they are beaten he must fail.

LITTLEDALE, J. If he defends as landlord in the right of the tenant, and that fails, his must fail too. If he enters into the consent rule as landlord, the *admission of the tenants as to their title is evidence against [786] him.

PATTESON, J. He is identified with the tenants as to this matter, by defending as landlord, and entering into the consent rule in that character.

COLERIDGE, J. concurred.

Rule refused.

WISE v. CHARLTON. April 18.

An instrument which, in other respects, was a promissory note, and had been properly stamped as such before making, contained in the body of it a memorandum that the maker had deposited certain title deeds with the payee as a collateral security. After it was made, it was stamped with a proper mortgage stamp on payment of the penalty. Held, that this was an assignable promissory note under stat. 3 & 4 Ann. c. 9, s. 1, and that it might be sued on by an endorsee, though the mortgage stamp was put on after the making, and though there was no assignment stamp.

If an instrument containing a mortgage be also a promissory note, it may still be stamped with a mortgage stamp, after the execution, provided it has a promissory note stamp on it at the time it is executed.

ASSUMPSIT by the endorsee of a promissory note against the maker. The declaration (which was filed before the operation of the rules Hil. 4 W. 4) de-

scribed the note as made 16th of April, 1823, in favor of John Goodwin Johnson or order, payable on demand, with lawful interest, for value received; and endorsed by Johnson to the plaintiff; and it averred a demand on 2d day of September, 1833. Plea, non-assumpsit. On the trial before Lord ABINGER, C. B., at the last Derby assizes, the note was produced; and it was in the following form:—

“ £120.

16th of April, 1823.

“ On demand I promise to pay to Mr. John Goodwin Johnson or order the sum [*787] of one hundred and twenty pounds, *with lawful interest for the same for value received; and I have deposited in his hands title deeds to lands purchased from the devisees of William Toplis, as a collateral security for the same.

“ W. CHARLTON.”

To this note there was a proper promissory note stamp at the time it was signed by the defendant, and a stamp of 2*l*. (the proper stamp for a legal or equitable mortgage of the amount of the note) had been imposed on payment of a penalty, subsequently to the commencement of the action. It appeared that the payee Johnson, and the plaintiff Wise, were partners as attorneys; that the note had been prepared by Wise, and the deeds mentioned in it left with him; but that, several years before the endorsement of the note to Wise, he, Wise, had delivered back the deeds to the defendant. It was objected, on the part of the defendant, that the latter stamp was unavailable, as having been made by the commissioners without authority; that, even supposing the commissioners had authority to stamp a promissory note after it was made, yet an assignment stamp was also requisite to enable an assignee to sue upon this instrument, and that it was an agreement and equitable mortgage, and not a promissory note assignable under stat. 3 & 4 Ann. c. 9, s. 1. The Lord Chief Baron received the note in evidence, but reserved leave to enter a nonsuit. The case went to the jury on some disputed facts respecting the consideration, and the plaintiff had a verdict.

Whitehurst now moved for a rule to show cause why a nonsuit should not be [*788] entered, or a new trial had *for misdirection. First, the commissioners had no authority to affix the 2*l*. mortgage stamp after the note was made, if the instrument is to be considered a promissory note. By stat. 23 G. 3, c. 49, s. 14, and 31 G. 3, c. 25, s. 19, the paper upon which promissory notes are drawn must be stamped before the note is made. And by the latter statute the commissioners are expressly prohibited from stamping any *paper*, &c., upon which a promissory note shall be written; and a note, not duly stamped, is not available in law or equity. Stat. 37 G. 3, c. 136, s. 1, enables the commissioners to stamp certain instruments after they are executed, upon the payment of a penalty; but that statute expressly excepts the *paper* upon which promissory notes may be written. The commissioners, therefore, had no authority to affix any stamp upon this paper upon which a promissory note had before been written. And sect. 5 of the act does not apply to a note which, when made, had not any stamp of the proper amount; *Green v. Davies*, 4 B. & C. 235; *Butts v. Swan*, 2 B. & B. 78. The regulations of former statutes on this subject are made applicable to the present stamp act, 55 G. 3, c. 184, by sect. 8 of that act. But, secondly, assuming that the commissioners had authority to affix the 2*l*. mortgage stamp after the note was made, and that that stamp would have been sufficient (stat. 55 G. 3, c. 184, sched. part 1, Mortgage) if the payee of the note himself had sued upon the note, yet, as the security has been assigned over, an additional stamp of 1*l*. 15*s*. was necessary (stat. 3 G. 4, c. 117, s. 2); for the assignment of the note is an [*789] assignment of the equitable mortgage *contained in the note. Thirdly, this was not an assignable promissory note, under stat. 3 & 4 Ann. c. 9, s. 1. It was an agreement, by which the maker undertook to pay Johnson the sum mentioned in the note, and Johnson undertook, on such payment, to deliver back the deeds. While the instrument was in the hands of the payee, the maker was entitled to require the re-delivery of the deeds upon the payment of the

money, and was not bound to pay if that re-delivery were refused. It never could have been the intention of the parties, that Johnson should have a right to hand over the defendant's title deeds, and that they should pass from hand to hand; nor could Johnson transfer the note without the deeds; for the defendant had a right to insist upon the delivery of the deeds from the person who had the note. It can make no difference that the deeds had been delivered up to the defendant before the endorsement; for a note which is not transferable at the time it is made, is not rendered so by any subsequent event; *Hill v. Halford*, 2 B. & P. 413. The present plaintiff cannot be in a better situation than Johnson. An agreement to pay money on re-delivery of deeds cannot constitute a promissory note under the statute of Anne, any more than a conditional order to pay would be a bill of exchange within the custom of merchants: the two securities are placed on the same footing by the statute. [LITLEDALE, J. In the case of a mortgage, or a deposit, the debt may be sued for by the mortgagee without delivering up the deeds. COLERIDGE, J. How can a collateral security fetter the principal security?] The securities are given by the same instrument; and the effect of the one *is therefore controlled by the other. [He then commented upon the evidence, and upon the remarks made upon it [*790] by the Lord Chief Baron to the jury.]

Lord DENMAN, C. J. With respect to the admissibility of the note in evidence, if it be a promissory note the stamp is right. And there is nothing to qualify its character. There is only a memorandum added of something else: but that is not imported into the main agreement.

LITLEDALE, J. This is an absolute promissory note; and there is no qualification. There is a memorandum that deeds are deposited as a collateral security; but, as a note, the instrument is quite valid without a mortgage stamp. Besides, the restriction, which prohibits stamping a promissory note after it is made, applies only to the promissory note stamp: the fact that an instrument, which, in the character of a mortgage, may be stamped after it is made, contains also a promissory note, amounts to nothing. The meaning of the legislature was, merely, that parties should not take their chance on a promissory note by delaying the stamping till they wanted to produce it in evidence as a promissory note: but that does not prevent a mortgage, which happens also to be a promissory note, from having a mortgage stamp put on after it is made. *Butts v. Swan*, 2 B. & B. 78, was a very different case. There the agreement stamp, put on after the instrument was made, was held insufficient, because the order to pay the money was so incorporated with the instrument *that the latter [*791] could not be used without calling in aid its operation as a promissory note. We need not enter into the question, whether it be necessary that there should be an assignment stamp. I do not know that an assignee of this instrument could at law avail himself of it, against the maker, as a mortgage.

PATTESON, J. This is not the less a promissory note, from its being also an agreement of another kind. The cases cited by Mr. *Whitehurst*, apply merely where there has been no promissory note stamp before the making.

COLERIDGE, J. If this be a promissory note, no difficulty remains. It is not the less a promissory note, from a memorandum of another kind being added, importing that a collateral security has also been given.

The Court took time for consideration as to the other grounds of motion; and afterwards (May 5th) the rule was
Refused.

*BARTLETT v. ANN PURNELL. April 19. [*792]

Whether an auctioneer be the agent of both purchaser and seller depends upon the facts of the particular case.

Therefore, where a party to whom money was due from the owner of goods sold by auction, agreed with the owner, before the auction, that the goods which he might purchase should be set against the debt, and he came the purchaser of goods, and was entered as

such by the auctioneer, it was held that he was not bound by the printed conditions of sale, which specified that purchasers should pay a part of the price at the time of the sale, and the rest on delivery.

ASSUMPSIT for cattle, and goods, sold and delivered, and on an account stated. Plea, non assumpsit. On the trial before **BOLLAND, B.**, at the last Somersetshire assizes, it appeared that the cattle and goods were put up to sale by public auction, under printed conditions of sale, according to which purchasers were to pay a certain per centage of the price at the sale, and the rest on delivery: that the defendant became the purchaser of goods to the amount of 145*l.*, and that her name was written down as such, at the time of the auction, by the auctioneer. The plaintiff was the executor of the late husband of the defendant, who claimed a legacy of 200*l.* under the will. The goods sold had been the property of the husband. On cross-examination of the plaintiff's witnesses, it appeared that, a short time before the sale, the plaintiff told the defendant that she might purchase goods to any amount under 200*l.*, and that it should go towards the legacy of 200*l.* This evidence was objected to on the part of the plaintiff, as tending to vary the printed conditions of sale; but the learned Judge received it, and told the jury, that if they believed that by the contract between the parties the legacy was to be set against the price of the goods, the claim was answered. The jury found for the defendant; and the learned Judge gave the plaintiff leave to move to enter a verdict for the plaintiff for 145*l.*

[*793] **Erle* now moved accordingly. The auctioneer was the agent of the defendant; and, by his writing down her name, she became a purchaser under the printed conditions. In *Gunniss v. Erhart*, 1 H. Bl. 289, see *Jones v. Edney*, 3 Campb. 285, it was held that declarations made by the auctioneer at the time of the sale, could not be received for the purpose of varying the printed conditions. *Powell v. Edmunds*, 12 East, 6, and *Shelton v. Livius*, 2 Cr. & J. 411, 2 Tyrwh. 420, are to the same effect. [**COLERIDGE, J.** The defendant said that she did not purchase at the sale. **PATTESON, J.** Your authorities relate merely to alterations made in the conditions of sale, affecting all purchases at the sale: the question here is, whether the purchase was under the sale by auction at all.] That cannot be disputed, after the plaintiff's name has been taken down as highest bidder. The defendant, in order to prevent this from having the usual legal effect, should have told the auctioneer, at the time of the sale, that she was not purchasing under the conditions.

LORD DENMAN, C. J. The jury must be taken to have found that the bargain related to the goods purchased at the sale, subject to the opinion of the Court whether the bargain could be given in evidence. I do not see why it should not, as it took place before the auction. The objection made is, that the auctioneer took down the defendant's name at the sale. No doubt an auctioneer may be agent for both parties: but here the bargain was, that what the defendant should buy was to be set off against the legacy. We do not overrule the former cases; but we consider them inapplicable. The auctioneer is not, *ex vi* [*794] termini, agent for both *parties: that depends upon the facts of the particula: case.

LITLEDALE, J. Goods are put up to auction; and a person to whom 200*l.* is due agrees to purchase, on the terms of the price being set against the debt, and goes to the auction in pursuance of this special agreement. It is said that the auctioneer is her agent: but it does not appear that he was so here. He put her name down; but the auctioneer must do so; he gives a bond to the commissioners of excise conditioned for his accounting for the duty. Then the sale to the defendant was exempted from the general conditions of the sale; and she was entitled therefore to set off the legacy.

PATTESON, J. We do not infringe upon former cases by refusing to grant this rule. When a party purchases under conditions of sale, he cannot give evidence to vary the contract. But here, properly speaking, the defendant does not so purchase. The bargain is made, subject to the original contract as to the payment.

COLERIDGE, J. The point suggested by Mr. *Erle* does not arise upon the facts. The question is, whether the defendant bought at all at this auction. If she did, there must be a verdict against her, as the record stands: but the jury were right in saying that she did not. The conversation was good evidence of that: she was to take the goods; but they were to be reckoned at the highest price bidden for them. The auctioneer wrote the name down; but that was merely the necessary way of fixing such price. Rule refused.

*LAWSON. *April 19.*

[*795]

Declaration complained that defendant published an advertisement in a newspaper, stating that a *capias* had issued against plaintiff, and that it had been impracticable to take him, and offering a reward for such information to be given to the sheriff's officer as would enable him to take plaintiff; innuendo that plaintiff was in indigent circumstances, incapable of paying the debt, and keeping out of the way to avoid being served with process. Plea, that a *capias* had been issued, endorsed for bail, and delivered to the sheriff; that defendant had kept out of the way to avoid being taken; that the sheriff's officer had been unable to take him; and that defendant had published the advertisement, at the request of the party suing out the writ, within four calendar months of the date of the writ, to enable the sheriff and his officer to arrest. Held, a justification.

CASE for libel. The first count stated that the plaintiff was the keeper of an hotel, and that the defendant printed and published in the Times newspaper a certain false, &c., of and concerning the plaintiff, as follows:—"Mr. Joseph Lay" (the innuendoes identifying this name with the plaintiff throughout). "Whereas a writ of *capias*, dated the 15th day of June last, has been issued against Mr. Joseph Lay, late of No. 31, Edgeware Road, hotel-keeper, but it has hitherto been impracticable to effect a caption, a reward of 5*l.* will be paid to any person who will give such information to Mr. Selby, sheriff's officer, of No. 31, Chancery Lane, as shall enable him to take the said Joseph Lay. The reward will only be paid on the caption being made." The libel was then further set out, describing the person of the plaintiff, and the following innuendo was added; "thereby then meaning that the plaintiff was in bad and indigent circumstances, and incapable of paying his just debts, and that he was keeping out of the way in order to avoid being served with process for debt." The second count stated the libel to be in the form of an advertisement.

Pleas, 1. Not Guilty. 2. That heretofore, and before the times, &c., to wit, &c., one Henry Cleeve, according to the form, &c., had sued and prosecuted, out *of the Court of Common Pleas in the county of Westminster, a certain writ of our lord the King called a writ of *capias* against the plaintiff, directed to the Sheriff of Middlesex, and dated, &c., by which writ our said lord the King commanded the said sheriff, &c. (setting out the *capias*); which said writ afterwards, and before the delivery thereof to the said sheriff to be executed as is hereinafter mentioned, to wit, on, &c., was marked and endorsed for bail for 80*l.* by affidavit, according to the form, &c., and which writ so endorsed, afterwards, to wit, on, &c., was delivered to Alexander Raphael, Esq., and John Illidge, Esq., who then and from thence until and at the time, &c., were sheriff of the said county of Middlesex, in due form of law to be executed; that afterwards, and before, &c., to wit, on the day and year last aforesaid, and from thence continually afterwards until the times of the committing, &c., the plaintiff hid and concealed himself, and kept out of the way, in order to avoid being taken and arrested by the sheriff; and thereby the plaintiff did, for and during all that time, hinder and prevent the said sheriff from taking and arresting him upon and by virtue of the said writ at the suit of the said H. C. for the cause aforesaid, although the said A. R. and J. I., as such sheriff, did during that time use and employ all necessary means, &c., in that behalf; that the writ of *capias* in this plea mentioned, and the writ of *capias* in the said supposed libels

respectively mentioned, are respectively the same writ and not other, &c. And that, the plaintiff remaining and continuing so concealed as aforesaid, and the said sheriff being and remaining wholly unable to find out, or take, or arrest him [*797] the plaintiff under the said writ as aforesaid, the *defendant, at the request of *George Stephen* the attorney of and for the said *Henry Cleeve* in that behalf, and in order to enable the said sheriff and *Philip Selby*, then being bailiff of the said sheriff in that behalf, and the same person as is named and described as *Mr. Selby* in the said supposed libels, to take and arrest the said plaintiff under and by virtue of the said writ, did, afterwards and within four calendar months from the date of the said writ, including the day of such date, to wit, at the said several times when, &c., print and publish, &c., as he lawfully, &c. Verification. Replication, de injuriâ, and issue thereon.

On the trial before Lord DENMAN, C. J., at the Middlesex sittings after Hilary term last, a verdict was found for the plaintiff on the first issue, and for the defendant on the second.

Thesiger now moved¹ for a rule to show cause why judgment should not be entered for the plaintiff, non obstante veredicto. The second plea shows no justification. On the trial, the defendant's counsel cited *Delany v. Jones*, 4 Esp. 191, which was an action for a libel contained in an advertisement, and where Lord ELLENBOROUGH is reported to have said, "That though that which is spoken or written may be injurious to the character of the party, yet if done bonâ fide, as with a view of investigating a fact, which the party making it is interested in, it is not libellous."² But the Lord *Chief Justice, on the trial of this [*798] cause, doubted the law laid down in that case; and said that he was not prepared to hold that bonâ fides was the only question, or that the right contended for existed, except for the purposes of public justice; and that, if that were so, every private transaction might be publicly inquired into by means of a newspaper.

Lord DENMAN, C. J. I do not know that I meant to say that the right existed, even in the case of a public charge; nor do I know that that is necessary for Lord ELLENBOROUGH's view. The libel in the case cited was inferential only. I have great doubt whether, there, the interest which the wife had in the inquiry could justify the offering a reward in a newspaper.

LITLEDALE, J. And this is a reward for the furtherance of a civil suit only.

The Court at first granted the rule; but afterwards (April 21) the Court said that they felt doubtful whether it should be granted, intimating a distinction between justifying on account of the cause of publication, and justifying by averring the truth of all the facts stated: and in the same term (May 5) his Lordship said that the Court thought the second plea contained a defence, and that, as the whole of it was proved, there must be no rule. Rule refused.

¹ Before Lord DENMAN, C. J., LITLEDALE, PATTESON, and COLBRIDGE, Js.

² The question in that case was, whether proof of the facts negated the malice, as there was only a plea of not guilty. See the judgment of HOLROYD, J., in *Fairman v. Ives*, 5 B. & Ald. 645, 6.

[*799] *ADDISON and JONES, Churchwardens, and RENDRICK and SPITTLE, Overseers, of the Parish of WEDNESBURY, v. ROUND. April 20.

A surveyor of the highways, quitting office (before stat. 5 & 6 W. 4, c. 50), claimed a sum as due to him from the parish; and, on the sum being guaranteed to him, agreed to deliver up his books. The sum was afterwards paid. In pursuance of a resolution of vestry, the books were demanded of him for the then churchwardens; and, in a subsequent year, they were also demanded by the churchwardens of the latter year: Held, that the churchwardens and overseers of the latter year were not entitled to maintain trover for the books; and, semble, that no parish officer of any year was so entitled.

TROVER for books containing the accounts, rates, assessments, and documents, concerning or belonging to the parish of Wednesbury. The particulars of demand, delivered under a judge's order, stated the action to be brought against the defendant as one of the late surveyors of the highways of the parish, to recover possession of one or more book or books, containing the rate or assessment for the repairs of the highways, and the names of the rate-payers in arrear, and the accounts as such surveyor, including the account of his colleague in office, for the year ending Michaelmas, 1827. The like for the years ending, respectively, 1828, 1829, 1830, 1831. Pleas, first, not guilty; secondly, that the plaintiffs were not possessed as of their own property, &c. The plaintiffs joined issue on the first and second pleas. On the trial before ALDERSON, B., at the last Stafford assizes, it appeared that the plaintiffs were the churchwardens and overseers for the year 1835-1836. The defendant was appointed surveyor of the highways in Michaelmas, 1826, and held that office up to Michaelmas, 1832, when he ceased to be surveyor. At that time he claimed a sum as due to him from the parish; and certain of the inhabitants personally guaranteed this sum; he thereupon agreed to give the books up; and the money was afterwards paid. In January, 1833, the then churchwardens demanded the books of him; and, in *the same month, a vestry meeting was held, at which it was resolved [*800] that the books should be deposited in the hands of the churchwardens; and, in conformity with this resolution, the defendant was required, by the then surveyors, to deliver up the books, to be deposited in the hands of the churchwardens. Shortly after, the surveyors applied to a magistrate; but, as was alleged, circumstances put it out of their power to pursue this application. In May, of the same year, the surveyors served another demand upon the defendant, to the same effect as their former demand. In the same year a rule nisi was obtained for a mandamus to him to deliver up the books, which was afterwards made absolute; and he made a return which was held good by this Court, upon argument, in Michaelmas term last (see *Rex v. Round*, ante, p. 139). In January last, Addison, the present plaintiff, being then and now one of the churchwardens, and the surveyors, again demanded the books of the defendant. In the same month a vestry meeting was held, at which it was resolved that the present action should be brought; and the chairman, on that occasion, again demanded the books of the defendant. Some of the books had not been given up at the time when the action was brought. To show a conversion, circumstances which took place at the times of the several demands were insisted upon; but the learned Judge was of opinion that no conversion was proved; and he was also of opinion that the present plaintiffs could not maintain the action. He therefore nonsuited the plaintiffs, giving them leave to move to have the nonsuit set aside, and a verdict entered for them, if the Court should be of opinion that there was evidence of a *conversion, and that the action was main- [*801] tainable by the plaintiffs. The argument on the second point only is reported here.

Ludlow, Serjt., now moved to enter a verdict. The right of the plaintiffs to maintain this action depends upon the question whether the parish have or have not a property in the books; for if the parish have such a property, then the churchwardens and overseers have, as keepers of these chattels for the parish, at least a special property in them; and a right of property is sufficient, without actual possession. The stat. 13 G. 3, c. 78, s. 48, provides that, after the accounts of the surveyor leaving office have been allowed or disallowed, all the books and assessments "shall be transmitted to the churchwarden or overseer of the poor for such parish," &c., "or, if the place be extraparochial, then to some principal inhabitant thereof, to be kept for the use of such parish," &c. Then stat. 58 G. 3, c. 69, s. 6, enacts that all rates and assessments, accounts and vouchers, of the surveyors of the highways, "and other parish books, documents, writings, and public papers of every parish, except the registry of marriages, baptisms, and burials, shall be kept by such person and persons, and de-

posited in such place and manner, as the inhabitants in vestry assembled shall direct; and if any person, in whose hands or custody any such book, rate, assessment, account, voucher, certificate, order, document, writing or paper shall be," "shall, after reasonable notice and demand, refuse or neglect to deliver the same to such person or persons, or to deposit the same in such place as shall be by the order of any such vestry be directed, every person so offending, and being [*802] *lawfully convicted thereof," "by and before two of his Majesty's justices of the peace, upon complaint thereof to them made, shall for every such offence forfeit and pay such sum, not exceeding," &c., "as shall by such justices be adjudged and determined." It is clear that the books, under the former act, ought to have been handed over to the churchwardens and overseers. [PATTESON, J. The act says, "to the churchwarden or overseer;" but you make the churchwardens and overseers all joint plaintiffs.] Where there is more than one churchwarden or overseer, delivery to one is delivery to all: all are therefore equally entitled to have the books delivered, for the use of the parish. Under both statutes, the books are clearly parish property: in parish accounts, the parish is always debited with the expense of the purchase of such books. The bells of the church, or the sacramental plate, would be described as the property of the parish officers in an indictment. [PATTESON, J. I doubt if they would be described as the property of the officers for years other than that to which the indictment related.] It is a continuing right; the change of officers can make no difference. It is true that no statute has yet gone so far as to make the churchwardens and overseers a corporation for this purpose. The rated parishioners are in the nature of *cestui que trusts* to the parish officers, who are trustees. [COLERIDGE, J. In a case in the Exchequer, *Underhill v. Ellicombe, M'Lel. & Y.* 450, it was held that debt would not lie by a surveyor of the highways to recover composition money; and it was said that there was no contract.] The surveyor may, in the present case, be charged as a wrong-doer. It is true that stat. 58 G. 3, c. 69, s. 6, gives another remedy; but a *proviso follows, "that every person who shall unlawfully retain [*803] in his custody, or shall refuse to deliver to any person or persons authorized to receive the same," "any book, rate, assessment, account, voucher, certificate, order, document, writing or paper belonging to any parish, or to the churchwardens, overseers of the poor, or surveyors of the highways thereof, may in every such case be proceeded against in any of his Majesty's Courts, civilly or criminally, in like manner as if this act had not been made." Here the circumstances prevented the summary proceeding.

Lord DENMAN, C. J. The nonsuit appears to me to have been perfectly right. A plaintiff does not, by showing that he has a right to obtain custody of a chattel, show that he has a property which entitles him to maintain trover. The act of parliament directs that the books shall be given up as the vestry shall direct, to be kept for the use of the parish; and it gives the means of enforcing this by a penalty. It may be unfortunate that this remedy could not be adopted in the present case; but such remedy is all that the statute gives. Great inconvenience would follow from a different construction.

LITLEDALE, J. It seems to me that this nonsuit was correct. (His Lordship then read the sixth section of stat. 58 G. 3, c. 69.) I do not say that the remedy given by penalty may not be cumulative: but it appears to me that there is no special property in the parish officers till the books are delivered up. There was a duty incumbent on the surveyor: but no right of possession vested in the plaintiffs.

*PATTESON, J. The legislature has not thought proper, so far as I [*804] can find, to vest the property of the books in the parish; it only directs who shall keep them. I do not even see how the parish officers of 1832 had the property, much less their successors. If we were to hold that this action would lie, we must hold that parish officers for any year may always sue for whatever their predecessors could have sued for. That was never so held. My

indenture did not amount to a *grant of anything for which ejectment lies, but merely to a permission to search and dig for ore. But it does [*809] not seem to follow that that permission actually demised and actually exercised would not be a hereditament enjoyed by the lessee; a hereditament being (in Lord Coke's well-known words, Co. Litt. 6 a) "whatsoever may be inherited," "be it corporeal or incorporeal, real or personal, or mixed;" and the statute gives this form of action for every hereditament enjoyed.

The evidence of use and occupation appears to us not only sufficient, but unusually strong.¹ Rule refused.

¹ The judgment on the other parts of the case is omitted.

DOE on the several Demises of HURST, PARTINGTON, and ORCHARD,
v. CLIFTON.² April 20.

Ejectment was brought against tenant in possession on the several demises of A. and B. Application was made to strike out B.'s name, on affidavit that the tenant claimed under B., that the action was defended to protect B.'s interest against A., and that A. claimed under a conveyance from B., which was asserted to be invalid by reason of fraud.

The Court granted the application, though B., who was in the East Indies, had not expressly authorized it, grounds being shown for inferring a general authority, in the party making the application, to act for B.'s interest with respect to the premises.

And this, although it was sworn, in opposition to the application, that the conveyance from B. to A. was *bonâ fide* and for good consideration, that B. had covenanted for further assurances to A., that the insertion of the name of B. was necessary to give legal effect to the conveyance, and that A. was in circumstances enabling him to defray the expenses of the proceedings, and to indemnify B.

In ejectment by a mortgagee, a defendant, not being the mortgagor, but in reality defending for his benefit, cannot set up a prior mortgage executed by him.

A mortgagor, in order to entitle himself to the benefit, in a court of law, of stat. 7 G. 2, c. 20, s. 1 (directing a re-conveyance by the mortgagee, plaintiff in ejectment, upon payment of principal, interests, and costs), must become a defendant in the action of ejectment.

Where he is not such defendant, the Court will not interfere, either under the statute, or in the exercise of its general power over actions in the Court.

Although the ejectment has been brought against the tenant of the mortgagor, and the Judge, at the time of the trial, treated the defendant as such tenant, and decided upon the evidence accordingly.

EJECTMENT for premises in Hertfordshire. The action was originally brought on the several demises of Hurst, Partington, Orchard, Thomas Neatby Stubbs, and Thomas Stubbs. In Trinity term, 1835, *Platt* *obtained a rule calling [*810] on the three lessors of the plaintiff first named, and the plaintiff's attorney on the record, to show cause why the names of Thomas Neatby Stubbs and Thomas Stubbs should not be struck out of the declaration, and why the plaintiff's attorney should not pay the costs of the application. Thomas Stubbs made affidavit that he had not authorized any person to use his name, that it was used against his will, and that he claimed no title or interest in the premises.³ The attorney of Clifton, and of Richard Stubbs (see page 809, note,² ante), who was the tenant in possession of part of the premises, made affidavit that the property had been devised to Catharine Neatby for life, remainder to trustees for Ann Stubbs the wife of Richard Stubbs for life, remainder to Thomas Neatby Stubbs in fee; remainder over, if T. N. Stubbs should, at the time of the death of Catharine Neatby or Ann Stubbs, be dead without having left any child or children of his body lawfully begotten then living; that Thomas Neatby Stubbs survived both Catharine Neatby and Ann Stubbs, and was now in the East Indies;

² There was another cause, Doe, on the same demises, against Richard Stubbs, which, as to all the points here noticed, turned upon nearly the same facts, and received the same decision, as Doe v. Clifton.

³ Nothing appeared in the affidavits on either side, showing any interest in T. Stubbs, besides the circumstance of his joining in the conveyance.

that the deponent believed that Hurst and Partington claimed title under deeds or instruments obtained from T. N. Stubbs under circumstances which the deponent was advised and believed rendered them invalid for fraud: that previous ejectments had been brought against Clifton, Richard Stubbs and others, as tenants in possession, for the same premises, on the demises of Hurst and Partington only, which had failed, except as to some copyhold premises, as to which a [*811] verdict had been found for *the plaintiff, subject to a question of law still pending; that in those actions the deponent acted nominally as attorney for the defendants, who claimed under Thomas Neatby Stubbs, but really for and at the instance and under the instruction of T. N. Stubbs, and for the protection of his interest against Hurst and Partington; that T. N. Stubbs continued, in his correspondence with the deponent, to express his anxiety on the subject, and had desired him to take measures for the security of the title deeds; and that the deponent believed that the name of T. N. Stubbs was used without his authority or knowledge, and against his will.

In opposition to the rule, Partington made affidavit that T. N. Stubbs and T. Stubbs had conveyed part of the premises to him bona fide, and for a valuable consideration; that he was informed and believed that the insertion of their names was necessary to give legal effect to the conveyance; and that he was able to bear the expenses of the ejectment or any proceedings incident thereto, and to indemnify T. N. Stubbs and T. Stubbs if he should be called on so to do. The plaintiff's attorney also made affidavit that, since the deaths of the devisors and of Catherine Neatby and Ann Stubbs, T. Stubbs and T. N. Stubbs had by deed bargained, sold, and assigned to Partington in fee, all their estate, right, title, interest, reversion, use, trust, property, claim, and demand whatsoever, both in law and equity, in a part of the premises, declaring therein that they had done no act to incumber the estate, and that T. N. Stubbs therein covenanted for reasonable further assurances, at his own expense, by himself and T. Stubbs, for and to the use of Partington in fee.

[*812] **Petersdorff*, in Trinity term, 1835, showed cause. Partington could not obtain leave from Thomas Neatby Stubbs to use his name, on account of his absence; but he claims under a conveyance from him and Thomas Stubbs. There may be some doubt whether the conveyance be legally complete; and it is just that the party taking it should be allowed to use the name of the parties conveying, for the purpose of getting rid of the difficulty of proof; and such a practice is very common. Even admitting that, where the parties, whose names are so used, themselves take the objection, this may be sufficient ground for the Court acceding to it, here Thomas Neatby Stubbs does not come into Court; the objection is taken by the attorney of a defendant in ejectment as the tenant in possession. In *Adams on Ejectment*, it is said, p. 211, 3d edit. (1830), that, "where demises are inserted in the names of any parties without their authority, the Court on motion will order such demises to be struck out of the declaration, *unless the justice of the case requires their insertion, and a sufficient indemnity is given.*" Here the justice of the case, and the sufficiency of the parties to indemnify, appear on the affidavits.

Platt, contra. This is an attempt to get rid of the question whether the conveyance was fraudulent, through which Partington claims. If the conveyance be not fraudulent, Partington's demise was sufficient. [PATTESON, J. Has there been any instance of this Court retaining names on the demise, on an indemnity, the parties being merely trustees?] No such instance can be found. [*813] [PATTESON, J. There might be a defect in the conveyance, *owing to an outstanding term.] Nothing of this kind is pretended.

Per Curiam.¹ This rule must be made absolute.

Rule absolute without costs.

The cause was tried before TINDAL, C. J., at the last Spring assizes at Hert-

¹ Lord DENMAN, C. J., LITTLEDALE, PATTESON, and WILLIAMS, Js.

ford. The lessor of the plaintiff, Orchard, proved a mortgage to him by Thomas Neathy Stubbs, in 1824, of his reversionary interest in the premises, expectant on the lives of Catherine Neathy and Ann Stubbs. The defendant produced a mortgage of the same premises to a different party, executed by T. N. Stubbs in 1822. For the plaintiff it was contended that T. N. Stubbs himself could not have been permitted to set up this prior mortgage against his own deed, and therefore that Clifton, who, as the plaintiff alleged, held possession as tenant to T. N. Stubbs, was, in like manner, precluded. The relation of Clifton, as tenant, to T. N. Stubbs, was disputed; but it was further urged, and appeared from the evidence, that the action was, in reality, defended for the benefit of T. N. Stubbs; and the Lord Chief Justice, considering that to be so, held that the mortgage of 1822 could not be set up. A verdict was therefore taken for the plaintiff on Orchard's demise, and for the defendant on the others. *Platt*, in the present term,¹ moved, by leave reserved, for a rule to show cause why a nonsuit should not be entered; contending that the defendant was not shown to be tenant to T. N. Stubbs, and was not otherwise identified with him. And now

**The Court* (having taken time to confer with TINDAL, C. J.) said that [814] the defendant appeared, by the evidence, to be merely a nominal one for the benefit of T. N. Stubbs, the mortgagor in the deed under which the lessor of the plaintiff, Orchard, claimed; and that, as it was not competent to T. N. Stubbs to derogate from his own mortgage by showing a prior deed, so neither could the defendant for his benefit: see *Doe dem. Ogle v. Vickers*, ante, p. 782. And the rule was refused.

On a subsequent day of this term (April 21st), *Platt* obtained a rule to show cause why it should not be referred to the Master to ascertain what was due for principal and interest, on the mortgage deed of 1824, and to tax the costs of the lessors of the plaintiff, and why Orchard should not accept the amount of such principal, interest, and costs in discharge of the mortgage, and execute a reconveyance to T. N. Stubbs, and deliver up all deeds, &c., or why, in case of Orchard's refusal so to do, the money should not be paid into Court to abide the further order of the Court: and why proceedings should not be stayed in the mean time. The affidavits in support of the rule stated the circumstances of the above-mentioned trial; that T. N. Stubbs was, and had for several years been in India; that he was the party who had a right to redeem the mortgage; that no suit in equity was pending to foreclose or redeem; and that judgment was not signed in either cause. The attorney who gave instructions for this application made affidavit that he was duly authorized to act for T. N. Stubbs in *this [815] behalf. In Trinity term following, June 11th, 1836,

Kelly and *Petersdorff* showed cause. This is an application under stat. 7 G. 2, c. 20, s. 1; but that statute applies only where the person having right to redeem "shall appear and become defendant" in the action of ejectment.

Platt, contra. The intention of the act was that the mortgagee should obtain only principal, interest, and costs, but not the land itself. This intention will be defeated if such an objection prevail: and especially as the mortgagor was identified with the defendant at the trial. The case is clearly within the equity of the statute. The application is on behalf of the mortgagor. At all events, the Court may suspend the proceedings, by its general power.

Lord DENMAN, C. J. We might, perhaps, wish that we had the power which the applicant contends that we have; but we have none such, directly or indirectly. The applicant does not answer the requisite which the statute makes essential, and for which there are good reasons. If we have not the direct power, under the statute, neither can we exercise such a power indirectly, for the sake of doing justice in a particular case.

LITTLEDALE, J. It is reasonable enough that the applicant should be relieved upon payment of principal, interest, and costs: but the question is whether this

¹ April 16th. Before Lord DENMAN, C. J., PATTERSON, and COLERIDGE, Ja.

Court has the power to give such relief. The courts, for many years, have endeavored to save expense in *proceedings arising from mortgages; but, [*816] in the case of ejectment, their power is defined by statute. One condition is, that the mortgagor should make himself defendant: that is a preliminary without which this Court has no jurisdiction, any more than it would have to relieve against a forfeiture for non-payment of rent.

PATTERSON, J. The words of the statute are, "and who shall appear and become defendant or defendants in such action." This applicant has not become a defendant. I do not see how we could exercise any equitable jurisdiction here, without utterly disregarding the statute.¹ Rule discharged.²

¹ WILLIAMS, J., was absent.

² See *Doe dem. Tubb v. Roe*, 4 Taunt. 887.

DOE on the several Demises of DANSON and Others v. PARKE. April 21.

A. being tenant in fee simple of customary land which passed by bargain and sale with surrender and admittance, became bankrupt, and the commissioners assigned the land to the assignees. Afterwards the bankrupt died; and, after that, the assignees were admitted.

Ejectments being brought, on the demises of the bankrupt's heir-at-law, and of the assignees, both laid between the bankrupt's death and the admission. Held, that the plaintiff must recover on one or the other demise; for that the title was not in abeyance; but, if the assignees' title was not perfect, it was in the heir.

EJECTMENT for messuages and lands in Cumberland. There were six demises. The first three were laid on the 10th of June, 1826, and were, first, by John Danson; secondly, by William Blendall, Thomas Bowes, and Richard Mellon; thirdly, by Blendall and Mellon, only. The other three demises were by John Danson, by Blendall, Bowes, and Mellon, and by Blendall and Mellon, and were laid on the 10th of March, 1832. *On the trial before PARKE, B., at [*817] the last Carlisle assizes, it appeared that the premises were customary freehold, and that, by the custom, they passed by deed of bargain and sale presented and enrolled at the manor house with surrender and admittance. John Danson was in possession in 1790; and his admission in that year was produced. It was further proved, on the part of the plaintiff, that John Danson continued in possession up to the 27th of February, 1821, on which day a commission of bankruptcy issued against him, and Blendall, Bowes, and Mellon, were appointed assignees. By bargain and sale of the 10th of April, 1821, duly enrolled in Chancery, the premises were assigned to them by the commissioners. The defendant claimed through a party who came into possession at a later period in 1821, under an equitable mortgage; but no evidence was offered of the title of such party. The said John Danson died in 1830, leaving his son, John Danson, his heir-at-law; and Bowes died between April, 1832, and April, 1833. On the 3d of July, 1835, Blendall and Mellon were admitted, and the admission was signed by the lord of the manor. On this evidence, the learned judge directed a verdict for the plaintiff, on the demise of John Danson in 1832.

W. H. Watson now moved³ for a rule to show cause why the verdict should not be set aside, and a new trial be had for misdirection. The proof given on the part of the plaintiff showed that the title was not perfected in the assignees; for the assignment passes nothing without surrender and admittance; and, even [*818] *supposing the admittance in 1835 to be evidence of a surrender assigned to by the lord, it did not prove a surrender before the day of the latest demise, the 10th of March, 1832. It has never been decided that a surrender and admittance have relation back to the bargain and sale, in the case of customary freeholds; though that is the case as to copyholds, see *Parker v. Bleeke*, Cro. Car. 568. "Customaryhold" is first mentioned in the bankrupt Act, 6 G. 4, c. 16, ss. 64, 68, &c. On this ground, the learned Judge directed

³ Before Lord DENMAN, C. J., LITTLEDALE, PATTERSON, and COLERIDGE, Js.

the verdict to be taken upon the demise of the heir-at-law. But the assignment divested the title of the bankrupt and his heir; and the plaintiff producing the proceeding in bankruptcy could not dispute their effect. And, indeed, the provision of stat. 49 G. 3, c. 121, ss. 10, seems to apply. [LITLEDALE, J. You say the title was in a sort of neutral state.] It was so: either as an inchoate title in the commissioners, or as an anomalous instance of a title in abeyance, under the peculiar operation of the bankrupt laws. [Lord DENMAN, C. J. A party who has a possession of twenty years has a title against any one coming in after, unless the latter shows title, see *Doe dem. Smith v. Webber*, 1 A. & E. 119. The question is, as to the effect of what has been done under the bankruptcy.] *Cur. adv. vult.*

Afterwards in this term (May 5th) Lord DENMAN, C. J., delivered the judgment of the Court.

We do not consider that the defendant can raise any question on stat. 49 G. 3, c. 121, s. 10. The plaintiff must recover in one way or the other. Either the bankrupt had not parted with the land, and then the *plaintiff must recover on the demise of the heir-at-law; or he had parted with it, and then the title of the assignees is good. Rule refused. [*819]

ATKINS and Another v. OWEN. April 21.

If a party receiving a bill payable to order, for the purpose of getting it endorsed for another person, procures the endorsement, pays in the bill to his own account at his banker's, with intent to appropriate the proceeds, and, before the bill is due, draws upon such account (though not specifically upon the credit of the bill), and his draft is honored, an action of trover may be commenced against him before the bill is due, but not an action for money had and received.

Plaintiff having been nonsuited for not producing a document on the trial, the Court set aside the nonsuit, on payment of costs, upon the affidavit only of the plaintiff's attorney, that he, the attorney, "as soon as he found that the action was likely to come on," had commenced inquiries to ascertain in whose hands the document was, and, upon discovering this, had immediately (through a person who promised to procure it) made efforts to obtain it, but had obtained it too late for the trial, and now had it.

ASSUMPSIT for money had and received. Plea, general issue. The plaintiffs having been nonsuited by reason of their not producing in evidence a bill alleged to have been misapplied by the defendant, the Court, on motion for a new trial, in Michaelmas term, 1834, held the nonsuit right, but granted a rule nisi for a new trial. *Atkins v. Owen*, 2 A. & E. 35. The rule was made absolute in last Hilary term, January 18th; and the *cause was again tried at the last Exeter assizes, before LITLEDALE, J. On this trial, it ap- [*820]

¹ The motion was made on an affidavit by the plaintiff's attorney, that, as soon as he found that the action was likely to come on, he commenced inquiries to ascertain in whose hands the bill was, and that, upon discovering this, he immediately made efforts to obtain it, through a person who promised to procure it; that deponent obtained it, but too late for the trial, and that he had it now in his possession.

Barstow showed cause. The plaintiff's attorney might have withdrawn the record, and, as the matter now stands, there is not a verdict against the plaintiff, but only a nonsuit. There is no precedent for setting a nonsuit aside under such circumstances. [Lord DENMAN, C. J. Is there any precedent for refusing?] In *Shillito v. Theed*, 6 Bing. 758, a nonsuit was set aside on the payment of costs, upon the ground of the absence of a material witness; but the witness had been subpoenaed. Here no inquiries were commenced till the plaintiff's attorney found the trial was likely to come on. It is not said that there was any application to the defendant. No dates are given in the affidavit. The plaintiff's attorney must be taken to have known, throughout, the necessity of producing the bill. [Lord DENMAN, C. J. It was a very strict application of the rule.] No breach of faith is imputed to the defendants. At least it should be made a condition of the rule that, if the defendant choose to pay the money, the plaintiff shall pay the costs of the former trial.

Sir W. W. Pollett, *contrá*, was stopped by the Court.

Lord DENMAN, C. J. There is no danger here of our setting a bad precedent. The rule must be made absolute, on payment of costs.

LITLEDALE and WILLIAMS, Js., concurred. (COLERIDGE, J., was absent.)

Rule absolute, on payment of costs.

peared that a bill of exchange for 100*l.* had been remitted to the plaintiffs in discharge of a debt due to them from Studdy; that the bill (now given in evidence) was payable to the order of Studdy, sixty days after sight; that the plaintiffs handed the bill to the defendant, in order that he might get it endorsed for them by Studdy; and that the defendant got it so endorsed, paid it to his own account at his bankers' (endorsed to them), and claimed a right to retain the proceeds. It also appeared that the bankers had placed the bill, in the usual way, to the defendant's credit; and that the defendant, after paying in the bill, had drawn upon his account at the bankers', though not specifically on the credit of this bill. He had frequently been allowed to overdraw his account at the bankers', and it was overdrawn when this bill was paid. They charged interest upon it, by reason of the amount having been advanced before it became due. The bill when paid in was not accepted; the bankers in due course forwarded [821] it for acceptance and for payment. It *remained in their books to the defendant's credit, all the time it was running. The action was commenced before the bill became due, and the learned Judge, on that account, directed a nonsuit, giving leave to enter a verdict for the plaintiffs.

Crowder now moved accordingly. *Trover* would clearly have lain; and the defendant is liable, under the circumstances, in an action for money had and received, though the bill, not being due, had not actually been turned into money when this action was commenced. It passed as money in the account on which the defendant drew, and that is sufficient. In *Reed v. James*, 1 Stark. N. P. C. 134, where a creditor issued execution against his debtor's goods, and took a bill of sale of them from the sheriff, it was held that the assignees of the debtor (who had committed acts of bankruptcy before the execution) might sue the execution creditor for money had and received, though the goods had not in fact been turned into money. Here, if the defendant had got the bill discounted, there could be no doubt as to the form of action; and he might have done so. It would not lie in his mouth, in such a case, to say that the bill was not yet due, when he could not deny that he had received the money on it. The same would be the case if he had pledged the bill. It has in fact been turned into money, since it has gone to the credit side of his account. When a party, having bills in the hands of his banker, draws generally upon his account, each bill is in fact drawn upon. If an insurance broker adjust a loss upon a policy, and [822] the underwriter gives him *credit in account, or a bill, for the amount, the assured may recover against such broker for money had and received, although no money may have come to his hands; *Andrew v. Robinson*, 3 Camp. 199; *Wilkinson v. Clay*, 6 Taunt. 110. [PATTESON, J. In such cases, by the course of dealing, the broker must be taken to have admitted the receipt of money, see *Scott v. Irving*, 1 B. & Ad. 605, and the cases there cited; if the underwriter fails, it is not open to the broker to defend himself by saying that money has not passed: that is the ground of decision.] The like ground exists here.

Lord DENMAN, C. J. The defendant's conduct appears to have been such, that I should have been happy if we could have granted this rule; but if it is evident that the action does not lie, it would be a waste of time to do so. *Trover* would clearly have lain; but a different form has been adopted; and, viewing the case as if, at the present moment, a bill not yet due were taken by the defendant and handed to his banker, what money is had and received to the use of the plaintiff? The defendant receives credit in his bankers' books on the expectation that the bill will be paid. If it is not paid, and he is held liable in this action, he may have to repay the amount twice over, being liable also to the banker. His being a wrong-doer cannot vary this view of the case.

LITLEDALE, J., concurred.

PATTESON, J. I am of the same opinion. This is a case, not of money had [823] and received to the use of the *plaintiff, but money lent by the banker to the defendant. The case is as my Lord has put it.

COLERIDGE, J., concurred.

Rule refused.

JEFFERY v. EDMUND POLLEXFEN BASTARD, Esquire. *April 21.*

In taking sureties in a replevin bond, the sheriff is to exercise a reasonable discretion in deciding upon their sufficiency; and, in an action for taking insufficient sureties, it is for the jury to decide whether he has used such discretion or not.

The sheriff or replevin clerk is not bound to go out of the office to make inquiries; but, if the sureties are unknown to him, he ought to require information, beyond their own statement, as to their sufficiency.

Where persons of respectable appearance are brought to the replevin clerk as sureties by the attorney's clerk on behalf of the party replevying, their circumstances being unknown both to the attorney's clerk and to the replevin clerk, and the latter causes the sureties to make affidavit in detail as to their sufficiency, with which he is satisfied, and an action is afterwards brought against the sheriff for taking insufficient sureties, the jury may properly find that the inquiry made does not excuse the sheriff.

On the trial of such an action, the bond, but not its amount, being admitted on the pleadings, evidence was gone into on both sides, upon the question whether or not, under the circumstances above stated, the replevin clerk had used reasonable caution. The replevin bond was referred to by both parties during the trial, and was stated to have been taken in double the value of the goods; and it was in court, ready to be produced; but, by an oversight, the plaintiff did not formally put it in, nor was it expressly noticed as a part of the evidence in the cause, till a verdict had been given for the plaintiff. The Judge stating to the Court that he considered it as in effect put in: Held, on motion to enter a verdict for nominal damages for want of proof of the bond, or other evidence of the value of the goods, that the bond must be considered as having been in effect proved at the trial.

In an action against the sheriff for taking insufficient sureties in a replevin bond, the penalty of the bond is the limit of damages.

CASE against the late sheriff of Devon, for taking insufficient sureties, Thomas Hallett and William Bellworthy, in a replevin bond. The distress was stated to have been of great value, to wit, 1000*l.*, and to have been taken for arrears of rent, to wit, 75*l.*; and it was alleged that the now plaintiff recovered in the replevin suit 75*l.* arrears of rent, and 159*l.* costs; and that, by the sheriff's default, the now plaintiff lost the benefit of the distress, and failed to recover his costs, &c. First plea, that, before the taking of T. H. and W. B. as such sureties, to wit, on, &c., the defendant, as such sheriff, &c., "instituted and made a due, and proper, *and reasonable inquiry into the circumstances, [*824] estate, substance and condition" of T. H. and W. B., in order to ascertain whether they and each of them was and were a good and sufficient surety and sureties; and that, upon such inquiry, and at the time of their becoming sureties, each of them "appeared to the defendant, as such sheriff as aforesaid, to be, and at that time ostensibly was, a good, able, sufficient and responsible pledge and surety," &c. Verification. Second plea, that T. H. was a good surety. Verification. The replication traversed the above statements in the two pleas respectively, and tendered issue to the country. Joinder. On the trial before LITLEDALE, J., at the last Spring assizes at Exeter, evidence was given for the plaintiff, to show the condition in life of the sureties; and the defendant then proved that, on October 24th, the day before the time for replevying expired, the clerk of the attorney for Leatt, the party replevying, came to the office of Drake, the defendant's replevin clerk at Exeter (who now gave evidence for the defendant), and tendered the two sureties. Drake questioned them at first separately, and afterwards together, as to their property, and took down the answers. They had the appearance of small farmers. Drake did not know them; nor did it appear that the attorney's clerk had any personal knowledge of them. The examination lasted half an hour. Drake finally took affidavits from the sureties, which were as follows:—

"Thomas Hallett, of Ottery St. Mary, in the county of Devon, yeoman, maketh oath and saith that he resides in the parish of O. St. M. in the said county, *on a leasehold property held under Sir John Kennaway, Bart., [*825] for a term of ninety-nine years, determinable on three lives. That the

¹ About thirteen miles from Exeter.

said lease was granted to him by the said Sir J. K., and this deponent has farmed the property ever since, and is now in the possession and enjoyment thereof. That there is a dwelling-house upon it, in which this deponent and his family reside, and the furniture therein is his own property; and this deponent further saith that there is no mortgage or charge on the said property or furniture, and that he is the sole and exclusive possessor thereof. And this deponent further saith that, under the will of his late uncle, Henry Pooke, he is entitled to the sum of 100*l.*, payable on the death of his mother, now aged seventy-three, and that the trustee under the said will is George Barne, Esq., of Tiverton, in the said county: and this deponent further saith that he is worth, over and above what debts he owes, the clear sum of 160*l.* and upwards.

"And this deponent, William Bellworthy, of Rockbeare,¹ in the said county, yeoman, maketh oath that he is a housekeeper in the parish of R. aforesaid; that he is the owner of the fee-simple of a cottage, formerly two cottages, in R. aforesaid, and an orchard or garden thereto belonging, now occupied by Francis Marker, at the annual rent of 5*l.* 5*s.*; that there is no mortgage or charge on the said property; and this deponent is the sole and exclusive possessor thereof: and this deponent lastly saith that he is worth, after all his debts are paid, the clear sum of 160*l.*"

[*826] Drake stated at the trial that this was the course he *always took in such cases: that he required the affidavits because he knew nothing of the parties: and that, at the time, he was quite satisfied in his judgment that they were responsible people. He also stated that the replevin bond was taken in double the value of the goods. The learned Judge expressed his opinion that this examination was not sufficient, and that inquiry ought to have been made on behalf of the sheriff among persons who had means of knowing the sureties. No witness acquainted with the circumstances of Hallett and Bellworthy was called for the defence. The plaintiff had a verdict for 160*l.*

Crowder now moved for a rule to show cause why there should not be a new trial on the ground of misdirection; or why the damages should not be reduced to nominal ones, on the ground after-mentioned. The inquiry was sufficient under the circumstances. The sureties were presented by the clerk of an attorney known in the town; and the replevin clerk was not bound to enter upon an investigation at two distant places before granting the replevin. The affidavits are available as showing the minute inquiry to which the parties had been subjected. The statements in them are very precise, and mention the names of known individuals, whom the parties would not refer to falsely upon oath. [Lord DENMAN, C. J. These are mere voluntary affidavits.] In *Hindle v. Blades*, 5 Taunt. 225, 1 Marsh. 27, it was held that the sheriff was not bound to warrant the sufficiency of the sureties: *Saunders v. Darling*, Bull. N. P. 60, [*827] was there cited, where it is said that slight evidence of *insufficiency is enough to throw the onus of proof on the sheriff, "for the sureties are known to him, and he is to take care that they are sufficient." But *MANSFIELD*, C. J., said, "I cannot think the statute 11 G. 2, c. 19, s. 23, meant to throw on the sheriff this onus;" and *HEATH*, J., observed,—"The mischief, before the statute, was, that the sheriff used to accept mere men of straw for sureties. But the sheriff cannot cast up the man's accounts to see the real state of his property." [Lord DENMAN, C. J. There a *prima facie* case of respectability appeared. *LITTLEDALE*, J. In this case the replevin clerk said that he took affidavits because he knew nothing of the parties.] They appeared to be small farmers and respectable persons. [*COLERIDGE*, J. How could the credit and apparent respectability of the parties be ascertained by examining themselves? If the attorney's clerk had known anything of them, he might have been questioned; but they appear to have been strangers to him.] It would have been seen on the examination of the parties whether they prevaricated, or were unable to answer any particular inquiry. The mere addition of the attor-

¹ About six miles from Exeter.

ney's clerk, or some other vouchee, who might or might not be known at the sheriff's office, would not much advance the case. The replevin clerk is not bound to go out of the office to make inquiries; and it was for the jury to say whether a reasonable discretion had been exercised in the inquiry made there. The learned Judge led them to suppose that, in point of law, the inquiry proved was insufficient. The case would be different if the sheriff had, within his office, means of knowing that the surety was insufficient; as *in *Scott v. Waithman*, 3 Stark. N. P. C. 168, where writs against one of the sureties had passed through the sheriff's hands. ABBOTT, C. J., there said that if the sheriff, "having the means within his power of informing himself," neglected to use them, he was responsible. That must signify means within his reach as sheriff, within his office: otherwise the qualification seems unnecessary; for the sheriff, like any other man, would of course have means within his power of inquiring at a distant place. *Sutton v. Waite*, 8 B. Moore, 27, also shows that the duty of the sheriff is not such as the plaintiff here would represent it; and PARK, J., there relies upon the expressions of HEATH, J., in *Hindle v. Blades*, 5 Taunt. 225; 1 Marsh. 27.

But further, the damages ought to be reduced. The value of the goods replevied was not proved. It was said to be admitted by the plea; but the declaration only lays it under a *videlicet*, at 1000*l*. A witness stated that the bond was taken in double the value of the goods; but the bond itself was not given in evidence, nor particularly adverted to till after the verdict. It was a mistake, but fatal to the plaintiff's right to recover any but nominal damages. [LITTLEDALE, J. The bond lay on the table of the Court. I considered it as being substantially put in.]

Elliott, for the plaintiff, made a cross motion to increase the damages, contending that the amount of damage alleged in the declaration to have accrued by the sheriff's default was admitted by the plea; and that, as against the sheriff, the right to recover was not *limited by the penalty of the bond. [LITTLEDALE, J. The penalty is the limit in all such cases.] [*829]

LORD DENMAN, C. J. It is admitted that the sureties were insufficient; the only question is, whether the defendant made a proper and reasonable inquiry. The only law to be collected from the cases is that which was laid down by ABBOTT, C. J., in *Scott v. Waithman*, 3 Stark. N. P. C. 168, namely, that the sheriff is to exercise a reasonable discretion and caution in receiving sureties. Whether he has done so or not, is a question for the jury in each case; and the law cannot be laid down with more particularity. If the learned judge in this case had left it to the jury, as law, that, under the circumstances, the sheriff's clerk could not have made a sufficient inquiry, there might have been ground for this application; but he did no more than make a strong observation upon the case before him. And, if the fact was that the sureties were utterly insufficient, that they were brought to the office by the attorney's clerk, and that no inquiry was instituted beyond the receiving of such answers as they chose to give, no judge would direct a jury, and no jury should say, that a proper discretion was exercised in receiving those sureties. That being so, the sooner we make an end of the course of proceeding which was said here to be usually adopted, the better: otherwise it may be said that, wherever the parties live at such a distance that the sheriff cannot personally know of their circumstances, no further inquiry is necessary than to receive their own statement. There must, in any such case, be some other means of *inquiry, as for example, [*830] by the attendance of a person from the neighborhood in which the sureties live; and here the sheriff, if he had used such means, would have the benefit of MANSFIELD, C. J.'s observation in *Hindle v. Blades*, 5 Taunt. 225; 1 Marsh. 27: "Suppose the sheriff had taken an eminent banker as surety a week before his bankruptcy, when no one in the world had the slightest reason to suspect his circumstances." The very circumstances of the clerk's taking an irregular affidavit from the sureties evinces his doubt of their sufficiency. His knowing

nothing of the parties appears, certainly, a bad reason for proceeding upon their oaths. As for the omission to give the bond in evidence, we must put a reasonable construction upon what took place; we must take it that all parties considered the instrument as having been proved; it was ready to be put in at a moment's notice; and, in the references made to the bond during the trial, it must be considered that both sides were talking of the document which lay upon the table before them. 'No rule can be granted.

LITLEDALE, J. I may have made strong observations on the insufficiency of such an inquiry as was proved, and may have said generally that it was insufficient; but, if I did so, it was with reference to the particular case, and not as laying down a rule of law.

PATTESON, J. The rule clearly is, that the sheriff shall exercise a reasonable discretion. If our present application of the rule would render it necessary for [*831] the sheriff to send about the country at his own expense to *make inquiries, I should hesitate as to refusing the rule. But, supposing that the sheriff knows the parties, he may accept them as sureties; supposing that he does not know them, he may decline receiving them till they satisfy him of their sufficiency, by the attendance of other persons, or by information from them in writing. I would not have it supposed that the sheriff or the replevin clerk is bound to go out of the office, and travel about for information; but he may require vouchers, personal or in writing. If that had been done here, there would have been a strong case for the sheriff.

COLERIDGE, J. There is no question as to the rule, but only with respect to the application. I think we may lay it down that, if the sheriff is fixed with knowledge of the real state of facts, he is responsible, according to such knowledge: but, where he has it not, he is bound to make a reasonable inquiry into the apparent responsibility of the sureties offered. Here three persons come, two sureties and the attorney's clerk. The replevin clerk does not even inquire of the attorney's clerk as to the apparent responsibility of the sureties, but examines them as to their actual responsibility. I agree that the sheriff, or his clerk, is not bound to go out of the office; but he may satisfy himself without doing so. And upon this subject it is observable that the sheriff is bound by statute, 1 & 2 Ph. & M. c. 12, s. 3, to have four replevin clerks at least, dwelling not above twelve miles from each other.

Rule refused.

[*832] *JONES v. DANIEL SHEARS, JAMES SHEARS, THOMAS MARGRAVE, and WILLIAM ELLWARD. *April 21.*

In *assumpsit* for rent of coal, the issue being whether or not the defendants, having given notice to quit, had afterwards waived the notice and continued the tenancy, it was proved that, after the time fixed by the notice had expired, they continued for two months working out certain portions of the coal, which, however, as they contended, it was usual for a tenant to take away on abandoning such a work; Held, that it was for the jury to decide on this issue, whether or not the defendants, in remaining for the two months, intended to waive the notice and continue the tenancy.

During all the time above-mentioned, the defendants constituted a firm, called the Llan-gonneck Coal Company. After the expiration of that time, the company appointed an agent. On the trial of the above action the plaintiff offered in evidence a letter of the agent, to show a recognition, by the firm, of a continuing tenancy. Before the letter was written, or the agent appointed, two of the defendants had withdrawn from the firm, but the business was still carried on in the name of the L. Coal Company, and no notice of the change had been given to the public: Held, that the letter was inadmissible.

ASSUMPSIT on an agreement between the plaintiff and defendants, that the plaintiff should let to the defendants, and they take of him, the coal under certain lands, for twenty-one years; that the defendants should be at liberty at any time during the term to terminate the same, by giving six months' notice in writing to the plaintiff of such intention, if the whole of the coal were worked

out, or on giving two years' notice at any time, or on paying two years' rent: and that the defendants should pay certain sums for royalty, way-leave, &c., and 100*l.* per annum sleeping rent. Averment, that the defendants entered, &c. Breach, non-payment of the sleeping rent for four years. Pleas, 1. Non assumpsit. 2. That on, &c., the defendants gave notice in writing of their intention to terminate the term at the end of two years, and that, at the expiration of the two years, and before any of the rent claimed became due, viz. on, &c., the term ceased by virtue of the said notice. Verification. Replication to the second plea, that the defendants, after giving the notice, and before the determination of the term, viz. on, &c., waived relinquished, and abandoned such notice, and agreed to a continuance of the term, and of their tenancy to the plaintiff, and *the same continued in all respects as if the notice had not been given. [833] Verification. The rejoinder traversed these allegations, and upon that traverse issue was joined.

On the trial before COLERIDGE, J., at the last Spring assizes at Carmarthen, it appeared that the defendants, under the name of the Llangonneck Coal Company, signed the agreement declared upon, in 1828: that they entered upon and worked the coal; and that, in April, 1829, they gave a notice to the plaintiff, beginning, "We the undersigned, being the individuals composing the Llangonneck Coal Company," signed by the four defendants, and stating that at the expiration of two years they should deliver up possession and put an end to the term. The plaintiff's case was, that they had continued to work the coal for two months after the expiration of the two years, and had thereby waived the notice. The defendants insisted that the working was not carried on with any view of continuing the tenancy; that the coal worked during the two months was taken from the pillars of coal which supported the roof of the mine; and that it was customary, on leaving a mine, to cut away from such pillars as much as could be removed with safety. To show that the defendants had in fact meant to continue the tenancy, a letter was tendered in evidence, written on behalf of the Llangonneck Coal Company, by a Mr. Seymour, their agent, in July, 1835. Two of the defendants had at that time quitted the company; two continued members; and other persons had come in. The defendants had never notified this change in the firm to the public. Seymour had been agent about eighteen months; he became so after the retirement of the two defendants who left the *company. The learned Judge held the letter inadmissible, [834] being of opinion that Seymour could not, in writing it, be considered the agent of the four defendants. And he left it to the jury to say whether the defendants had continued working the coal with intent to waive the notice and continue the tenancy, or without such intent. The jury found a verdict for the defendants on the second issue.

Wilson now moved for a rule to show cause why there should not be a new trial on the grounds of misdirection, and of an improper rejection of evidence. The question of intent ought not to have been submitted. When a tenant holds over after his lease is determined, whether by efflux of time or by matter collateral, an absolute legal liability is incurred, and there is no question of intent for a jury. Here the working from the pillars was the same, in point of law, as if the defendants had entered upon an unworked seam. The plaintiff might, at his option, treat them as trespassers or tenants. In *Digby v. Atkinson*, 4 Camp. 278, Lord ELLENBOROUGH said, "Where the tenant holds over after the expiration of the term, he impliedly holds subject to all the covenants in the lease which are applicable to his new situation." Nothing is said there of a question of intent to be decided by the jury. In *Right dem. Flower v. Darby*, 1 T. R. 159, Lord MANSFIELD said, "If there be a lease for a year, and by consent of both parties the tenant continue in possession afterwards, the law implies a tacit renovation of the contract." If intention may be relied upon, where the party holds over for months, it may as *well be so if he [835] hold on for years. [PATTESON, J. Your argument would go the length

of insisting that, if a tenant gave notice to quit at Lady-day, and remained a week after, for his own convenience, he could not dispute that his intention was to renew the tenancy.] If the landlord, in such a case as this, does not treat the parties as trespassers, his intention, in suffering them to remain, must be considered, as well as that of the tenant in remaining. [LITTLEDALE, J. Surely an issue like the present makes the waiver a question for the jury.] As to the rejection of evidence: Seymour's letter ought to have been received. The firm of the Llangonneck Coal Company continued from the time when the agreement was executed till the writing of the letter. No change in it was made known to the public. And two of the defendants still remained members. Seymour is at least agent for them. For the purpose of an action like this, a letter by two of four joint lessees would bind their companions; so also will the letter of an agent for those two.

LORD DENMAN, C. J. There is no ground for a rule. It was impossible, upon this issue, not to leave the question to the jury; and it was for them to decide whether the parties, by their mode of continuing in possession, showed an intention to waive their notice to quit, and to remain tenants as before. Then as to the letter. In 1831 the four defendants were members of the Llangonneck Coal Company. The letter in question was written by an agent of the company in 1835. Now although Seymour might be the agent of the present company for all purposes which they now employ one, he could not be their agent [*836] for the purpose of *binding, by his letter, persons who were no longer members.

LITTLEDALE, J. I do not know that, where a tenant holds over, he is always to be considered as bound to hold upon the same terms as far as they are applicable. In *Digby v. Atkinson*, 4 Camp. 275, the rent was raised; that change alone could not vary the obligation to repair: but, if one-half of the terms of holding were to be changed, I do not know that the tenant holding on would be bound, in point of law, to keep the other half. Here, however, the question was, not whether the parties held over on the terms of the original tenancy, but whether they held over as tenants at all. It was for the jury to say whether the defendants intended to avail themselves of their notice to quit, or whether the acts done by them amounted to a waiver of such notice.¹ As to the letter written by Seymour, the notice in 1829 was given by four members. Afterwards two went out of the firm. When Seymour became agent and wrote the letter, he was not agent for the four defendants, but to the new firm. It is contended that, being agent for two of the defendants, he was agent in this instance for the four. But the two who left the firm had not entered into any agreement which could make them answerable for his acts.

PATRESON, J. This is an action upon an agreement, entered into by four persons, to become tenants of coal for a term, a power being reserved to them to [*837] end the *term by a notice. The plea is, that such notice was given; but it is replied that the tenants waived the notice; and upon that replication issue is taken. It is contended that a mere possession by the tenants, after the expiration of the time limited by the notice, precluded the jury from inquiring whether their notice was waived or not. But, upon this subject, the authorities decide only that, where there is an actual continuance of possession by the tenant, the terms of holding are considered to be the original ones. The question in *Digby v. Atkinson*, 4 Camp. 275, was, upon what terms the parties held on, not whether they continued tenants. It is, of course, a question for the jury in such a case, whether the possession was continued at all. It is also for the jury to consider under what circumstances it was continued; whether, for instance, the parties acted on a supposed right, or as knowing themselves to be trespassers. Here I should suppose that the defendants thought they had a right to take the coal from the pillars after they gave up the works. The circumstances were such as it was necessary and proper to leave to the jury, in order

¹ See *Johnson v. The Churchwardens of St. Peter, Hereford*, ante, p. 520.

that they might say whether or not the notice was waived and a new tenancy commenced. As to the letter, it is clear that Seymour never was agent to the four defendants under the agreement in question. The time limited by the notice to quit expired in April, 1831. There is nothing to show that, at least after the expiration of two months from that time, any tenancy in point of fact was continued on the premises in question. And Seymour did not become agent to the company till long afterwards. How then could he be agent to the four defendants for the purpose *of writing the letter of July, 1835, even if [*838] all of them were proved to have been members of the company at that time?

COLERIDGE, J., concurred.

Rule refused.

LEWIS v. Lady PARKER. April 21.

Assumpsit by endorsee against acceptor of a bill of exchange. Plea, that the bill was an accommodation bill, endorsed to plaintiff's endorser for the purpose of its being discounted for defendant's use; that it was endorsed to plaintiff in fraud of defendant, and that plaintiff took the bill, by such endorsement, after it was due. Replication, that the bill was endorsed to plaintiff before it became due, he not knowing the premises, without this, that plaintiff took it after it was due. Issue thereon:

Held that, at the trial, it lay on the defendant to begin, by proving that the bill was due when endorsed.

ASSUMPSIT against defendant as acceptor of a bill of exchange, drawn by Miles, payable to his order, and endorsed by him to Elkins, who endorsed to plaintiff. Also on an account stated. Plea, that Miles drew, and defendant accepted, the bill for the accommodation of defendant, and that Miles might get it discounted and thereby raise money for her use, and without any value or consideration given by Miles for her acceptance; that Miles endorsed to Elkins, without having received any consideration, and for the purpose aforesaid; that Elkins received the bill for the purpose of discounting it, but did not do so, nor did he pay defendant or Miles any money on account of the bill, or otherwise give defendant or Miles any value or consideration for the same, and, on the contrary, the said Elkins, having notice of all the premises, endorsed the bill to plaintiff in fraud of defendant: and, further, that plaintiff took the bill by endorsement from Elkins after it became due, viz. on, &c. Verification. There were two other pleas, not material to the point decided.

Replication, that Elkins endorsed the bill to plaintiff before it became due, plaintiff not knowing the premises *in the said plea mentioned; without [*839] this, that plaintiff took the bill by endorsement from Elkins, after it had become due. Conclusion to the country. Similiter. On the trial before WILLIAMS, J., at the sittings in Middlesex during this term, it became a question whether, upon these pleadings, the plaintiff was bound, in the first instance, to show that the bill was endorsed before it was due, or the defendant to show that it was endorsed after having become due. The learned Judge held that the onus lay on the defendant; and, no evidence being offered on her part, the plaintiff had a verdict.

Barstow now moved for a new trial on the ground of a misdirection. The object of this motion is to raise a question similar to that now depending in *Mills v. Barber*¹ in the Court of Exchequer. The plaintiff, by his replication, admits the want of consideration between Miles and the defendant, and Elkins and Miles, and the endorsement by Elkins in fraud of the defendant. Suppose that, before the new rules, these facts had been proved by the defendant under the general issue; the plaintiff would have been bound to show that he took the bill before it was due, or that he gave consideration. The defendant here could not prove the negative of those facts; it did not lie within her knowledge. [Lord DENMAN, C. J. The answer to that might be, "Why did you plead

¹Decided in this term, 1 Mee. & Welsb. 425. The Court of Exchequer there held, after conference with the other Judges, that the defendant ought to begin.

that which you were unable to prove?"'] The prevailing opinion in the Court of Exchequer, in *Simpson v. Clark*, 2 Cro. M. & R. 342, 5 Tyrwh. 593, was that, where a bill was shown to have been given for accommodation between the [*840] *original parties, a subsequent holder ought to prove consideration. And in *Whittaker v. Edmunds*, 1 M. & Rob. 366, S. C., in banc, 1 A. & E. 638, PATTESON, J., said, "If, indeed, the defendant can show that there has been something of fraud in the previous steps of the transfer of the instrument; that throws upon the plaintiff the necessity of showing under what circumstances he became possessed of it." [LITLEDAL, J. The only issue to try on this record was, whether or not the bill was endorsed after it became due.]

Lord DENMAN, C. J. No case in point has been cited; there must therefore be no rule.

LITLEDAL, PATTESON, and COLERIDGE, Js., concurred. Rule refused.¹

¹ See *Low v. Burrows*, 2 A. & E. 483.

EVANS v. DAVIES. April 22.

In assumpsit on a promissory note bearing interest, proof that defendant, being sent to by plaintiff for money, paid 1*l.*, and said, "this puts us straight for last year's interest, all but 18*s.*; some day next week I will bring that up," is sufficient answer to a plea of the statute of limitations, no evidence being given of any other debt due from defendant to plaintiff.

ASSUMPSIT on a promissory note, dated November 19th, 1809, for 100*l.* payable on demand, with interest, and on an account stated. Plea (among others), the statute of limitations. Replication, that the causes of action did accrue, &c. Issue thereon. On the trial before WILLIAMS, J., at the Shropshire Spring assizes in this year, it appeared that the action was brought to recover the amount of the [*841] note, and *29*l.* 0*s.* 2*d.* interest. To take the case out of the statute, the plaintiff proved that, in 1831, his son called upon the defendant and said, "My father sent me to ask you to let him have a pound;" upon which the defendant paid the son a pound, and said, "This puts old Mr. Evans and me straight for last year's interest, all but 18*s.*; some day next week I will bring that up and get a receipt from the old man." Nothing appeared on the note to indicate any payment of interest within six years. No proof was given of any other debt from the defendant to the plaintiff than that upon the note. *Tippets v. Heane*, 1 Cro. M. & R. 252, was cited for the defendant. Leave was given to move to enter a nonsuit if the Court should think that case applicable. The learned Judge, after observing that the 1*l.* must have been paid in respect of the note, or the plaintiff could not succeed, left the case to the jury, who gave a verdict for the plaintiff for the whole amount claimed.

R. V. *Richards*, on a former day of the term,² moved for a rule to show cause why a nonsuit should not be entered, or a new trial had. The judgment of PARKE, B., in *Tippets v. Heane*, 1 Cro. M. & R. 252, applies to this case. [Lord DENMAN, C. J. There the payment might have been by way of settling a balance; or it might have been the price of a particular article.] Here no allusion was made to the note at the time of payment; and *prima facie* the payment would not seem referable to the note, 1*l.* 18*s.* not being a year's interest on 100*l.* This payment was not endorsed upon the note. The admission [*842] *of such evidence would let in all the mischief which the statute was intended to prevent. *Cur. adv. vult.*

Lord DENMAN, C. J., now delivered the judgment of the Court. After stating the facts, his Lordship said: *Tippets v. Heane*, 1 Cro. M. & R. 252, was cited for the defendant; but we think that case essentially different. We have consulted my brother PARKE, whose judgment in that case was referred

² April 20th. Before Lord DENMAN, C. J., LITLEDAL, PATTESON, and COLERIDGE, Js.
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to. Here it appears clearly enough that the payment was made on account of an existing debt; and there was no proof of any other debt than that in question; we therefore think that the jury were warranted in applying it to that. And we think that the effect of the admission is not to be restrained to the year's interest, but extends to the whole amount claimed. There will, therefore be no rule.

Rule refused.

The KING v. The Justices of STAFFORDSHIRE. April 23.

A party appealing against an order of justices for payment of a church rate, under stat. 53 G. 3, c. 127, s. 7, need not give notice of appeal to the justices making the order; it is sufficient to give it to the churchwardens. And, if such notice to the justices were necessary, service of it upon one of the justices would suffice.

Thomas Stonor Simpkins was summoned before two justices, pursuant to stat. 53 G. 3, c. 127, s. 7, for nonpayment of a church-rate; and an order was made upon him to pay. He gave notice to the two justices, and to the churchwardens, that he should, at the next (April) quarter sessions for Staffordshire, move *to enter and respite the appeal, which was accordingly done. Previously to the ensuing (June) quarter sessions, he gave notice of trying the appeal to the then churchwardens, and to one only of the magistrates who had made the order. The sessions refused to hear the appeal on the ground that notice of trial had not been given according to the practice of the sessions, having been served on one only of the two justices. A rule nisi was afterwards obtained for a mandamus to the justices of the county to enter continuances, and hear the appeal. In opposition to the rule, a clerk in the office of the clerk of the peace deposed that, during the last sixteen years, it had been the practice of the sessions, when appeals were to be tried against convictions or orders of justices out of sessions, except orders of removal, to require that notice of appeal should be served on each justice making the order or conviction; and he referred to the printed rules of the sessions as to notices; which, however, contained no direction as to the persons upon whom notices should be served.

Whateley now showed cause. If the rule of practice, as sworn to, be reasonable, the Court will support it. It may be important that the justices should both have an opportunity of defending their own order. But if both are not entitled to notice, neither is. Supposing that one justice had left the county, the notice might be given to him, purposely omitting the other. [LITTLEDALE, J. If half a dozen signed, must there be notice to all?] The argument must go that length: but it is not the practice for such a number to sign orders.

**Wightman*, contrâ. There is no occasion to serve the magistrates at all, if notice be given to the churchwardens, who are the real parties. [844] At all events both magistrates need not be served. (He was stopped by the Court.)

Lord DENMAN, C. J. The appellant has entitled himself to the writ. The sessions have no right to introduce a new condition of appeal, which is not in the act of parliament. And, if notice to the justices were necessary, service on one would be sufficient. It has been so held under other statutes which require the giving of notice to justices.

LITTLEDALE, J., concurred.

PATTESON, J. The statute 53 G. 3, c. 127, s. 7, only says that the party aggrieved by the order of two or more justices may appeal; nothing is said of notice.

COLERIDGE, J. The two justices act together on a joint authority, see *Rex v. Sillifant*, antè, p. 354; notice to one would be sufficient. Rule absolute.

[*845]

*MORRIS v. DIXON. April 25.

Under Lord TENTERDEN's act, 9 G. 4, c. 14, s. 8, the following memorandum,—“I acknowledge to owe M. 36*l*., which I agree to pay him as soon as my circumstances will permit,”—is exempt from stamp duty, as a writing made necessary by that statute, provided it be put in for the mere purpose of barring the statute of limitations, the debt itself being proved by other evidence.

ASSUMPSIT for money lent, and on an account stated. Pleas, 1. The general issue. 2. That defendant did not promise within six years. Issues were joined on both. The particular of demand was for cash lent, principally in 1824. On the trial before VAUGHAN, J., at the Chester summer assizes, 1834, some evidence was given as to the contracting of the debt; and it appeared that the last advance made by the plaintiff to the defendant was in August, 1826. The only evidence of an acknowledgment by the defendant within six years before the commencement of the action was the following memorandum given by him to the plaintiff.

“Chester, June 30th, 1832.

“I acknowledge to owe Mr. James Morris of Bolton, the sum of 36*l*. which I agree to pay him as soon as my circumstances will permit me so to do.

“JOHN DIXON.”

Evidence was given to show the defendant's ability to pay at the time when the action was brought. For the defendant, it was objected that this paper ought to have had an agreement stamp, as an agreement, or as a note payable on a contingency and not to bearer or order, within the first head of exemptions in stat. 55 G. 3, c. 184, sched. part 1, tit. Promissory Note. The learned judge gave leave to move to enter a nonsuit on this point; and the plaintiff had a verdict for 36*l*. *John Jervis* in the next term moved according to the [*846] *leave reserved; and he cited *Smith v. Nightingale*, 2 Stark. N. P. C. 375, and (comparing the instrument to a cognovit) *Ames v. Hill*, 2 B. & P. 150, and *Reardon v. Swaby*, 4 East, 188. A rule nisi was granted.

Cottingham and *Couling* now showed cause. No stamp was necessary. This was not an agreement, but a mere acknowledgment, and therefore admissible in evidence without a stamp; *Fisher v. Leslie*, 1 Esp. N. P. C. 426; *Israel v. Israel*, 1 Camp. 499; *Mullett v. Huchison*, 7 B. & C. 639; *Langdon v. Wilson*, 7 B. & C. 640, note (b). It contains no promise but such as the law would imply from the acknowledgment. [LITLEDAL, J. The promise here is not that which the law would imply; it is to pay when the party is able. It renders proof of ability necessary on the plaintiff's part. PATTESON, J. Ought not you to have declared specially, on a qualified promise to pay?] The judgment of the Court in *Tanner v. Smart*, 6 B. & C. 603, seems to intimate that that would be the proper form; but this point was not taken at the trial. The plaintiff here is no party to the instrument; it does not bind him to wait for his money. There is not the mutuality which is necessary to an agreement. In *Green v. Gray*, 1 Dowl. P. C. 350, a cognovit, containing a promise by the defendant to bring no writ of error, &c., and to take no advantage of the cognovit having been given before declaration, was held not to require a stamp, there being no mutual agreement. In *Lees v. Whitcomb*, 5 Bing. 34, a written undertaking by a servant to remain with her mistress to learn a trade was held not to be a binding agreement within the statute of frauds, because it contained no [*847] *engagement on the mistress's part. By sect. 8, of stat. 9 G. 4, c. 14, (for rendering a written memorandum necessary to the validity of certain promises) it is enacted “That no memorandum or other writing made necessary by this act shall be deemed to be an agreement within the meaning of any statute relating to the duties of stamps.” This was a memorandum made necessary by the act, sect. 1, to take the debt in question out of the statute of limitations.

J. Jervis, contra. The statute of limitations had not attached when this paper was given. There is no proof that it was given to prevent the operation of the statute; it may have been an original promise, and so not within Lord TENTERDEN's act, 9 G. 4, c. 14. And, if it was executed for the purpose of barring the statute, it may be assumed that the parties were stating an account together, and that, by consent, a writing in the words here used was signed in order that the statute might not run. Then it is an agreement. Or the case may be put thus: leaving out the words, "as soon as my circumstances will permit me to do so," this is a promissory note: with the addition of those words, it is a promise within the stamp act. The object of Lord TENTERDEN's act was to exclude loose verbal expressions which had formerly been relied upon as barring the statute, providing, at the same time, that parties should not be subjected to a new burden of stamp duty. It does not follow that, if that is put into writing which before the statute would have required a stamp, the stamp shall no longer be requisite. In *Williamson v. Bennet*, 2 Camp. 416, an instrument signed by the defendants, *acknowledging that they had received of the plaintiffs 200*l.* in three drafts payable to the defendants [*848] at certain periods, which they promised to pay to the plaintiffs with interest, was held to be a special agreement; yet the reasons against that construction were very like those which occur in the present case. [LITTLEDALE, J. The clause exempting from stamp duty seems nugatory, unless the act was meant to apply where words of agreement were used; because in other cases, even independently of the act, no stamp would be requisite.] Perhaps the clause was inserted from excess of caution. According to the argument now used, any agreement for payment of a debt might be exempted from stamp duty, on the suggestion that it was intended to bar the statute of limitations.

Lord DENMAN, C. J. I thought, at first, that there had been no evidence in the case respecting the debt besides this document, which certainly is an agreement, and, under other circumstances, would require a stamp. But there was other evidence of the debt. This evidence, therefore, comes within the eighth section, which enacts, that no memorandum or other writing "made necessary by this act" shall be deemed an agreement within any of the stamp acts. The act points out no particular form of memorandum or writing as necessary; but I think it cannot be said that the instrument in question is not a writing of that quality which the statute makes necessary.

LITTLEDALE, J. The undertaking here is in a qualified form; but still it is the promise which is relied upon for the purpose of taking the case out of the *limitation. It is, therefore, within the exemption of stat. 9 G. 4, c. 14, s. 8. [*849]

PATTESON, J., concurred.

COLERIDGE, J. This was an instrument made necessary by the act 9 G. 4, c. 14, for barring the statute of limitations: and it was used for no other purpose. If there had been no other evidence of the original debt, I should have thought that it was used to prove that; but, there being evidence of the original debt, independent of this, I think that it was used under the statute, and is exempted by it from stamp duty.

Rule discharged.

The KING v. MORLEY. April 25.

On attachment for a contempt, where the defendant has been examined on interrogatories, and the Master of the Crown Office directed to report thereon to the Court, if he reports that the defendant has cleared himself of the contempt, the Court will not enter into a discussion of the correctness of such report, unless it appear, by the interrogatories and answers (Semble, not by affidavit), that the Master has been mistaken. It is not sufficient ground for a review, that the Master's report appears contradictory to the opinion of a Judge who granted the attachment.

IN Trinity term, 1835, a rule was obtained, calling on the defendant to show cause why an attachment should not issue against him for his contempt in not attending the trial of a cause as a witness, pursuant to subpoena. In the ensuing Michaelmas term, cause was shown in the bail court before LITTLEDALE, J., who ordered that it should be referred to the Master to inquire whether the defendant's clerk was at Westminster at or before five minutes after ten on the morning of the day of trial, and if he was, that the rule should be discharged, but, if the Master should find that he was not, then that the rule should be made [850] absolute. The *Master reported that he was not, and the rule was made [850] absolute for an attachment. Interrogatories were thereupon administered to the defendant; and it was ordered by the Court that such interrogatories, and the defendant's answer thereto, should be referred to the coroner and attorney of this Court, to examine the same, and report thereupon to the Court; and the defendant entered into recognizances to answer. The defendant, in his answers, did not state that his clerk was at Westminster at or before five minutes after ten on the morning in question, or that any attendance was given by defendant, or on his behalf, at that time; but stated merely that he sent his clerk to Westminster between nine and ten that morning, and that the clerk, on arriving, found that the cause had been decided, three or four which stood before it having gone off suddenly; and that this alone caused defendant's absence. The Master of the Crown Office reported as follows:—"I have examined the interrogatories and answers above referred to me, and am of opinion that the above-named defendant hath cleared himself of the contempt imputed to him."

The Master's report being now read, on the motion of *Turner*,

E. V. Williams moved that the interrogatories and answers should be read, and that the Master of the Crown Office might be directed to review his report. The Master's report is not conclusive; his inquiry is only in ease of the Court (like taxation of costs); and, if his report be manifestly contrary to the opinion of the Judge who granted the attachment, it ought to be reviewed. [LITTLEDALE, J. He sifts the matter more fully, upon the *interrogatories, [851] than the Judge could.] In 3 Hawk. P. C. Book 2, c. 22, s. 1, p. 273, Leach's edition, 1795, where the practice on this subject is stated, it is said that, "If the party fully purge himself upon oath, in his answer to such interrogatories of the whole matter charged upon him, the Court will discharge him of the contempt, and leave the prosecutor to proceed against him for the perjury, if he thinks fit: But if the party confess part of the contempts in his answer to such interrogatories, and deny others, the Court will not discharge him from the contempts so denied, but will proceed farther to examine the truth of them, and will inflict such punishment as from the whole shall appear reasonable: Neither will the Court discharge the party upon a shifting or evasive answer to any material part of the charge against him, but will punish him in the same manner as if he had confessed it." [LITTLEDALE, J. If the Master clears him of the contempt, the Court does nothing; if the case is doubtful, the Court will consider of it; if the Master reports the party to be in contempt, the case comes before the Court for decision as to the punishment. Have you any authority for an interference in such a case as this?] No similar case has been found. In *Coulson v. Graham*, 2 Chitt. Rep. 57, where the Court refused to hear the Master's report discussed, he had reported the party in contempt; and the defendant wished to file affidavits in addition to the interrogatories. [Lord DENMAN, C. J. Have you any ground to show for reviewing this report?] The report is contrary to the opinion of the learned Judge who granted the attachment. The Court is asked to look into that point. [Lord DENMAN, C. J. That would be [852] rehearing the *case. I do not say that if we found that the Master was mistaken, we should not desire a review of his report. But some ground must be laid for it.] Affidavits can be put in on behalf of the prosecution. [Lord DENMAN, C. J. If there has been a mistake, it will appear from

the interrogatories and answers.] The only ground independent of affidavit is that already stated.

Per Curiam.¹

Rule refused.

Turner then moved that the defendant's recognizances should be vacated, which was ordered.

¹ Lord DENMAN, C. J., LITTLEDALE, PATTESON, and COLERIDGE, Js.

RICHARD SLEGG and Another, Executors of JOHN SLEGG, v. PHILLIPS. April 26.

C. and P. made a joint and several promissory note for 200*l.* with interest. P., being sued solely, pleaded illegality of consideration: Held, that C. was not a competent witness to support this plea.

And that it made no difference that C., before action brought, had paid 100*l.* of the note, a year's interest being also due at the time of such payment; inasmuch as C., in case a verdict were given against P., would be liable to contribution in respect of that interest.

ASSUMPSIT against the defendant as maker of a promissory note, dated 15th of March, 1830, for 200*l.*, payable to the testator, 15th of May, 1830, with interest at 5 per cent. till paid. There was also a count for money lent, money paid, interest, and an account stated.

First plea, to the first count, that, before the time of making the note, to wit, &c., Charles Crippen, as the agent for and in the name of one Alexander Kennedy, had become and was indebted to divers, to wit, twenty persons, in various sums, amounting in the whole to a *large, &c., to wit, 1200*l.*, upon and [*853] by virtue of divers unlawful wagers, and contracts in the nature of wagers, relating to the future price and value of certain public stock called consols, that is to say, &c. (the plea then set out facts to show that the debt arose on a transaction rendered illegal by stat. 7 G. 2, c. 8): and that, thereupon, the said C. C. was desirous of obtaining a loan of 200*l.*, for the purpose of enabling him therewith in part to satisfy the said sum of 1200*l.*, and did accordingly apply to and request Slegg, in his lifetime, to lend him the said sum of 200*l.* in the said promissory note specified; which Slegg consented to do, and did accordingly lend the said sum to C. C. for the purpose aforesaid, and on no other account; and thereupon the defendant, in the lifetime of Slegg, to wit, &c., made the note for the purpose of securing to Slegg the payment of the said sum of 200*l.*; whereby, and by force of the said statute in such case, &c., the said note became, and was and still is, void in law. Verification. Replication: that the 200*l.* in the said note specified was not, nor was any part thereof, lent by Slegg, with knowledge of the supposed premises in the said plea mentioned, or for the supposed purpose in that plea alleged: conclusion to the country. Similiter. Second plea, to the other counts: Non Assumpsit.

On the trial before Lord DENMAN, C. J., at the Middlesex sittings after Michaelmas term, 1834, the plaintiffs put in and proved the note, which was a joint and several note made by Phillips and Crippen. The defendant then called Crippen in support of the first plea, and proved that Crippen had paid 100*l.* to the plaintiffs on account of the note, before the action was brought, on the 18th of June, 1831. The plaintiffs' *counsel objected that Crippen was still incompetent; and the Lord Chief Justice, being of that opinion, [*854] rejected the evidence, and the plaintiff had a verdict.

In Hilary term, 1835, *Erle* obtained a rule nisi for a new trial, on the ground of the rejection of this witness.

Sir F. Pollock and R. V. Richards now showed cause. The witness was incompetent, because, if the plaintiffs recovered against the present defendant, the latter might obtain contribution from the witness for both damages and costs; 1 Stark. Ev. 106 (2d ed.), *Simons v. Smith*, Ry. & M. 29, *Hall v. Rex*,

6 Bing. 181; *Evans v. Yeatherd*, 2 Bing. 133. It is true that, as far as the present action is concerned, the liability is severed; but that does not affect the ultimate liability of the proposed witness to the result of the action. Thus, in the case of a joint and several bond, if one obligor be sued alone on his own several contract, he may still recover contribution against the other obligor. A release to one is a release to both; each, therefore, has an interest in defeating the claim, though made on one only. The witness would have been admissible for the plaintiffs on the grounds stated in *Blackett v. Weir*, 5 B. & C. 385, *Hall v. Curzon*, 9 B. & C. 646, *York v. Blott*, 5 M. & S. 71. As for the payment by Crippen, that leaves him still liable for the interest on the 100*l.* paid.

Erle, contrā. It is true that the extinction of the debt as to one of two joint and several obligors, and perhaps as to one of two joint and several makers of a note, extinguishes as to both. But here Crippen has *already paid all [*855] which he could be called upon to contribute. No interest is shown to be unpaid on the 100*l.*; and he is not liable to the costs of the action, it not appearing that he has authorized the defence; *Knight v. Hughes*, M. & M. 247. This answers the argument from the cases cited, where an interest arose from the liability to costs. Crippen has here a greater interest in the success of the plaintiffs than in that of the defendant. If the plaintiffs succeed, no liability accrues to him; and, even if the defendant could in that case recover contribution, it could be for only 50*l.*, as the plaintiffs can recover only 100*l.*, and the plaintiffs' claim against Crippen is then extinguished. But, if the defendant succeed, the plaintiffs may sue Crippen for all the 100*l.* [*PATTESON, J.* He comes to prove that no action lies at all.] The test of his competency is, not the particular evidence which he is to give, but the effect which the verdict will have on his interest.

Lord DENMAN, C. J. I rejected this evidence at the trial on the authority of the cases in the Common Pleas. It is not denied that Crippen, if he had not paid the 100*l.*, would be liable to contribution. But, at the time of his paying, a year's interest was due on the 100*l.*, as well as the remaining principal and interest. There was, therefore, still a charge remaining upon him; and he had a direct interest: for, if the plaintiffs recovered against the defendant, the defendant could recover a part from Crippen. Then he comes to show that the plaintiffs cannot recover, because the consideration was illegal. And it is argued [*856] that he would, in fact, be *benefitted by the plaintiffs' recovering here, because the sum so recovered would go to exonerate him, as between himself and the plaintiffs. It seems to me that it is not in the defendant's mouth to say this: for his defence is that the note is a nullity; and the same defence would be available for Crippen.

LITTLEDALE, J. I think the witness was not competent. If he had paid the full amount for which he was liable, he would not be liable to contribution. But he has not done so; and therefore he seems to be interested: for Phillips would sue him, if the plaintiffs recovered, for contribution in respect of the difference between what he has paid and what he was liable for. And, as for the chance of the plaintiffs' recovering against Crippen if they failed against Phillips, that might depend upon many contingencies. Then, again, Crippen comes to prove that the note was illegal. If one maker of a note can prove illegality on behalf of the other, and so defeat the action, the other may also prove the illegality when the first is sued: and so the two makers may get rid of the liability altogether.

PATTESON, J. I am of opinion that the witness was rightly rejected. He was called to prove a plea that the consideration was unlawful, not, as in some of the cases, to defeat the action by proving his own joint liability. Perhaps that circumstance makes no great difference. But it is clear that, if the plaintiffs recover, the defendant will be entitled to contribution from Crippen: the latter has therefore a direct interest in defeating the action. I admit that, if he had

paid all which the defendant could obtain by way of contribution, *his interest would be gone. But that he has not done: he has paid only [*857] half the principal; and the interest on that half remains due from him; so that the defendant would recover from him at least 5*l*. Then it is said that, if the plaintiffs fail in this action, they will sue Crippen for the whole. That is a very uncertain and contingent interest. I admit that, if Crippen were sued, he could not avail himself of a verdict obtained by the defendant in this action: but the result would be that, he having proved the illegality on behalf of Phillips, Phillips might prove it afterwards on behalf of Crippen. In *Hall v. Rex*, 6 Bing. 181, the Court held that the direct interest must prevail, not the contingent.

COLERIDGE, J. The argument founded upon the payment would be sound, if borne out by the facts; but the interest on the principal paid is still unsatisfied. The argument that Crippen is more interested to obtain a verdict for the plaintiffs than for the defendants has already received an answer. Crippen comes to defeat the instrument upon which the action is brought, and thereby to prevent any action against himself for contribution. The other liability suggested is more remote.

Rule discharged.

*Don NUNO ALVARES PEREIRA DE MELLO, Duke DE CADAVAL *v.* THOMAS COLLINS. April 27. [*858]

Plaintiff being a foreigner, ignorant of the English language, was arrested at Falmouth soon after his first arrival there from abroad, by defendant, for 10,000*l*. Defendant and plaintiff then signed an agreement, by which, in consideration of 500*l*. paid by plaintiff to defendant, plaintiff was to be discharged, and not to be again arrested; and, plaintiff was to put in bail in twelve days; the 500*l*. was to be "as a payment in part of the writ;" and both parties were to abide the event of the action; the agreement containing no provision for refunding the money if the action should fail. Plaintiff paid the 500*l*. and was released. No bail was put in; and the writ was afterwards set aside for irregularity. Plaintiff then sued defendant for the 500*l*. as money had and received; and the jury found that the defendant knew that he had no claim upon plaintiff: Held, that the action lay, the payment having been made under the compulsion of colorable legal process.

ASSUMPSIT for money had and received, and on an account stated. Plea, Non assumpsit. On the trial before Lord DENMAN, C. J., in London, February, 1835, it appeared that the plaintiff was a Portuguese nobleman, who had been a member of the Portuguese government under Don Miguel. In July, 1834, the plaintiff arrived at Falmouth, with his family, from Portugal. Soon after his arrival, he received a letter from the defendant, dated 26th of July, 1834, stating that he had claims on the government of Don Miguel to the amount of 16,200*l*., for services performed and pay due, as asserted; but making no claim on the plaintiff individually. The plaintiff took no notice of this letter. On the 5th of August he was arrested at the suit of the defendant, on a writ for 16,200*l*. against the plaintiff and Manuel Viscount de Santarem. The affidavit was for 10,000*l*. and upwards for work and labor. The plaintiff, who did not understand English, applied to the Portuguese Vice-Consul at Falmouth, and had an interview, in his presence, with the defendant, his brother, and an attorney, who attended on behalf of the defendant: and, after some negotiation, the following memorandum was drawn up and signed:—

"We, the undersigned, agree to the following conditions:—

"First, his Excellency the Duke of Cadaval pays 500*l*. in lawful money [*859] of Great Britain to Thomas Collins, as a payment in part of the writ issued in London for 16,200*l*., and the remainder his Excellency to give bail immediately: to run the usual course of an action in the Court of King's Bench: both of us the undersigned to abide by the result: the said 500*l*. to be paid at nine o'clock to-morrow morning, for which Mr. Lake the consul is responsible.

"Falmouth, 5th August, 1834.

"DUQUE DE CADAVAL,
"THOMAS COLLINS."

The plaintiff was then released; and, on the 6th of August, the following agreement was signed by the parties:—

"An agreement made and entered into, this 6th day of August, 1834, between Thomas Collins, of Platt Terrace, in the county of Middlesex, Esquire, of the one part, and his Excellency the Duke de Cadaval, at present residing at Falmouth, in the county of Cornwall, of the other part. Whereas the said Thomas Collins did lately cause a writ of *capias* to be issued out of His Majesty's Court of King's Bench at Westminster against the said Duke de Cadaval and one Manuel Viscount de Santarem, at the suit of him the said Thomas Collins, for the sum of 16,200*l.*, and whereas the said Duke de Cadaval was, on the 5th day of the said month of August, at Falmouth aforesaid, arrested and taken into custody by virtue of a warrant granted on the said writ of *capias* by the sheriff of Cornwall aforesaid, and whereas (Sic), the said Duke de Cadaval, not being at [860] *present prepared to give the required bail to the said sheriff of Cornwall: and it is hereby declared and agreed by and between the said Thomas Collins and the said Duke de Cadaval that, in consideration of the sum of 500*l.* of lawful British money to the said Thomas Collins in hand paid by the said Duke de Cadaval, at or upon the execution of these presents, the receipt whereof he doth hereby acknowledge, he the said Thomas Collins, doth hereby consent and agree that he, the said Duke de Cadaval, shall be forthwith discharged from his said arrest, and shall not be taken or deemed liable to be taken again into custody by virtue of the aforesaid warrant or otherwise, except in execution; and the said Duke de Cadaval doth for himself, his executors and administrators, covenant, promise, and agree to and with the said Thomas Collins, his executors and administrators, that he will, within twelve days from the date hereof, give bail to the action, according to the form of the statute in such case provided, being in accordance with the tenor of an agreement entered into between the said parties, bearing date the 5th day of the said month of August (which agreement has been this day destroyed, but it is to be held in full force and vigor by these presents) as follows, that is to say:—'We, the undersigned,' &c. [here the agreement of the 5th of August was set out].

"In witness whereof the said parties have hereunto set their hands, the day and year first above written.

"DUQUE DE CADAVAL,
"THOMAS COLLINS."

The plaintiff, at the time of the execution of this agreement, paid 500*l.* to the defendant. The writ was set aside for irregularity by a judge at chambers, on [861] *the 30th of August, 1834. A rule nisi for setting aside the judge's order was obtained by the defendant in this Court, but discharged in Michaelmas term, 1834; and no steps had since been taken in that action by the defendant against the plaintiff. No evidence was given, at the trial of the present cause, of any debt due from the plaintiff to the defendant; and it was proved that the latter had taken the benefit of the Insolvent Act in 1833, and that his schedule, though of a date later than a greater part of the claims set up by him in his first letter to the plaintiff, made no mention of any such claims. It was objected, for the defendant, that the money had been paid by the plaintiff voluntarily, and under an agreement between the parties, and with full knowledge of the facts, and could not, therefore, be recovered back in this action. The Lord Chief Justice directed the jury to find for the defendant, if they thought that he believed himself entitled to sue the plaintiff in the first action, but otherwise for the plaintiff. The jury found a verdict for the plaintiff, and stated it as their opinion that the defendant knew that he had no claim upon the plaintiff. In Easter term, 1835, *Platt* obtained a rule to show cause why the verdict should not be set aside, and a nonsuit entered, or a new trial had.

Sir John Campbell, Attorney-General, *Kelly*, and *Alexander*, who were to have shown cause, were stopped by the Court.

Platt and *Butt* in support of the rule. The money no longer belongs to the plaintiff. It is not pretended that the plaintiff, when he entered into the agree-

ment, *was ignorant of the facts. Therefore, if the money was paid as part of the debt claimed, it cannot be recovered back. On the other hand, if it was paid simply until bail should be put in, and as a consideration for the delay, and to abide the event of the suit, the plaintiff, not having put in bail, has not performed his part of the agreement, and cannot claim the money back. Even assuming that he was to receive back the money on putting in bail, he cannot recover till he has performed this, as was done in *M'Neil v. Perchard*, 1 Esp. 263. The payment was voluntary; for legal process, even when founded on a claim which cannot be supported, does not constitute that sort of compulsion which avoids a contract. The reason is that the law, which creates the pressure, supplies the defence. This is shown by *Marriot v. Hampton*, 7 T. R. 269, *Knibbs v. Hall*, 1 Esp. 84, and *Brown v. M'Kinally*, 1 Esp. 279. [PATTERSON, J. In *Fulham v. Down*, 6 Esp. 26 (note), Lord KENYON qualifies the doctrine; he says, "unless to redeem, or preserve your person or goods."] The principle upon which all these cases have been decided is, that the party who disputes the claim must do so by resisting the action in the first instance; and that there must be some end to litigation. On this principle, if the plaintiff had paid the whole sum claimed, he could not now recover it. *Hamlet v. Richardson*, 9 Bing. 644, is to the same effect, though the marginal note there introduces the exception of the case of fraud on the part of the person obtaining the money. No fraud, however, seems to have been in question, in the case itself. The case of *Cobden v. Kendrick*, 4 T. R. 432, note (a), is there questioned by TINDAL, C. J., and *he refers to the judgment of HOLROYD, J., in *Milnes v. Duncan*, 6 B. & C. 679, which supports the principle now contended for. The same principle was acted on in *Bilbie v. Lumley*, 2 East, 469, and *Brisbane v. Dacres*, 5 Taunt. 143. In *Snowdon v. Davis*, 1 Taunt. 359, a bailiff, by threat of a distress for a sum for which his warrant did not authorize him to distrain, obtained that sum, and afterwards obtained another sum from the same party by distraining upon him under another warrant, which authorized him only to distrain on a different person; and it was held that the party paying might recover back both sums. There the distresses were wrongful throughout; upon which ground that case differs from the present, where the agreement was made by a party under an arrest upon a warrant against that party, and the money paid by the party under such agreement. An action for money had and received has been held to be given where no other remedy lay, as in *Hills v. Street*, 5 Bing 37, see judgment of BEST, C. J., p. 41; but here the plaintiff, if entitled at all, may recover the sum by way of damages in an action for a malicious arrest.

Lord DENMAN, C. J. It is asserted that the principle of decision in *Marriot v. Hampton*, 7 T. R. 269, has not been adhered to in this case. But that case does not warrant the argument drawn from it. It does not decide that money obtained under the compulsion of legal process can never be recovered back; but only that, after the defence in an action has failed, and money has been recovered in the action, it cannot be recovered back in *another action. This is the ground upon which the decision is put by Lord KENYON. He says, "After a recovery by process of law"—not extortion—"there must be an end of litigation." And GROSE, J., says, "It would tend to encourage the grossest negligence if we were to open a door to parties to try their causes again, because they were not properly prepared the first time with their evidence." The question there arose, not upon an extortion by legal process, but upon the want of means of defence in a previous action, which means a party ought to have when such action is brought. On the other hand, I certainly felt that there might arise, in this case, an inconvenience from our allowing the plaintiff's claim, since there may be another action for a malicious arrest. After the judgment in this case, there will nevertheless be no bar to that action. We must, however, see whether there be anything to defeat the plaintiff's right here, if the money be still his. For Mr. *Platt* has put the question in its true form:

is it still the plaintiff's money? How is it shown not to be so? Why, by striving to give effect to a fraud. That is the finding of the jury: the arrest was fraudulent; and the money was parted with under the arrest, to get rid of the pressure. This case differs from all which have been cited as being otherwise decided: in none of those was the *bonâ fides* negatived, not even in *Marriott v. Hampton*, 7 T. R. 269; for, in default of evidence to the contrary, the party there might have believed the debt to be due. But here the jury find that the defendant did know that he had no claim. The property in the money, [*865] therefore, never passed from the plaintiff, who parted *with it only to relieve himself from the hardship and inconvenience of a fraudulent arrest.

LITLEDALE, J. The case of *Marriott v. Hampton*, 7 T. R. 269, was different from the present. There the plaintiff in the original action claimed a debt, which the defendant asserted that he had paid, but he could not produce the receipt; and, finding he could not defend, he paid the money and gave a *cognovit* for the costs. Afterwards he found the receipt; and sued, in order to recover back what he had paid. But, as the money had been originally recovered by legal proceedings, it was held that he could not recover it back as money had and received. That was the ground on which Lord KENYON and GROSE, J., proceeded. They considered that an action did not lie to recover back that which had once been recovered under a legal decision. But here there was no such recovery. The plaintiff was arrested; and the jury find that the arrest was merely colorable: and the money was paid for time to get bail. The arrest must have been merely colorable, since the debt was not inserted in the defendant's schedule. I admit the difficulty which arises from the liability of the defendant to an action for a malicious arrest: no doubt such an action would lie; for, as Collins knew that there was no debt, there is distinct malice. Still we cannot prevent the plaintiff from recovering back his money as money had and received.

PATTESON, J. I think this verdict was right. I put the matter entirely [*866] upon the special circumstances of *the case. I admit, in general, that money paid under compulsion of law cannot be recovered back as money had and received. And, further, where there is *bona fides*, and money is paid with full knowledge of the facts, though there be no debt, still it cannot be recovered back. But here there is no *bona fides*, and on that I ground my opinion. When a man sues to recover back money paid under compulsion of law, it lies upon him to show that there was fraud. Has the plaintiff shown that here? The jury find that the arrest was fraudulent, in consequence, I suppose, of the debt not appearing in the schedule; for, if such a debt existed, the defendant was bound to insert it in the schedule, under the act of parliament; and the omission of it would have been a misdemeanor severely punishable. The jury, therefore, concluded that the defendant knew that the debt did not exist, and that he used the process colorably. To say that money obtained by such extortion cannot be recovered back, would be monstrous. Then the terms of the agreement form a very strong circumstance. The defendant, having a man in custody for a debt for which he knew that he had no claim, is to get the 500*l.*, whether he recover in the action or not; for there is no provision for the defendant refunding the money in case of his failure. Now suppose the plaintiff had put in bail to the sheriff, instead of entering into this agreement, what would the consequence have been? On application to my Brother ALDERSON the writ was cancelled, though perhaps on a paltry objection; but the result would have been, in the case supposed, that nothing would have got into the pocket of the defendant. It would be a scandal to the law if this money could not be recovered back.

*COLERIDGE, J. I quite agree. Although the decisions have gone [*867] as far as they can go, yet I will not attempt to disturb them: and they are quite consistent with the decision which we are now giving. It is clear

that, if money be paid with full knowledge of facts, it cannot be recovered back. It is clear too that, if there be a *bonâ fide* legal process, under which money is recovered, although not actually due, it cannot be recovered back, inasmuch as there must be some end to litigation. That is the substance of the decisions. But no case has decided that, when a fraudulent use has been made of legal process, both parties knowing throughout that the money claimed was not due, the party paying under such process is not to have the assistance of the law. If, indeed, the property were changed, it would follow that the plaintiff must fail; but the defendant's counsel assumed that. I rely on the position which is laid down in *1 Selwyn's Nisi Prius*, 89, *Assumpsit II.*, 8th ed. 1831, "If an undue advantage be taken of a person's situation, and money obtained from him by compulsion, such money may be recovered in an action for money had and received." For this, *Astley v. Reynolds*, 2 Str. 915; and see *Morgan v. Palmer*, 2 B. & C. 729; *Shaw v. Woodcock*, 7 B. & C. 73, is cited, in which the circumstances of compulsion were much less strong than in the present case. My opinion, therefore, is founded upon the particular circumstances of the case. When it is said that we are not to look to the degree of hardship, so as to depart from the legal principle, I agree; but here the particular circumstances make the law of the case. Here is a foreigner, at a great distance from his friends, at a great distance from London, ignorant of the law of England (though I do *not rely upon that), charged with owing a very large sum. Then, first, is not the payment compulsory? Next, is there *bonâ fides*? According to the finding of the jury, the defendant commits perjury, and uses legal process colorably to enforce an unjust demand. I should have been sorry to find that our hands were tied in such a case. Rule discharged.

TINKLER v. ROWLAND. April 28.

In trespass *quare clausum fregit*, issues were joined on three pleas: 1st, of a public carriage way; 2dly, of a public bridle way; 3dly, of a public foot way. The jury found a verdict for the plaintiff on the first issue, and for the defendant on the third; and the Judge, without the consent of the plaintiff, discharged the jury from giving a verdict on the second issue.

The Court granted a new trial, although the plaintiff, at the beginning of the trial, had agreed that the damage, if any, should be merely nominal.

TRESPASS, *quare clausum fregit*. Pleas: 1st, a public carriage way; 2dly, a public bridle way; 3dly, a public foot way. The replication traversed the rights of way, on which the defendant joined issues. On the trial before Lord DENMAN, C. J., at the Surrey Lent assizes, 1835, the counsel for the plaintiff, at the outset, agreed that the damages, if any, should be merely nominal. The jury found a verdict for the plaintiff on the first issue, and for the defendant on the third: but, after having retired for many hours, they told the Lord Chief Justice that they could not agree as to the second issue; and it appeared by the testimony of a medical man that one of the jurymen was ill. Upon this, his Lordship directed the verdict to be taken as above, on the first and third issues, and discharged the jury from giving a verdict on the second, without the consent of the plaintiff. In Easter term, 1835, *Thesiger*, for the plaintiff, obtained a rule to show cause why a new trial should not be had.

Channell now showed cause. The objection, on which the rule was obtained, is, that the Judge has no power *except by consent of parties, to discharge a jury from giving a verdict on one of several issues. That objection is well founded, only where the issue, on which the jury are discharged, is material, as the parties are situated. Now, the only matters left to be determined by the second issue were the damages and the costs of the particular issue.¹ The damages are here immaterial, because the plaintiff's counsel

¹ The finding for the defendant on the third issue would have put an end to the question of damages; but the point was raised in argument, as above, to avoid any question as to that finding having been irregular, on account of its being given separately.

limited his claim to nominal damages. And, as to the costs of the particular issue, they cannot make such a materiality as would warrant the objection; for that materiality would have existed in every case, as, for instance, in *Powell v. Sonnett*,¹ where, nevertheless, it was held that a jury might be discharged on eight of twenty counts, without the consent of parties, the eight being rendered immaterial by the finding as to the rest. [PATTESON, J. That case, in which I was engaged, is no authority for your position. The Exchequer Chamber there decided, on error brought, that, as it did not appear that the parties had not consented, they would presume that all which ought to have been done had been done.] In replevin and avowry for rent-arriere, if non tenuit and riens in arriere be pleaded, a verdict for the plaintiff in replevin on the non tenuit renders the other immaterial, and the jury should be discharged, *Cossey v. Diggons*, 2 B. & Ald. 546. [Lord DENMAN, C. J. The question on the second issue here was material as to the right of the parties.] The defendant might make [*870] that objection; but the plaintiff cannot. *The finding of the jury on that issue, even if it were for the plaintiff, would not negative the public right of bridle way hereafter. He could not use such a verdict; and he claimed only nominal damages now.

Per Curiam.* The second issue was material for ascertaining the right. The plaintiff assented to nominal damages, on the understanding that all the issues were to be tried. The issue was material; and, if so, the finding was material.

Rule absolute.

Thengier was to have argued in support of the rule.

¹ 3 Bing. 881. S. C. affirmed in error in the House of Lords, 1 Bligh, N. S. 545; where see the judgment of Lord LYNDBURST, p. 552.

* Lord DENMAN, C. J., LITTLÉDALE, PATTESON, and COLERIDGE, Js.

GOODMAN v. HARVEY and Others. April 28.

In giving notice of non-payment to the drawer of a foreign bill, resident abroad, it is sufficient to inform him that the bill has been protested, without sending a copy of the protest.

In an action by the endorsee of a bill who has given value, if his title be disputed on the ground that his endorser obtained the discount of such bill in fraud of the right owner, the question for the jury is, whether the endorsee acted with good faith in taking the bill. The question whether or not he was guilty of gross negligence is improper. Gross negligence may be evidence of mala fides, but is not equivalent to it.

ASSUMPSIT on a bill of exchange drawn by defendants, September 1st, 1832, at Limerick, upon Gould, Dowie and Co. (London), for 262*l.* 13*s.* 1*d.*, value in freight per Cicero, payable at four months to John Scott or order, endorsed by Scott to David Levy, and by D. Levy to plaintiff. The first count alleged non-acceptance: the second, non-payment. Plea (before the new rules), Non Assumpsit. On the trial before Lord DENMAN, C. J., at the sittings in London, after Hilary term, 1835, the following facts appeared. The bill was given by the defendants, merchants at Limerick, to Scott, a ship-owner, for a balance of [*871] freight. Scott gave it to Hudson, a ship's captain (who gave no value, and whose name did not appear on the bill), to get it discounted. Hudson delivered the bill for that purpose to David Levy, who caused it to be presented for acceptance on September 20th. The drawees refused acceptance, in consequence of having received from the defendants a notice, sent to the latter by a solicitor, warning them not to pay any money to Scott, or to any other person on his account, as the party giving the notice was about forthwith to sue out a commission of bankrupt against him, on the petition of certain persons named in the notice.² The drawees gave this communication (the receipt of which was proved at the trial) as their reason for not accepting. The bill was

² The commission did afterwards issue, on a fiat dated January 15th, 1835, and this action was understood to be defended by Scott's assignees.

noted for non-acceptance, and protested. No notice of the non-acceptance was given to the defendants. Levy returned the bill to Hudson, who, in the latter part of October, carried it back to Scott. Scott, who had by that time been arrested for debt, gave the bill to Hudson again, in order that he might once more endeavor to raise money by discounting it; and Hudson undertook to do so. Hudson again placed the bill in the hands of Levy; and he got it discounted by the plaintiff, who paid about 260*l.* upon it. Levy never remitted the proceeds, but, as was represented at the trial, retained them in fraud of Scott; and no value was ever given for the bill by either Levy or Hudson. When the bill became due, the plaintiff presented it for payment, which Gould, Dowie and Co., refused, although they had funds, the right to the proceeds being contested. They were *furnished with funds a day or two before the bill became due, but had not funds at the time of the non-acceptance. The bill was [*872] protested for non-payment; and notice of the non-payment was sent to the defendants by letter, stating that the bill had been protested as last mentioned, but not enclosing a copy of the protest. For the defendants it was objected, first, that the letter ought to have contained a copy of the protest, which objection the Lord Chief Justice overruled; and, secondly, that the plaintiff, in taking the bill from Levy with the notarial marks upon it, had been guilty of gross negligence, and therefore took the bill with all its vices, and could have no better right to recover upon it than Levy himself, who clearly would have had none. The Lord Chief Justice was of this opinion, and observed that the plaintiff had received the bill with a death-wound apparent on it; and he proposed to the plaintiff's counsel either a nonsuit, or that the case should go to the jury on the question whether or not the plaintiff had been guilty of gross negligence. The jury, in answer to a question from the Lord Chief Justice, said that, in their opinion, the notary's marks on the bill were sufficient notice to an endorsee of non-acceptance. A nonsuit was then taken; and in the next term *Erle* moved for a new trial, on the ground that the above ruling against the plaintiff was incorrect; that the bill had been lawfully sent into the market by Scott, while not yet due; and that the plaintiff, who had taken it before maturity, and given value for it, had a right to recover the amount, notwithstanding any defect in the title of an intermediate party. A rule nisi was granted.

*Sir John Campbell, Attorney-General, and *Mellor*, now showed cause. [*873] Independently of the objection which prevailed, the plaintiff ought not to have recovered, first, because the defendants had no proper notice of the refusal to accept. A holder, knowing that the bill has been dishonored by non-acceptance, is bound to give notice of it to the drawer, as admitted by all the Judges in *O'Keeffe v. Dunn*, 6 Taunt. 305; affirmed on error, *Dunn v. O'Keeffe*, 5 M. & S. 282. Here the notarial marks afforded such knowledge to any holder. The object of the notice to the drawer is that, if he has funds in the hands of the drawee, he may remove them; and here the defendants had funds in the hands of Gould, Dowie & Co., before the bill became due. Secondly, no regular notice of the non-payment was given, because the letter communicating that fact did not furnish any copy of the protest. This was a foreign bill, being drawn in Ireland, *Mahoney v. Ashton*, 2 B. & Ad. 478. And, where the endorsee of a bill, drawn in the West Indies, payable in London at sixty days' sight, noted it for non-acceptance, and at the end of sixty days protested it for non-payment, and then wrote to the drawer, in the West Indies, acquainting him that the bill was not accepted, it was held that the endorsee, "by not sending the protest for non-acceptance," had "made himself liable;" *Goostrey v. Mead*, Bull. N. P. 271, 2; 1 Selw. N. P. 337, 8th ed. Where notice, without a copy of the protest, has been held sufficient, the party receiving the notice was resident in England at the time. [*PATTESON, J.*, referred to *Cromwell v. Hyson*, 2 Esp. N. P. C. 511, and Lord DENMAN, C. J., to *Robins v. Gibson*, 8 Camp. 334; S. C. in Banc, 1 M. & S. 288. The observation as [*874] to residence applies to the latter case, if not to both; and, in the first, the rea-

sons of Lord KENYON's ruling are not stated. In *Chaters v. Bell*, 4 Esp. 48, where it was held that, if a foreign bill were regularly presented and noted, protest might be made at any time before action brought, the Court, after argument, recommended a special verdict, but the recommendation was never acted upon, 1 Selw. N. P. 361, 8th ed. [COLERIDGE, J. A very good book, after stating the decisions in *Cromwell v. Hynson*, 2 Esp. N. P. C. 511, and *Goose-trey v. Mead*, Bull. N. P. 271, 272, observes, 1 Selw. N. P. 337, 8th ed., of the latter, "The only way in which this case can be reconciled with Lord KENYON's decision is, by considering the expressions used in the latter case, 'not sending the protest,' as meaning nothing more than 'not giving notice of the non-acceptance.'" Then, as to the other point; the plaintiff, although he gave value for the bill, was not entitled to recover; in the first place, because he took the bill after it had been noted for non-acceptance, and no distinction is to be drawn between a bill noted for non-acceptance, and one dishonored by non-payment; per BAYLEY, J., in *Crossley v. Ham*, 13 East, 502: he took it, therefore, subject to all infirmities which would have attended it in the hands of Hudson; and Hudson could not have recovered upon it, having given no value. Secondly, even if the plaintiff had taken the bill without notice of dishonor, yet, as it had been endorsed in fraud of the proprietor Scott, the plaintiff could only have recovered on showing that he was a bona fide holder for value. Now, [*875] although it can no longer be maintained as law that the holder of a bill is disabled from recovering it, if he has taken it under circumstances which might reasonably have awakened suspicion, the present is a case of gross negligence; and such negligence has so far the effect of fraud, that the holder who has been guilty of it can have no better title than the party from whom he takes.

Erle, contra. The first point was not taken at the trial; and the facts proved showed that the notice could not be necessary. Secondly, assuming it to be requisite that notice should be given of protest as well as non-payment, it is sufficient if the letter communicating the non-payment states that there has been a protest. In *Bayley on Bills*, page 259, 5th ed., speaking of protest and notice of dishonor in the case of a foreign bill, the author merely says, "In some cases a copy, or some other memorial of it" (the protest), "should accompany the notice." [Lord DENMAN, C. J. We have no doubt that the notice here was sufficient.] Then, thirdly, as to the plaintiff's title as holder. No objection is made to it, except that his taking the bill with the notarial marks on it is supposed to show gross negligence. In *O'Keefe v. Dunn*, 6 Taunt. 305; affirmed on error, *Dunn v. O'Keefe*, 5 M. & S. 282, it was held that the endorsee of a bill which, in the hands of his endorser, had been refused-acceptance, no notice of such refusal having been given to the drawers, might nevertheless recover upon [*876] the bill, provided he took the endorsement without knowledge of the previous dishonor. Here, if the plaintiff knew of the dishonor, the distinction taken in that case might, under ordinary circumstances, be available against him. But that distinction is important only where notice to the drawer was necessary in the first instance. Here it was not; for it must be implied, from the communication made to Gould, Dowie & Co. by the defendants, that the non-acceptance was within their knowledge. Then, notwithstanding the notarial marks, the bill was as if it had never been presented for acceptance. [LITTLEDALE, J. As far as regards notice.] Scott, then, had a good cause of action against the defendants after the non-acceptance, and might transfer that right to his endorsee. Any ground of complaint as between Scott and the parties to whom he had transferred it before it reached the plaintiff, cannot affect the plaintiff's right. The only question is, whether the plaintiff acted bona fide in discounting it. (He was then stopped by the Court.)

Lord DENMAN, C. J. The question I offered to submit to the jury was whether the plaintiff had been guilty of gross negligence or not. I believe we are all of opinion that gross negligence only would not be a sufficient answer, where the

party has given consideration for the bill. Gross negligence may be evidence of mala fides, but is not the same thing. We have shaken off the last remnant of the contrary doctrine. Where the bill has passed to the plaintiff without any proof of bad faith in him, there is no objection to his title. The evidence in this case as to the notarial marks could only weigh as rendering it less likely that the bill should *have been taken in perfect good faith. See Willis v. The Bank of England, *anté*, p. 32. The rule must be absolute. [*877]

LITTLEDALE, PATTESON, and COLERIDGE, Js., concurred. Rule absolute.

WALLISS v. BROADBENT and ROBINSON. *April 29.*

Declaration in assumpsit, that defendant had held lands, under a lease from E., on certain terms, which were set forth on the record; that the reversion came to plaintiff; and that defendant, in consideration of an alteration of the rent, promised to hold of plaintiff on the same terms in all other respects; but that defendant broke the terms. Plea, Non Assumpsit. Plaintiff not having proved an express contract to hold of defendant on the old terms, held, that he could not rely upon an implied contract, arising from the old lease, without putting it in evidence; and that the old lease could not be used as such evidence, unless properly stamped.

ASSUMPSIT. The declaration stated that Elizabeth Eldridge, being seised in fee of a certain messuage and premises, on the 1st of November, 1820, by articles of agreement between her on the one part, and the defendants on the other part, agreed to demise the messuages and premises to them, to hold from the 11th of October then last, at the rent of 63*l.*, on certain conditions set out in the declaration, relating to the repair and management of the demised property by the defendants, and the state in which it was to be left; the agreement to continue in force for one year from the said 11th of October, and so on from year to year, as long as both parties should agree upon the terms and conditions therein specified, unless six months' notice in writing should be given by one party to the other, in which case the demise should cease from the 11th of October next after the delivery of such notice: the declaration then averred that the defendants entered, and enjoyed as tenants to Elizabeth Eldridge, under the agreement, till her death; and that she, in the lifetime *of one Henry Bell, since deceased, duly devised the messuage and premises to Bell and the plaintiff in fee, and died seised of the reversion in fee, 1st of February, 1823; that Bell and the plaintiff thereupon became seised of the reversion in fee, and continued so seised till Bell's death: that, on the 11th of October, 1825, in consideration that Bell and the plaintiff, at the special, &c., would permit the defendants to hold and enjoy the messuage and premises, at the rent of 60*l.*, upon all other the terms and conditions before mentioned, the defendants promised to abide by, observe, and perform all other the said terms and conditions, according to the agreement: it was then averred that the defendants did so hold and enjoy by permission of Bell and the plaintiff during Bell's life, and since his death by permission of the plaintiff, till the 11th of October, 1834, when the term ended and determined: the declaration then set out breaches of the conditions committed before and after the death of Bell. Broadbent pleaded non-assumpsit, on which issue was joined; and Robinson suffered judgment by default. On the trial before TINDAL, C. J., at the Leicester Spring assizes, 1835, the plaintiff offered in evidence the alleged agreement; but it was objected to and held inadmissible, on the ground that it amounted to a lease, but had no lease stamp. The only other evidence offered, of the contract between the plaintiff and the defendants, was an express agreement, between Broadbent and the plaintiff's agent, that the rent should be raised from 55*l.* to 60*l.*, in consideration that the defendants should be permitted to plough up certain lands. The defendants' counsel objected, first that there was no evidence to prove upon what terms they had held the premises; and, secondly, *that, as it did not appear that Robinson, who was [*879] originally a mere surety for Broadbent, was in any manner a party to the

alleged new agreement by parol, there was no proof of a joint contract. The Lord Chief Justice held both objections to be fatal, and nonsuited the plaintiffs, but reserved leave to move to enter a verdict for such damages as the jury should assess. The jury found 70*l.* damages. In Easter term, 1835, N. R. Clarke obtained a rule to show cause why the nonsuit should not be set aside, and a verdict entered for the plaintiff with 70*l.* damages.

Miller now showed cause, and was directed to confine himself, in the first instance, to the first point. The contract laid in the declaration was not proved. There is no pretence for saying that an express contract to hold on the terms of the old lease, or on any terms except as to the amount of rent, was shown; and the implied contract cannot be raised without producing the old lease. This would have been necessary before the rules of H. 4 W. 4; and, by these rules, Pleadings in particular Actions, I. Assumpsit, 5 B. & Ad. vii., it is ordered that "the plea of non assumpsit shall operate only as a denial in fact of the express contract or promise alleged, or of the matters of fact from which the contract or promise alleged may be implied by law." Now here, there being no express contract or promise to hold according to the terms of the old lease, such promises can only be implied from the fact of the defendants having previously held under such lease. The existence, therefore, of such lease being one of the [*880] facts from which the *implied contract or promise was to be raised, it became necessary, according to the terms of the rule of Court, that such fact should be proved. The mere averment of the existence of the lease or agreement, with a recital of its terms, in the declaration, was not sufficient, because the plea required that it should be in evidence. Then, it being necessary to prove it, that could only be done by the production of the instrument; which, however, was inadmissible for want of a proper stamp. There was, therefore, no proof at all of the existence of the lease and previous holding under it. (He was here stopped by the Court.)

Humphrey and Bayley, contra. The existence and execution of the lease were not in issue on this record; they were mere matter of inducement, and were as much admitted by the plea as the death of Mrs. Elridge. Even before the new rules it was held, in an action against a tenant for breach of agreement as to his management of a farm, that the averment of the estate of the lessor was an immaterial averment, and that a variance as to that was unimportant; *Winn v. White*, 2 W. Bl. 840. [PATTESON, J. It does not appear, from that case, that it would not have been necessary to prove some title in the landlord.] In *Jones v. Brown*, 1 New Ca. 484, the defendants, in an action of trespass for taking goods, justified upon an alleged property in themselves, as assignees of a bankrupt; and the plaintiff joined issue on the question of property in the defendants: and it was held that this was an admission of the bankruptcy, and of the defendants being assignees. In *Barnett v. Glossop*, 1 New Ca. 633, it [*881] was held *that, where non assumpsit only was pleaded to an action upon the bargain and sale of a copyright, it was not open to the defendant to object that the assignment was not in writing: that must have been on the principle that the assignment was mere inducement. In *Frankum v. The Earl of Falmouth*, 2 A. & E. 452, the declaration, in case, stated that the plaintiff was possessed of a mill, and by reason thereof was entitled to the use of a stream for the mill, and that the defendant had wrongfully and injuriously diverted the stream; and it was held that a plea of Not Guilty put in issue nothing but the fact of the diversion.

Lord DENMAN, C. J. It is clear that the new rules do not dispense with the necessity of proving the original agreement. The promise laid in the declaration is, to abide by, observe, and perform all the terms and conditions of that agreement, except as to the rent; and the defendant says, I made no such promise. How is the plaintiff to prove his case on this issue? He must prove the fact of the promise, or he must prove facts from which the promise may be implied.

This view of the case cannot be varied by calling the original agreement matter of inducement.

LITTLEDALE, J. I am of the same opinion. I think that the terms of the original agreement were put in issue, there being no proof of an express promise. Nothing was proved except the alteration as to the amount of rent; it was not shown to what that applied, but merely that this alteration was the result of an agreement by *the defendants while they were in possession of the [*882] premises. To show what the old terms were, the agreement containing the terms must be proved. The defendant says that, under the new rules, this proof is dispensed with. Now, here, there is no express promise proved; but it is sought to imply one, by law, from the terms of the old holding. That, therefore, is precisely within the terms of the rule, which says that the plea of Non Assumpsit puts in issue the matter of fact from which the contract or promise alleged may be implied by law. It was therefore necessary to prove the original agreement: and that, not being properly stamped, was not admissible.

PATTESON, J. It seems to me that this nonsuit was right on the particular evidence given. A contract is declared on, and issue is joined on the fact of the contract. Of the contract itself there is no evidence; only evidence is given, that at one time the parties, then holding at a rent of 55*l.*, agreed that the rent should be raised to 60*l.*; and that this took place upon an application respecting the ploughing of certain land. We clearly cannot go upon that. The contract, then, upon which the plaintiff is to proceed, arises from the change in the situation of the landlord. There is no evidence of an express agreement; the plaintiff, therefore, relies upon an implied agreement. That being so, the plea of non-assumpsit denies all matter of fact from which the agreement is to be implied. It denies, therefore, the original agreement; and the plaintiff has to prove this, in order that he may raise the implication that the contract was to go on upon all the old terms except those relating to the rent. The common case is that, *where a lease expires, the acceptance of rent raises an [*883] implication by law that the holding on is upon the old terms: and this is what the plaintiff relies upon. But then he must prove the facts. I do not say that, if proof had been given of an express contract to hold on the old terms, with an alteration of rent, there would not be enough proof of the old terms in this case; the inclination of my mind at present is, that it would be so. But here there is no such express contract proved.

COLERIDGE, J. I am of the same opinion, upon the ground taken by my brother PATTESON. I do not wish to be bound to an assertion that if there had been proof of an express promise to hold upon the terms contained in the original instrument, the mere production of the instrument without proof of the execution or stamp might not be sufficient. But here the promise relied upon is an implied one; and that makes it necessary to prove everything from which the promise is to be implied. There are other objections as to the sufficiency of proof; but into these I will not enter. Rule discharged.¹

¹ See *Richardson v. Gifford*, 1 A. & E. 52.

*WANSBROUGH and Another v. MATON. April 30. [*884]

A tenant is entitled, at the expiration of his term, to remove a wooden barn which he has erected on a foundation of brick and stone, the foundation being let into the ground, but the barn resting upon it by weight alone.

He may maintain trover for such a barn, against a party converting it. If the reversioner, having refused, while off the premises, to allow such tenant to take away the barn, afterwards, while a third party is in possession of the land, come on the land and prevent the tenant from entering to take the barn away, this is a conversion by the reversioner.

TROVER for two barns, 1000 planks of wood, 1000 rafters, 1000 joists, and

for iron, stones, bricks, &c. First plea, Not Guilty; second plea, that plaintiff was not lawfully possessed, &c. Issue on both pleas. On the trial before GURNEY, B., at the Salisbury Easter assizes, 1835, it appeared that the plaintiffs held some land as tenants to the defendant for a term of years determinable on lives. On the expiration of the last life, the plaintiffs quitted possession, and the defendant demised the land to a new tenant, who entered. When the plaintiffs quitted, they left on the land a barn (called a stavel barn) which they had erected, and for which the action was brought. It consisted of wood, resting on, but not fastened by mortar or otherwise to, the caps of blocks of stone (called stavels or staddels) fixed into the ground or let into the brickwork, the brickwork being built on and let into the ground in those parts where the ground was lowest, for the purpose of making an even foundation for the barn to rest upon. The wooden barn could be taken away without injury to the rest. It is usual, in the part of the country where the barn stood, for tenants, who have built such barns, to remove them on quitting, or to have them valued to the incoming tenants. The plaintiffs, after the new tenant had entered, demanded the barn of the defendant, off the premises; the defendant said that they should not have it till they had agreed with him as to another matter in dispute: [*885] and they afterwards sent men to bring it away; but the defendant, being then on the premises, ordered the men to leave the ground, and locked the gates after them. Upon this evidence the defendant's counsel applied for a nonsuit, on the grounds, first, that the barn was a fixture, for which trover would not lie; and, secondly, that no conversion was proved. The learned Judge refused to nonsuit, but reserved liberty to move to enter a nonsuit on both points.

In Easter term, 1835 (April 23d),¹ *Merewether*, Serjt., moved accordingly. There was no conversion. If the plaintiffs chose to leave any movable chattel on the land, they had no right afterwards to enter for the purpose of taking it away. The defendant was not the person in occupation. And this was no fixture.

The Court refused the rule on the point of conversion, but granted it on the other point.

Erle now showed cause. The barn was a chattel, inasmuch as it was not affixed to the freehold, either naturally or artificially, so as to be not removable without injury to the freehold. The stones and the brickwork could not indeed be removed: but the barn, which is merely a loose fabric of wood, might be taken away, and the fixed stand of brick and stone be left uninjured. In 11 Vin. Abridg. 154, *Executors (U)* pl. 74, it is said, "A granary built on pillars in Hampshire is a chattel, and goes to the executors, and may be recovered in trover. This shall be understood according to the custom of the country; coram EYRE, *Ch. B., Summer assizes, 1724, apud Winchester." In the present case evidence was given to show the understanding of the country to be that such barns are removable. The cases are collected in *Amos and Ferard's Law of Fixtures*, p. 248, part II. ch. 1, s. 3. One of the latest cases is *Davis v. Jones*, 2 B. & Ald. 165, where it was held that trover would lie for jibs, which could be taken out of machinery without injuring it or the building in which it was erected, and which had been left on the premises by outgoing tenants; though it was held that the action would not have lain, if the jibs had been removable solely on the ground of the privilege of trade. That case is indeed rather less strong than the present; as there the jibs could not be removed without injury to themselves. In *Penton v. Robart*, 2 East, 88, a similar decision was given as to buildings; though it is true that the ground of that decision was, in part, the privilege of trade. In *Elwes v. Maw*, 3 East, 88, farm buildings were held not to be removable: but they were fixed to the freehold, and could not be removed without injuring it.

Merewether, Serjt., and *W. M. Manning*, contra. In *Elwes v. Maw*, 3 East,

¹ Before Lord DENMAN, C. J., LITTLSDALE, PATTERSON, and COLLIERIDGE, Js.

88, it was laid down that the case of buildings for trade was an exception, and Lord ELLENBOROUGH said that to extend the rule in favor of tenants, as was proposed, would be "to introduce a dangerous innovation into the relative state of rights and interests holden to subsist between landlords and tenants," page 57. The attempt there was to apply the exceptions to buildings fixed for the purpose of agricultural occupation. *Davis v. Jones*, 2 B. & Ald. 165, and *Penton v. Robart*, 2 East, 88, are also cases where *the fixtures were erected for the purpose of trade. In *Culling v. Tuffnal*, Bull. N. P. 34, it was held [*887] (as in the case cited on the other side from *Viner*), that trover might be supported for a barn put on pattens and blocks lying on the ground, but not fixed in or to the ground, the custom of the country being to erect barns in this way, and carry them away at the end of the term. But this case is explained by Lord ELLENBOROUGH, in *Elwes v. Maw*, 8 East, 55, to be justifiable, independently of the custom, by the circumstance that the pattens and blocks were themselves not fixed. Here the foundation of brickwork and stone is let into the ground: the freehold is therefore interfered with; this foundation is a fixture which cannot be removed without injuring the freehold, and is thus an irremovable fixture. The question therefore is, whether the upper part of a building can be separated from the foundation. To hold that it can, would be to allow a roof, or any part of a building, which is connected with the lower part merely by pressure, to be separable from the rest. Many buildings have the upper and lower parts connected merely by gravitation. A landlord is not to have a foundation made in his freehold, and then the rest of the building taken away, for which alone the foundation is valuable. [PATTERSON, J. In *Rex v. Otley*, 1 B. & Ad. 161; see *Steward v. Lombe*, 1 B. & B. 506, it was held that a wooden mill, resting by mere weight upon a foundation of brick, was not part of the freehold, so as to contribute to the value of a tenement on a question of settlement. Lord DENMAN, C. J. Suppose the barn in this case had been placed upon a yard paved with stones.] Such a barn might be taken away. The *true principle seems to be that, if the whole building be erected, one part with a view to the other, it is an entire inseparable [*888] structure; and that, if one part be placed on a lower part, previously existing and belonging to the landlord, the two may be separated. The degree in which the realty is interfered with cannot determine the question. If, by the nature of the building, the several parts have always constituted a whole, they cannot be separated.

Lord DENMAN, C. J. Questions as to fixtures generally arise between the *primâ facie* right of the landlord on the one hand, and exceptions in favor of trade or of tenants on the other. Any general rule is liable to exception. But the first question must be, whether the erection be a part of the freehold. If it be not united to the freehold, we cannot say that it is a part of it; and here it is not so united, and therefore not a fixture. Were we to hold otherwise, we should overrule the decision in *Rex v. Otley*, 1 B. & Ad. 161, where such a building was held to be removable, and no part of the tenement.

LITLEDAL, J. The barn consists of nothing but the timber, and is not attached to the stone or brickwork. Perhaps the tenant might not have been entitled to dig into the ground for the purpose of making these foundations, and might be liable in damages for so doing. But, having so done, he places the barn on the stone caps, not fixing anything to the freehold. Therefore, in removing the barn, he does not disturb the freehold. A tenant may require barns of different kinds; he might take away this building, and substitute, for instance, a *fowl house, keeping always the same foundation in order to insure a level surface. Suppose holes were made in the wooden part, [*889] or grooves constructed, so as to fix the barn on to the foundation, I do not know that the barn, if so fixed, might not be removed, since it could be done without injuring the freehold. But that it is not necessary to decide; for here there is nothing of the kind, the barn being kept in its place merely by weight. The

foundation must remain; if that be injured, the landlord may maintain an action.

PATTESON, J. I cannot distinguish this case from *Rex v. Otley*, 1 B. & Ad. 161. It was decided there that the wooden mill, resting by its weight on a brick foundation, was not annexed to the freehold. And that was a strong case; for the mill and ground had been demised together by the same person to the pauper. Yet it was held that the mill did not constitute a part of the tenement so as to make up the annual value of 10*l*.

COLERIDGE, J. In the absence of exception by custom, or in favor of trade, the rule is clear. The tenant has no right to remove the whole or any part of what is fixed to the freehold. The question therefore is, What is fixed? That is, in the present case, What does the barn consist of? Does it include the stone caps, or merely the woodwork? I apprehend that the woodwork is the whole barn. That wooden barn is supported by mere pressure. And this meets the argument suggested, as to the criterion being whether one part of the building be erected with a view to the other. Rule discharged.

[*890]

*LAWSON v. LANGLEY. April 30.

To support a plea (framed on stat. 2 & 3 W. 4, c. 71, s. 2) of a right of way enjoyed for forty years, evidence may be given of user more than forty years back.

TRESPASS. The first count was for breaking and entering plaintiff's close; the second count, for laying mortar, &c., upon it. Pleas: 1st, Not Guilty; 2d, As to the breaking and entering, that defendant was occupier of a workshop, &c., and that the occupiers for the time being of the said workshop, &c., for the full period of forty years next before the commencement of this suit, have actually, and as of right, and without interruption, enjoyed, and defendant, as such occupier of the said workshop, &c., still of right ought to enjoy without interruption, a certain, &c. (justifying in right of a foot and horse way). Replication, traversing the enjoyment as of right as alleged. Issues were joined on these pleas. On the trial before LITLEDALE, J., at the Spring assizes for the county of Rutland, in 1835, the plaintiff began, and offered evidence to show that, at periods both within and beyond forty years from the commencement of this action, the way in question had not been enjoyed. The evidence beyond forty years was objected to, and excluded. The defendant's counsel afterwards offered evidence of user: but, on his proposing to carry this fifty years back, it was objected that, consistently with the ruling which had already taken place, the defendant could not on the issue joined upon the second plea, and under stat. 2 & 3 W. 4, c. 71, s. 2, extend his proof beyond the forty years. In reply, it was contended that the evidence was admissible, either as substantive proof for the defendant, or in contradiction to the plaintiff's case. The learned Judge rejected the evidence, doubting at the same *time whether that

[*891] on behalf of the plaintiff, going more than forty years back, ought not to have been received. The plaintiff had a verdict on the second plea. In the next term *Adams*, Serjt., obtained a rule nisi for a new trial, on the ground, among others, of the above rejection of evidence. The learned Judge's report being now read,

Lord DENMAN, C. J., said, Surely the user fifty years ago was some evidence as to the state of things at the distance of forty. Indeed I should think that proof as to the user of the road at any time could scarcely be excluded; though, if it went no farther than to show what had taken place at a very distant period, it would amount to nothing. However, it is sufficient to decide on points as they come before us. I think the rule must be absolute.

LITLEDALE, J. If evidence of user beyond forty years were to be excluded, it might be that, after the case had been established as far as thirty-eight years back, a discontinuance of proof might occur as to the two or three preceding years, and the party might fail because he was unable to carry his case on with-

out going to the distance of forty-one. I think the evidence of user more than forty years back was admissible.

PATTESON and COLERIDGE, Js., concurred.

Rule absolute.

Humfrey and *G. T. White* were to have opposed the rule, but did not argue, the opinion of the Court being decided on the point. *Adams*, Serjt., and *N. R. Clarke* were to have supported the rule.

*HAINE v. DAVEY and Another. April 30.

[*892]

Under stat. 3 & 4 W. 4, c. 42, s. 1 (which provides that the contemplated rules of pleading shall not disable any person from pleading the general issue and giving the special matter in evidence, where by statute he may now do so), an overseer, sued in trespass for taking A.'s goods, may still prove, on plea of Not Guilty, that he, as overseer, distrained the goods for a poor's rate due from B., and that they were B.'s, not A.'s. The general issue does not, under the rules of Hil. 4 W. 4, confine him to proof of his character of overseer.

The practice of not granting a new trial on the ground that the verdict was against evidence, if the amount claimed fall short of 20*l.*, applies to motions made by plaintiff, as well as motions by defendant.

But where the ground is misdirection, the amount is not regarded. And, where the Judge had misdirected the jury by submitting for their consideration a fact not proved nor deducible from the evidence, the Court granted a new trial, though the amount in question was less than 1*l.*

TRESPASS for taking a horse, harness, and other goods of plaintiff, and converting them, &c. Plea (December 13, 1834), Not Guilty. On the trial before GURNEY, B., at the Launceston Spring assizes, 1835, it appeared that the plaintiff claimed the goods (with the exception of the harness), as having bought them at a sale made by the sheriff under an alleged execution against the goods of one Read. The defendants, as overseers of the poor, had afterwards distrained all the goods in question as Read's, for arrears of poor's rate, and they gave this justification in evidence, under stat. 43 Eliz. c. 2, s. 19,¹ alleging that the sale to the plaintiff had been collusive and fraudulent, and that the property remained in Read. For the plaintiff it was *contended that this defence ought to have been specially pleaded under the rule of Hil. 4 W. [*893] 4, tit. Pleadings in particular Actions, V. 3, 5 B. & Ad. x., that "in actions of trespass de bonis asportatis, the plea of not guilty shall operate as a denial of the defendant having committed the trespass alleged, by taking or damaging the goods mentioned, but not of the plaintiff's property therein;" and that the evidence now offered was not let in by the proviso of stat. 3 & 4 W. 4, c. 42, s. 1 (under which those rules were made), enacting "that no such rule or order shall have the effect of depriving any person of the power of pleading the general issue, and giving the special matter in evidence, in any case wherein he is now or hereafter shall be entitled to do so by virtue of any act of parliament now or hereafter to be in force." It was argued that the statute saved the right of giving the special matter in evidence under the general issue so far, that officers might still prove under that plea the character and authority in respect of which they justified, but not that they might disprove the plaintiff's right to the goods, without pleading specially in denial of it. The learned Judge overruled the

¹ Stat. 43 Eliz. c. 2, s. 19, enacts, "That if any action of trespass or other suit shall happen to be attempted and brought against any person or persons for taking of any distress," &c., "or any other thing doing, by authority of this present act, the defendant or defendants in any such action or suit shall and may either plead not guilty, or otherwise make avowry," &c., alleging in such avowry, &c.; to which avowry the plaintiff shall be admitted to reply, &c. (de injuriâ): "Whereupon the issue in every such action shall be joined, to be tried by verdict of twelve men, and not otherwise, as is accustomed in other personal actions: and upon the trial of that issue, the whole matter to be given on both parties in evidence, according to the very truth of the same." The act gives treble damages, with costs, in case of a nonsuit, or verdict for defendant.

objection. It was proved that the harness was upon the horse at the time of the seizure; and both were taken together; what had become of the harness afterwards did not appear. There was no evidence to show that it was not the plaintiff's. Its value was about nine or ten shillings. The learned Judge desired the jury to say, as to the rest of the goods, whether the sale was fraudulent or not; and, as to the harness, he put it to them whether the defendants [*894] took this away with the horse, or whether *they might not have left it on the premises. The jury found a verdict for the defendants. In the next term, *Erle* obtained a rule to show cause why there should not be a new trial, the grounds being the improper reception of evidence, misdirection, and that the verdict was against evidence.

Bompas, Serjt., and *W. M. Manning* now showed cause. Since the new rules a party may still give the special matter in evidence under the general issue, wherever he was formerly entitled to do so. The words of stat. 43 Eliz. c. 2, s. 19, are quite general; and there is no authority to show that, under that section, any matter in bar may not now be proved on a plea of the general issue, as it might have been before. As was observed by *PATTESON*, J., on the motion in this case, the question here is not simply one of property. [*PATTESON*, J. I thought the test was this: would the character in which the party justifies have been a sufficient defence of itself, before the new rules? If it would not, the act must have contemplated something more than the proof of that character merely, or the provision must be useless in a case like the present. *COLERIDGE*, J. It might, however, be asked, where the dispute was as to property in the goods, whether the party was indebted to the statute of Elizabeth for his right of contesting that point under the general issue. If not, does the saving clause of stat. 3 & 4 W. 4, c. 42, s. 1, apply? Lord *DENMAN*, C. J. If the defendants could prove that the goods were not the plaintiff's property, they did not want that statute to enable them to prove such a defence under a plea of not guilty.] The words of stat. 3 & 4 W. 4, c. 42, s. 1, are, that a party shall not be deprived of the power of pleading the general issue in [*895] *any case wherein he is now entitled to do so by any act now in force. If the legislature had meant to confine this exception to the special matter by which particular persons, as such, were to be justified under a statute, the clause would have been worded accordingly. The meaning is, that any of the statutes referred to shall have the full effect which it would formerly have had, notwithstanding the new rules. In *Wells v. Ody*, 7 Carr. & P. 22; and see S. C. 2 C. M. & R. 128; S. C. 5 Tyrwh. 725, it was held that, since the new rules, a defendant having raised what he alleged to be a party wall might still make his full defence under the Building Act, 14 G. 3, c. 78, s. 48, denying the plaintiff's exclusive property in the wall, though he had pleaded only the general issue as permitted by s. 100, of that Act. With respect to the harness, the taking of it has been negatived by the jury; and there was no evidence of its having been in the actual possession of the defendants. And, at any rate, as the value is below 20*l.*, the Court will not grant a new trial. [Lord *DENMAN*, C. J. As to the general issue, it certainly occurred to me, at first, that the statute 3 & 4 W. 4, c. 42, s. 1, only saved the necessity of pleading such matter as must have been specially pleaded if it had not been for some former statute. But the words of stat. 43 Eliz. c. 2, s. 19, are very general; and I think it will be difficult for the plaintiff to get over them.]

Erle and *Butt*, contra. Supposing the Court to be of opinion that the whole defence in question is still let in under the new rules, and that, according to the wide language of the statute of Elizabeth, the matter relied upon by the defendant, including that which is totally *independent of his character of [*896] overseer, may be proved under the general issue, the plaintiff lies under this difficulty, that he cannot anticipate from the plea whether or not the property will be disputed; and the Court, therefore, will more readily grant a new trial, if the direction of the learned Judge, on this part of the case, has been

too unfavorable to him. (They then insisted upon an alleged misdirection as to this part of the case, which it is unnecessary to notice further.) With respect to the harness, it was proved to have been in the plaintiff's possession, and to have been upon the horse when seized: if it was kept for ever so short a time, there was a trespass in respect of it. No proof was given of its being returned, nor any question asked on the subject in cross-examination. The learned Judge, therefore, was not authorized in putting to the jury the supposition that it was slipped off and left on the premises. The rule, that a new trial will not be granted where the verdict is for less than 20*l.*, ought not to apply where there is a wrongful verdict for the defendant. The plaintiff ought to recover what he rightfully claims, however small the amount may be. At all events, the rule must be confined to the case where he moves on the ground that the verdict is against evidence: in that case he would have to pay costs, and the Court takes it into consideration that the costs would be greater than the amount to be recovered. Here the motion is made not only on the evidence but for misdirection. [Lord DENMAN, C. J. The rule clearly does not apply where the ground is misdirection. COLERIDGE, J. If the motion is made on the evidence, the rule extends to a verdict for the defendant as well as for the plaintiff.]

*Lord DENMAN, C. J. On the first point, the doubts I had entertained [897] have been removed. I think the learned Judge was right in admitting the evidence in question under the general issue, notwithstanding the new rules, and the construction which has been given in argument to stat. 3 & 4 W. 4, c. 42, s. 1; for it is clearly the provision of stat. 43 Eliz. c. 2, s. 19, to which the clause cited in the statute of William extends, that the whole of the matter of defence may be proved under the general issue. But, as to the harness, I think that the learned Judge was not correct in leaving the case to the jury upon the suggestion of a possibility that the defendants might have taken off the harness and left it on the premises. The rule must therefore be absolute.

LITTLEDALE, J. As to the first point, the statute of Elizabeth says that a defendant shall be at liberty to plead not guilty, and, upon the trial of the issue on such plea, the whole matter is to be given in evidence on both sides, according to the very truth. I think therefore that, under this statute, the defendants might prove the whole defence on the plea of the general issue, notwithstanding the general rules of Hil. 4 W. 4. As to the other point, I think the direction was wrong.

PATTESON, J. I am of the same opinion on the last point. The harness was on when the horse was seized; there was no evidence of its having been taken off and left; and, the defendant being once proved to have seized the harness, it lay upon him to show that he had disposed of it in the manner suggested. As to the other point, I am of opinion that the matter in question was admissible under the general issue; *and I do not rely only on the statute of Elizabeth, though the expressions there used, "the whole matter to be given [898] on both parties in evidence, according to the very truth of the same," are much stronger than the words "giving the special matter in evidence:" but I think that wherever a statute says that a party may prove his defence under the general issue, it means that he may prove the whole matter of defence.¹ Here it was not sufficient defence that the parties were overseers; they had to prove that they distrained for a rate, and that they seized the goods of a person liable. If the fact that the goods were those of the party liable be excluded from proof under the general issue, then, to establish the present defence, the defendants must have but two pleas on the record: and there is no instance in the history of pleading, in which a party has been obliged to plead two pleas for a single defence. I think therefore that, wherever a statute authorizes proving a defence under the general issue, it is meant that the whole defence may be so proved; and consequently that the statute 3 & 4 W. 4, c. 42, s. 1, when it says that the contemplated rules shall not deprive any person of the power of pleading the

¹ See the language used to this effect in stat. 7 Ja. 1, c. 5.

general issue and giving the special matter in evidence, where he is now entitled by statute to do so, means by the "special matter" the whole matter of defence.

COLERIDGE, J. On the point as to the general issue, I entertained some doubts, which I think it right to say are removed; but I would rather ground my decision on the words of the statute of Elizabeth than on those of the later act. The difficulty suggested, that two pleas might become necessary for a single defence, does *not seem to arise; for, before the new rules, the answer, [*899] under the general issue, that the goods were not the property of the plaintiff, would have been an entire defence without anything further. I therefore consider it best to rely on the words of the statute of Elizabeth; but I think the intention of the late statute was to affirm, and not to repeal, acts which give a defence under the general issue. On the other point, the smallness of the sum would have been an answer to the present application, if the learned judge had not misdirected the jury; but it is a misdirection where the judge in his summing up speculates upon a fact not in evidence nor deducible from the circumstances of the case. The rule must therefore be absolute. Rule absolute.

ELIZABETH URMSTON v. THOMAS NEWCOMEN. May 2.

Quere, whether a father deserting his infant child be liable in assumpsit to a party who supplies the child with necessaries, no further proof of contract being given?

No such action can be maintained, if the father had reasonable grounds to suppose that the child was provided for.

U. offered to N. to take care of N.'s child, without putting N. to any expense; upon which N. gave up the child to U. Afterwards U. gave up the child to N.'s wife, who was living apart from N., in adultery; and afterwards the child, to escape cruel treatment by N.'s wife and the adulterer, returned to U., who maintained it thenceforward: Held, that N., who had no notice of the child's quitting U. at all, or of the cruelty, was not liable to U. for the maintenance of the child, inasmuch as the facts did not show any desertion of the child by N., and negatived a contract between N. and U.

And that it made no difference that U., when she made the original undertaking, was a married woman; the ground of the decision being, not that U. had made a valid contract, but that the circumstances negatived desertion; and that, therefore, the question as to the implied liability did not arise.

ASSUMPSIT for work and labor in instructing Elizabeth Newcomen, the infant daughter of the defendant, in reading, &c., and other necessary and useful accomplishments, &c., at the special instance and *request of the defendant, and for clothing and suitable apparel, &c., and other necessary things by the plaintiff found and provided, and used, &c., in and about that work and labor, and at his like special, &c., and for meat, drink, &c., found, &c., at the like special, &c., and for other work and labor, and for goods sold and delivered, for money lent, for money paid, for money had and received, and on an account stated. Plea, Non assumpsit.¹ [*900]

On the trial, before Lord DENMAN, C. J., at the Middlesex sittings, after Michaelmas term, 1834, the following facts appeared:—On the 8th of March, 1806, the defendant married Elizabeth Urmston, the daughter of Captain Urmston and Mrs. Urmston, the plaintiff. On the 10th of June, 1810, Mrs. Newcomen left her husband's house and went to live with Major Stratford, with whom she continued living in adultery till some time between 1825 and 1829, when Major Stratford forsook her. She never returned to her husband. On the 10th of February, 1811, while she was living with Major Stratford, she was delivered of a daughter, Elizabeth Newcomen. In June, 1812, a female servant of Mrs. Newcomen, named McNamara, took the child to the neighborhood of the defendant's residence, and applied to him to acknowledge and provide for her. The defendant denied that the child was his; but he sent a

¹ There were other issues, not material to the point here decided, which were found for the plaintiff.

but, on cause being shown before PATTERSON, J., the learned Judge refused to make any order. The trial took place at Dolgelly, in July, 1834, before VAUGHAN, J. The plaintiff offered no evidence on the first issue, and on that a verdict was entered for the defendant; but the plaintiff obtained a verdict on the issue joined on the plea of fraud, for 200*l.* damages, costs 40*s.* Afterwards, in Hilary term, 1835, the demurrer was argued; and, in the same term, judgment was given for the defendant.¹

*On the taxation of costs, the defendant contended that the plaintiff ought not to have gone to trial before the issue in law was determined; [*84] that the whole declaration had been virtually answered by the plea demurred to; and that the finding for the plaintiff on the fraud therefore became a nullity. Damages having been found for the plaintiff as above stated, and inserted in the *postea*, the Master, in order to raise the question as to the plaintiff's right to try the issue joined on the plea of fraud before the argument on the demurrer, allowed him, by way of increase, the general costs of the cause in the usual manner, deducting the defendant's costs of the other pleadings, the argument, &c. He, however, suggested in his report that so much of the *postea* as gave damages and costs to the plaintiff, should, at all events, be struck out; in which case, the plaintiff's costs, he suggested, would be limited to those of and occasioned by the second plea, but would include the costs of the trial (unless the Court should be of opinion that the plaintiff had no right to take the record down to trial before the argument on the demurrer); and, consequently, that the defendant should have the general costs of the cause in respect of the residue of the case, including, of course, the costs of the demurrer and argument.

In Hilary term last, Sir John Campbell, Attorney-General, obtained a rule to show cause why the Master should not review his taxation by striking out all the costs allowed to the plaintiff, and taxing the defendant his full costs of the third plea, including the costs of arguing the demurrer thereto; and why he should not strike out of his allocatur on the *postea*, the damages of 200*l.* marked by him for the plaintiff.

*John Jervis showed cause in Hilary term last.¹ Damages having been [*85] found for the plaintiff, and inserted in the *postea*, the Master was obliged to allow him, in addition to the costs of the trial on the issue upon the plea of fraud, the general costs of the cause, amounting to about 5*l.*; and he cannot be deprived of those costs until the damages have been struck out as suggested. He is, at all events, entitled to the costs of the trial on the second issue. In *Cooke v. Sayer*, 3 Burr. 753, S. C. 2 Wils. 85, the defendant pleaded two pleas, each to the whole of the action; issue was joined on one, and the other was demurred to: first, the issue in fact was tried and found for the plaintiff; afterwards the demurrer was argued, and judgment given for the defendant; and the Court allowed the defendant the costs of the demurrer, but allowed no costs on either side as to the trial. But now, according to the rules H. 2 W. 4, I. 74, 3 B. & Ad. 385, and H. 4 W. 4, General Rules and Regulations, 7, 5 B. & Ad. iv., v., each party is to have the costs of the issue on which he succeeds. This was ruled in *Hart v. Cutbush*, 2 Dowl. P. C. 456; where it was also held that the costs to which the plaintiff was entitled, included, not only those of the pleadings on the issues on which he had succeeded, but of the witnesses on these issues, and all the costs of the trial relating to them.

Sir John Campbell, Attorney-General, contra. It was not intended, by the new rules, to alter the practice in this respect. It now appears that the plaintiff went unnecessarily to trial on the second issue; and he cannot *call [*86] upon the defendant to pay the expenses of his doing so. If the business of the Court had been less, the demurrer would have been first heard, and would have disposed of the whole question. By stat. 4 Ann. c. 16, s. 5, the costs are in the discretion of the Court. *Cross v. Johnson*, 9 B. & C. 613, is an authority

¹ See the argument and judgment, *Bird v. Higginson*, 2 A. & E. 698.

² January, 80. Before Lord DENMAN, C. J., LITLEDALE, WILLIAMS, and COLERIDGE, Ja.

case, is the duty on the part of the husband to provide for his wife; that foundation exists in the other case, because the primary duty is equally imperative. If a party be bound to perform an act, and neglect it, another party performing it for him acquires a right of action against him. Thus, if a dead body be neglected, an undertaker who buries it may sue the executor. [COLERIDGE, J. Is that more than a charge on the assets? Would not want of assets be a defence?] A party who relieves a neglected pauper, may sue the overseer. [COLERIDGE, J. In *Blackburn v. Mackey*, 1 C. & P. 1, ABBOTT, C. J., held that a father was not liable for clothes furnished to his son, being under age, unless an express or implied authority were shown.] The desertion here is ground for implying a contract. In *Maule v. Maule*, 1 Wils. & Shaw, 266, a son raised an action of aliment against his father before the Court of Sessions in Scotland; and that Court held the father liable to an annual aliment, which they fixed according to their views of the rank and means of the parties. The House of Lords reversed that judgment, and assuilmized the father; but it was not disputed, in the judgment, see pp. 291, 293, that a father is bound, at all events, to protect his *child from actual destitution. Then, as to the [*904] particular facts here. The undertaking of September 27th, 1812, is of no effect, as Mrs. Urmston was then a feme covert, and her husband's assent is not shown. Further, that contract, supposing it valid, was put an end to by the mother taking the child under her charge; for the mother was the wife of the defendant, not having been divorced, and the law will recognise her as her husband's agent so far as relates to the care of the child. The child was afterwards driven from the mother by ill-treatment. The grandmother, in then receiving her, was not acting upon the undertaking of September 27th, 1812, but stood in the situation of a party relieving a deserted child. The defendant was abroad, and could, therefore, receive no notice. He was situated as the owner of a ship which is supplied with necessaries in a foreign country, without express authority from him: such an owner would be liable to an action if it was impossible to apply to him in time, though not otherwise.

Alexander, contrâ. The supposed foundation of the defendant's liability does not exist. It is not true that by the common law a father is bound to maintain his child. There are indeed statutory means of compelling parents to provide for their children; but the statutes authorize only particular modes of enforcing the natural duty; and, where such modes are not resorted to, no contract can be implied like that now contended for. There is no express decision on the point; and, with the exception of foreign treatises, the text books are nearly silent upon the subject. In 1 Blackst. Com. 449, it is said, "No person is bound to provide a maintenance for his issue, unless where the children [*905] *are impotent and unable to work, either through infancy, disease, or accident; and then is only obliged to find them with necessaries, the penalty on refusal being no more than 20s. a month." There the liability is placed exclusively on stat. 43 Eliz. c. 2, s. 7; and, indeed, the existence of the statute seems of itself to show the absence of a common law liability. [COLERIDGE, J. In *Cooper v. Martin*, 4 East, 84, LE BLANC, J., says, "The only method of compelling maintenance is by the order prescribed by the statute of Elizabeth;" and he adds, that that extends only to natural relations.] Subsequent statutes have been passed on the subject, confirming this view of the case. Thus stat. 1 Ann. c. 80, sess. 1, enables the Lord Chancellor to compel Jewish parents to maintain their children, being Protestants, suitably; this statute was occasioned by the decision in *The Inhabitants of St. Andrew's v. De Breta*, 1 Ld. Raym. 699, from which the absence of a common law liability must be inferred. [Sir John Campbell. By the common law, if a child perish for want of proper care, it is murder in the person neglecting it. Lord DENMAN, C. J. If the person has the actual custody. PATTESON, J. Or the child be part of his family. Would it be murder in a parent to abscond?] From *Blackburn v. Mackey*, 1 C. & P. 1, and *Fluck v. Tollemache*, 1 C. & P. 5, it

appears that there must be an express or implied contract proved, in order to render the father liable to a party furnishing an infant with clothes: if there were such a general liability as is contended for, no such proof could ever be necessary. The proper remedy is to summon the father before a magistrate. As to the suggested case of *an undertaker burying a neglected dead [*906] body, the executor is liable to repay only when there are assets; and this rests upon the duty of applying the testator's property fitly: it is like discharging a debt on the contract of the testator himself. Besides, both in that instance, and in the other supposed case of an overseer, the law has unquestionably created the obligation, whilst the very point disputed at present is the existence of any obligation at all. It is argued that the wife was the husband's agent. But that proceeds upon a mistake of the facts. Mrs. Newcomen was living with Major Stratford; and the presumption of authority, if there be any, is negatived where the wife is living in adultery and apart from the husband. Even under stat. 5 G. 4, c. 83, s. 3, the husband is not punishable for not supporting her; *Rex v. Flintan*, 1 B. & Ad. 227. There BAYLEY, J., said, "The ground of a husband's liability in an action for goods supplied to his wife is a supposed authority communicated to her by him; but when she improperly leaves him, that authority is determined," *Manby v. Scott*, 1 Sid. 109; 1 Keb. 69, 80, 87, 206, 337, 361, 383, 429, 441, 482; 1 Lev. 4; 1 Mod. 124; 1 Bac. Abr. 714; *Baron and Feme* (H), 7th ed. *Govier v. Hancock*, 6 T. R. 603, also supports the doctrine laid down by BAYLEY, J. How then can the wife, living apart in adultery, have authority to bind the husband in what respects the child? At the trial, Lord ELDON's dictum in *Rawlins v. Vandyke*, 3 Esp. 252, was cited, that, where the father does not assert his right to the custody of the children, but suffers them to remain with their mother, "he thereby constitutes her as his agent, and authorizes her to *contract those [*907] debts for clothing and other necessaries." That cannot be applied to a case where the mother has lost even the right of rendering her husband liable for necessaries supplied to herself. It is true that in *Heaketh v. Gowing*, 5 Esp. 131, Lord ELLENBOROUGH held that the father of a bastard, adopting it as his own, was liable for necessaries supplied to it. But that is on the ground of acquiescence by him, which is here negatived. Supposing, however, that the common law liability existed as contended for, the facts here show that that liability is extinguished. The defendant gave up the child to the plaintiff on her express undertaking to provide for it at her own expense. How, after that, can the plaintiff insist upon the defendant's liability? It has been argued that the defendant's husband was no party to the undertaking, and, consequently, that it was inoperative as being made by one not sui juris. But the undertaking was made in 1812, and Captain Urmston did not die till 1815: he must, therefore, have known of the contract, and, by acquiescing, have adopted it. Besides, the question here is, not whether Mrs. Urmston bound herself by any contract, but whether the defendant has rendered himself liable by anything which he has done. It is clear that the plaintiff, when she received the child back from her mother, received her upon the former footing; and the letter of January 6th, 1832, evidently treats the defendant as liable to no claim but that in respect of the funeral expenses. This letter was put in, not, as suggested in the charge to the jury, to show a waiver of the contract, but to show that such contract had never *existed. The shifting about of the child, and the [*908] cruelty she experienced from the mother, do not create any charge on the defendant, who was privy to neither, but who might have had notice if the plaintiff had thought proper. His absence from the country (if at all important) raised only a temporary obstacle, for, in 1826, he was in England for a short period, and, in 1827, returned permanently to Ireland. At any time, therefore, after 1826, the plaintiff might in fact have revoked her express undertaking to provide for the child, and thus reimposed upon the father his assumed common law liability, supposing it could be reimposed at all. Neither that

notice nor that revocation having taken place, it is impossible to charge upon the defendant that he deserted his child with a knowledge of its destitute condition.

LORD DENMAN, C. J. The general question is important; but the facts do not raise it. In order that the law should imply a liability in the father to repay another for supporting his child, it is absolutely necessary that desertion of the child by the father should be proved. Now that is not shown here. The strongest way in which the case can be put for the plaintiff is, that utter neglect and want of inquiry, on the part of the father, might be like a deliberate desertion. But the evidence does not go even that length. For, though the plaintiff's letter might not always be present to her mind, and though she might even have discontinued her intention of providing for the child, the father might say, "by the desire of the child's grandmother, and on her express undertaking that I should not be put to any expense, I left the child with her."

[*909] *While he had reason to suppose that the grandmother was maintaining the child at her own expense, he could not be said to neglect the child. Such an expectation may perhaps now appear to have been unreasonable, and contrary to the fact; but that does not show that his conduct at the time amounted to total neglect. It would be unjust to a father, who was poor, and had thought that another would save him from the expense of providing for his child, to hold that he was guilty of desertion by acting upon such a belief. We have no right to suppose that, if he had had notice from the grandmother that she would no longer maintain the child, he would not have taken care of it. The general question, therefore, which we should approach with much anxiety, does not arise; but, upon the other and more limited view of the case, I think this rule should be made absolute for a new trial.

LITTLEDALE, J. The general question does not arise. The mother leaves the father and lives in adultery; then a child is born, as to which the father, apparently, doubts whether it be his; and he is going to put it into the Foundling Hospital; the grandmother, not liking this, sends for the child, and says (with or without the knowledge of her own husband) that the defendant shall be put to no expense. The child is then put into her custody. Afterwards the mother takes it; after which it is sent back again to the grandmother, and then to the mother again: and then it returns to the grandmother; being sent backwards and forwards according to the caprice of the mother. As far as related to the defendant, the child was still in the custody of the grandmother; for he is not proved to *have known that she was not in that custody, or that [*910] the circumstances of cruelty had occurred. His original wish had been to put her in the Foundling Hospital at Dublin; and he might well presume that she was in custody better than that of the Foundling Hospital. I do not say that he might have found out how the fact actually was; perhaps he might not be anxious to learn: but the grandmother never applied to him. As to the argument that the plaintiff was a married woman, and not capable of entering into the undertaking, that is immaterial; for the question is not, whether the undertaking created a legal charge on the plaintiff.

PATTERSON, J. I agree that the general question does not arise. The circumstances are peculiar. The plaintiff cannot say that the defendant made a contract, either express or implied, *with her*. The defendant doubted whether the child was his; however, he had the control over it, and placed it with his steward. He was about to provide for it (whether he was right or wrong as to the provision which he meant to make is immaterial); and then at the request of the plaintiff herself, he gave it up to her. The plaintiff was then a married woman; but it is immaterial whether the letter of September 27th constituted a binding contract on the plaintiff: it is enough, if it induced the defendant to part with the child, so as to negative the presumption of a contract by him. Afterwards, it is true, the child is taken from the grandmother: but that was in no sense the act of the defendant; the child was taken by the mother, then

living apart from the plaintiff in a state of adultery, and we know of no communication between the plaintiff and his wife. The defendant, therefore, did not of *his own act take the child out of the plaintiff's custody. No communication is made to him till 1832. But it is said that he was abroad. If he was [*911] (which, however, is negatived even as to a part of 1826), it makes no difference. A letter would go abroad: this is not a question as to suing a party who is abroad, but of giving him notice. A letter might have been written to the continent as well as to a place in this country. The plaintiff took steps to show to the defendant that he must come forward; she, therefore, has no right to sue him. This leaves untouched the question, how far a party, who finds a child in a state of destitution, and provides for it, can sue its father.

COLERIDGE, J. It is best to say nothing on the general question. For the purpose of this case, I will assume (what is not to be understood as my opinion at present) that the general liability is as contended by the Attorney-General. Then how does the plaintiff charge the defendant? The child is treated by the plaintiff as legitimate and placed under the charge of his steward: The grandmother finds that the child is ill treated; but it does not seem that the defendant knew this. He parts with the custody on an express understanding that he is to be put to no further expense. It is said that the plaintiff was a married woman. But suppose her husband, while alive, had brought the action, the defence would have been, not an allegation that the plaintiff had contracted, but a repudiation of any contract by the defendant. It is material too that, although the expense sued for was incurred during a series of years, no knowledge at all is brought home to the defendant of the child's being, at any period, otherwise than *under the care of an indulgent grandmother; he, therefore, stands on the same footing as when he first parted with the child. [*912]

Rule absolute for a new trial.

MARY SUSANNAH PIGGOTT v. RUSH. May 8.

Assumpsit for unliquidated damages, is within the saving clause in sect. 7, of the statute of limitations, 21 Jac. 1, c. 16.

If a party, who is in prison when the cause of action accrues, commences an action after the six years have elapsed, but during the continuance of the imprisonment, the operation of the statute is barred by the saving clause in sect. 7.

ASSUMPSIT, on defendant's promise to conduct with care certain proceedings in Chancery as the plaintiff's solicitor; breach, negligence. Plea, that the supposed causes of action did not, nor did any of them, accrue within six years before the commencement of this suit. Verification. Replication, that, at the time when the cause of action first accrued, the plaintiff was imprisoned, and that she continued so imprisoned until and upon, to wit, the 11th June, 1834, which was the first time of her being at large after the accruing of the cause of action; and that she commenced this suit within six years next after the time of her first so being at large. Verification. Rejoinder, that the plaintiff commenced this suit whilst she was so imprisoned, and before the first time of her being at large therefrom; and that the supposed causes of action did not, nor did any of them, accrue at any time within six years next before the commencement of this suit. Conclusion to the country. Demurrer, for that the matters stated in the rejoinder tender an immaterial issue.

Mansel, for the plaintiff. Assumpsit is within the proviso in sect. 7, of the statute of limitations, 21 Jac. 1, c. 16; *Chandler v. Vilett*, 2 Saund. 120. The rejoinder *suggests no answer: if a party could not sue while the protection of the proviso continued, an infant could never sue except [*913] within six years of the cause accruing: and the effect would be to disable from the expiration of the six years to the time of majority, and then to give a revived right for six years. The objection which the rejoinder raises was also made in *Chandler v. Vilett*, 2 Saund. 121 a, and failed.

G. Hayes, contra. The proviso merely says that the party may sue within six years after coming of age; it does not say that the statute shall not run against him in the mean time under any circumstances. *Chandler v. Vilett*, 2 Saund. 121 a, is the only authority. The other point, which arises on the replication, is that assumpsit for unliquidated damages is not within the proviso. The words of the proviso are "any such action of trespass, detinue, action sur trover, replevin, actions of accounts, actions of debts, actions of trespass for assault, menace, battery, wounding or imprisonment, actions upon the case for words:" none of these words apply to assumpsit. It is true that, in *Chandler v. Vilett*, 2 Saund. 120, it was held that the proviso applied to indebitatus assumpsit. That case was decided at a time when the Courts leaned strongly in favor of restricting the operation of the statute; but lately it has been construed more liberally, as one passed "for quieting of men's estates, and avoiding of suits." Many of the early decisions have been overruled on this ground. [PATTERSON, J. In *Crosier v. Tomlinson*, 2 Mod. 71, the Court held that the words "action of trespass," in the proviso, comprehended assumpsit.] That [*914] action, like *Chandler v. Vilett*, 2 Saund. 120, was indebitatus *assumpsit; and three of the judges said it would be very strange if the plaintiff could bring debt and not indebitatus assumpsit. Supposing that the Court will now adopt so violent a construction, still the analogy between debt and indebitatus assumpsit does not extend to assumpsit for unliquidated damages. *Swain v. Stephens*, Cro. Car. 245 (which was relied on in *Crosier v. Tomlinson*, 2 Mod. 71), is not applicable here. The question there was, whether trover was within the enacting section, the third, where it is expressly mentioned in the introduction, and is clearly comprehended under "the said actions upon the case," which follows in the limitation clause. But there are no words in the proviso including assumpsit for unliquidated damages; and this circumstance is the stronger, because two species of actions of the case, trover and for words, are expressly mentioned in the proviso, and actions on the case are mentioned generally in the enacting section. There is a class of cases in which an interpretation has been put on the words in the enacting section, "actions of debt grounded upon any lending or contract without specialty;" and it has been held that a debt created by statute, or by an award under seal, is not within these words.¹ Modern decisions, however, are generally in favor of a liberal interpretation of the statute, and, consequently, of a strict interpretation of the proviso.

Mansel, in reply. The words in the proviso, sect. 7, are, "that if any person or persons that is or shall be intitled to any such action of trespass," &c.; the reference is to the enacting clause in the third section, and *the [*915] proviso, though it specifies only a few causes of action, by way of instance, must be understood as applicable to all comprehended in the enacting clause. But, besides, assumpsit is an action of trespass, according to the old use of the word; thus, in the old form of declaring by bill, the defendant was said to be in the custody of the marshal, "of a plea of trespass on the case on promises." "Upon the case" in the third section would have included assumpsit on accounts between merchant and merchant, but for the express saving.

Lord DENMAN, C. J. It seems to be hardly disputed that the plaintiff may recover, if assumpsit for unliquidated damages be within the proviso in the seventh section. Indebitatus assumpsit is held to be so in *Chandler v. Vilett*; 2 Saund. 120, and in *Crosier v. Tomlinson*, 2 Mod. 71, assumpsit is said to be included in trespass. That is certainly rather strong. Yet, if assumpsit were omitted from the proviso, the omission was so palpably unintended that the Courts perhaps were justified in straining the language. We cannot now overrule those cases.

LITTLEDALE, J. We are bound by the cases. If it were *res integra*, I should

¹ See *Hodsdon v. Harridge*, 2 Wms. Saund. 64 b., and the notes there.

be of a different opinion. I may remark that different words are used in different parts of the statute without any reason whatever. I cannot say that I think the cases cited were rightly decided.

PATTESON, J. We cannot decide in favor of the defendant without overruling those cases. A distinction has been suggested between *indebitatus assumpsit*, *and *assumpsit* for unliquidated damages: but the question turns on the words of the act; and, if *assumpsit* be comprehended under the words at all, it is so equally, whether it be for liquidated or unliquidated damages. [*916]

COLERIDGE, J. We cannot overrule cases which have been followed by such invariable practice. Judgment for the plaintiff.

COLEBROOKE v. TICKELL and WALKER. May 3.

The lord of a manor, as owner of a market in the parish of W., was entitled to part of certain market tolls in W. By an act for better paving part of W., authority was given to levy rates for the purposes of the act; and by the same act the market tolls were made payable to commissioners, who were to collect them and to pay over to the lord a part equivalent to his former dues. There was no clause in the statute making the lord rateable in respect of these payments.

By a subsequent local public act, for the relief of the poor in W., for cleansing, lighting, and watching, and for repair of highways, in W., and for repairing the parish church, it was enacted (sect. 53) that certain rates should be laid "upon all and every the person and persons who do and shall inhabit, hold, occupy, possess or enjoy any land, house, shop, warehouse, or other building, tenement, or hereditament; that is to say," one rate for the relief of the poor, one for repair of the church, and a third for cleansing and lighting streets, and watching and repairing highways within such parts of the said parish as are not within certain liberties; such last-mentioned rate to be a pound rate (not exceeding a certain proportion) "upon or according to the annual rent or value of all messuages, lands, tenements, and hereditaments as shall be held or occupied within such parts of the said parish as are not within the said liberties." By a subsequent section, the rates for the poor were to be levied and recovered in the same manner as poor rates are directed to be levied and recovered by stat. 43 Eliz. c. 2.

In several subsequent clauses of this act, and in the rating clause and a previous one of the paving act, the words "tenement" and "hereditament" were used with reference to corporeal hereditaments solely.

Held, that, in sect. 58 of the more recent act, "hereditament," in the clause fixing the pound rate, meant such as were local and corporeal only; and that "hereditament" in the prior clause of the same section must be construed in the same sense: and therefore that the payments to the lord in lieu of toll were not rateable under this act.

TRESPASS for distraining plaintiff's goods. Plea (under stat. 21 Ja. 1, c. 12, s. 3, and the local acts after mentioned), Not Guilty. The following case was stated for the opinion of the Court, pursuant to stat. 3 & 4 W. 4, c. 42, s. 25.

Stat. 11 G. 3, c. 15, for the better paving that part *of the High Street, in the parish of Whitechapel, which lies in Middlesex, &c., [*917] appoints commissioners for the purpose therein mentioned; and it recites (sect. 88), that "there is due, and has been accustomed to be received, for every cart or waggon loaded with hay brought into the said parish, and sold on the usual market days, the sum of 6d., whereof is due and of right belonging to the lord of the manor of Stebonheath, otherwise Stepney, in the county of Middlesex, as owner or proprietor of the said market, and has accordingly, from time to time been paid to and received by him;" and that 2d., other part of the said 6d., is due to the parish for taking away the dirt occasioned by such carts, &c., and has been paid to the householders and inhabitants before whose doors such carts, &c., have stood on the market days, for the use of the parish; and that the remaining 2d., is due to and has been received by the last-mentioned householders and inhabitants. It is then enacted, for the better carrying into execution the purposes of the act, that from and after, &c., there shall be paid to the

receiver or receivers, collector or collectors, to be appointed by the said commissioners, "for every cart or wagon loaded with hay, which shall be brought into the said parish for sale on the usual market days, and sold or exposed to sale, the aforesaid sum of 6*d.* in lieu of all other tolls which are or shall be authorized to be taken and collected, the said receiver or receivers, collector or collectors, paying thereout to the lord of the said manor, or such other person as shall be owner or proprietor of the said market for the time being, or such person or persons as shall be appointed by him or them to receive the same, the sum of 2*d.* clear of all charges and expenses, *for every cart or wagon [918] loaded with hay, which shall be brought into the said parish, and sold or exposed to sale on the usual market days as aforesaid."

Section 34 enacts, for defraying the charges attending the execution of the powers of this act, that a rate or assessment, over and above those now payable, shall, once or oftener in every year, be made and assessed by the commissioners upon all persons "who do or shall *inhabit, hold, occupy, possess, or enjoy any house, shop, warehouse, cellar, vault, or other tenement within the said street,*" for raising such a sum as the commissioners shall think needful, so as such rate or rates do not in any year exceed, in the whole, 1*s.* 6*d.* in the pound "of the yearly rents or yearly values of such *houses, shops, warehouses, cellars, vaults, or other tenements or hereditaments* respectively; and that all and every tenant of every *house, shop, warehouse, cellar, vault, or other tenement or hereditament,* shall and may deduct one-third of such sum as shall be so assessed," out of his rent, and "the landlord and landlords, owner or owners of *such premises*" are required to allow such deduction, on the residue being paid.

Stat. 46 G. 3, c. lxxxix. (local and personal public), "for the better relief," &c., "of the poor within the parish of St. Mary, Whitechapel, in the county of Middlesex; for cleansing and lighting the squares," &c., and keeping a nightly watch, and for raising money for repairing certain of the highways, and the parish church, enacts, by sect. 53, "That from and after the passing of this act, the rector, churchwardens, overseers of the poor, and vestrymen of the said parish" of Whitechapel, "qualified as aforesaid, shall assemble [919] and meet together in the vestry-room of the said parish, within" *fourteen days after the sums to be levied shall have been ascertained, as is directed to be done annually by sect. 52, "and the said rector," &c., "or any nine or more of them, so assembled, shall, and they are hereby required to make and sign three distinct rates or assessments, not exceeding the amount of the respective sums so settled and ascertained, upon all and every the person and persons who do and shall *inhabit, hold, occupy, possess, or enjoy any land, house, shop, warehouse, or other building, tenement, or hereditament;* (that is to say), one rate or assessment for the relief, maintenance, regulation, and employment of the poor of the said parish; and also for paying" (composition money to the trustees under a certain highway act); "one other rate or assessment for defraying the expenses of the repairs of the said parish church," and for payment of certain annuities charged thereon; and one other rate or assessment for cleansing and lighting the squares, streets," &c., "and regulating a nightly watch, and repairing the highways within such parts of the said liberties of his Majesty's Tower of London, and city of London; such last-mentioned rate to be a pound rate upon or according to the annual *rent or value of all messuages, lands, tenements, and hereditaments, as shall be held or occupied within such parts of the said parish* as are not within the said liberties, provided that the same does not exceed in any one year the sum of 1*s.* 3*d.* in the pound upon such messuages, lands, tenements, and hereditaments."

Sect. 60 enacts that the rates to be made and assessed as aforesaid, for the relief of the poor, "shall be received, collected, levied, and recovered in such and [920] *the same manner as rates and assessments made for the relief of the poor are directed to be levied and recovered by the said act passed," &c.

(43 Eliz. c. 2), "or by any subsequent act or acts relating to the relief of the

poor ; and such said several methods of levying and recovering the said rates or assessments for the relief, maintenance, and employment of the poor, shall and they are hereby declared to be the legal methods of enforcing the rates or assessments directed to be made in pursuance of the said act for the relief, maintenance, and employment of the poor of the said parish, as fully and effectually as if such ways and methods were repeated and re-enacted in the body of this act."

Other clauses of the two local acts were stated in the case, which it is unnecessary to notice further than as they are adverted to in the argument.

The plaintiff is lord of the manor of Stepney, and owner of the market above mentioned ; and, during the time for which the after-mentioned rates were made, he received the sum of 2*d.* payable to the owner of the market under stat. 11 G. 3, c. 15, s. 38. There was no ground for rating the plaintiff, unless he was rateable " in respect of the market, or the said money payment in lieu of toll."

The case stated that the rector, &c., assembled according to stat. 46 G. 3, c. lxxxix. above mentioned, duly made and signed three distinct rates or assessments (not exceeding the sums settled and ascertained according to the statute), " upon all and every the person or persons who did inhabit, hold, occupy, possess, or enjoy, any land, house, shop, warehouse, or other building, tenement, or hereditament, and among others upon the said plaintiff," as lord of the manor and owner of the market, in respect *of the said sum of 2*d.* for every [*921] cart or wagon, &c. One of the rates to which he was assessed was for the relief of the poor and other purposes ; the other rate, for cleansing and lighting the squares, streets, &c., and repairing the highways. The rates were duly allowed and published. The plaintiff not having paid the sums assessed upon him by these rates, his goods (after summons, &c.) were distrained upon by virtue of two warrants under the hands and seals of the defendants, justices of Middlesex.

The question for this Court was, whether the plaintiff was liable to either of the two rates on account of the sums of 2*d.* payable to him as above stated.

Sir *W. W. Follett*, for the plaintiff. The plaintiff, if rateable, can only be so by force of the local acts, inasmuch as he is not shown to be an inhabitant of the parish, or to occupy any real property within it. Neither the market toll nor the payment in lieu of it under stat. 11 G. 3, c. 15, could make him an occupier within stat. 43 Eliz. c. 2, s. 1 ; *Rex v. Bell*, 5 M. & S. 221. (This point was conceded.) Then the plaintiff, if liable to rate, must be so under stat. 46 G. 3, c. lxxxix. s. 53, as holding, occupying, possessing, or enjoying an " hereditament" in the parish ; but by stat. 11 G. 3, c. 15, the toll formerly payable to the lord is vested in the commissioners appointed by that act ; they, if any person, would be the rateable occupiers : the plaintiff merely receives the 2*d.* from them as part of a sum which comes to their hands to be distributed. He has no power to demand, or to receive it, but through them. But farther, the statute of 46 G. 3, was not intended to *impose a new liability on [*922] any person ; its object was merely to establish a mode of rating. " Tenement" and " hereditament," in section 53, are not to be taken in the widest legal sense, but as limited to matters ejusdem generis with " land, house, shop, warehouse, or other building," mentioned just before. These words would have been unnecessary if " tenement" and " hereditament" had been used in the largest sense. And the final clause of sect. 53 speaks of all " messuages, lands, tenements, and hereditaments," which shall be held or occupied within such parts of the said parish," &c., evidently contemplating something local and corporeal. [*PATTESON*, J. That clause refers only to the third of the rates mentioned ; but the prior clause must, to make sense of it, be read with a reference to this, for, without such reference, there is no local limit given within which the persons inhabiting or holding any land, house, &c., shall be liable to rate.] Sect. 34 of the former stat., 11 G. 3, c. 15, which relates to the raising of rates for the purposes of that act, evidently uses the words " tenement" and " heredita-

ment" in the limited sense here contended for; and sect. 38 speaks of "cellars, vaults, and other places, belonging to any house, shop, warehouse, or *tenement*." Sect. 68 of stat. 46 G. 3, c. lxxxix. gives certain powers to the overseers, "in order to avoid the loss which frequently happens by tenants or occupiers of houses, *tenements*, or *hereditaments*, quitting and removing from the same before the quarter day on which the rates or assessments, charged by virtue of this act, on the said houses, *tenements*, or *hereditaments*" become due. And the two words are used in the same limited sense in sections 69, 70, 71, which also regard the rates. Rex v. The *Manchester and Salford Waterworks Company, 1 B. & C. 630, and Rex v. Mosley, 2 B. & C. 226, are instances in which the word "*tenements*" has been held to take a qualified sense from the words with which it was associated. In this case very plain words should be pointed out, to burden the owner of the market with charges to which, unless by the local act, he is not liable.

Sir John Campbell, Attorney-General, contra. The only question is, the meaning of "*hereditament*" in stat. 46 G. 3, c. lxxxix. s. 53: it cannot be contended that these payments are within stat. 43 Eliz. c. 2, s. 1. The words in the present act are different from those of the statute referred to in Rex v. The Manchester and Salford Waterworks Company, 1 B. & C. 630, and Rex v. Mosley, 2 B. & C. 226: here the assessments are to be made on all persons who "inhabit, hold, occupy, possess, or enjoy any land, house, shop, warehouse, or other building, *tenement* or *hereditament*;" the words being apparently meant to be taken *reddendo singula singulis*. It is said that the clause ought not to be construed favorably to the imposing of a new burden; but there is, in principle, no reason against charging the property in question as well as property of other kinds, and the lord, who by stat. 11 G. 3, c. 15, s. 38, is in the situation of a *cestui que trust* with respect to it, is the person who in justice ought to be charged; not the commissioners, who derive no benefit from it. Not only the maintenance of the poor, but the cleansing and watching of the streets, and repair of the highways, are matters in which the owner of this market has an interest, and *to which he ought, in justice, to contribute. The construction, therefore, of the rating clause ought not to be limited without clear words having that effect. In Rex v. The Trustees for paving Shrewsbury, 3 B. & Ad. 216, where the words "houses, shops," &c., were followed by the words "and other buildings and *hereditaments*," it was contended that "*hereditaments*" must be taken to mean *hereditaments ejusdem generis* with those enumerated before; but the Court held otherwise. [COLERIDGE, J. The previous words there would have restrained the construction, but for the exception that followed.] It is true that, in both the present local acts, the word "*hereditament*" is sometimes used to denote such as are corporeal; but, where that is the case, the context shows clearly that it is meant to be so applied; and in local acts the same word is frequently used in different senses. The final clause of stat. 46 G. 3, c. lxxxix. s. 53, which speaks of "messuages, lands, *tenements*, and *hereditaments*," "held or occupied within such parts of the said parish," &c., refers, at all events, but to one of three rates; there is no ground for saying that it limits the prior clause of the same section, which speaks generally of *hereditaments* enjoyed. It may more reasonably be contended that the latter clause, by implication, extends to the general description of *hereditaments* mentioned in the previous one. [PATTERSON, J. The first clause, taken alone, has no local limit; it may comprehend all persons throughout the kingdom.] It must be supposed that that limit is meant which would be the reasonable one. In Rex v. The Manchester and Salford Waterworks Company, 1 B. & C. 633, [925] BAYLEY, J., relied upon the object contemplated by the act there in *question, and argued that property, which the act was not intended to benefit, did not fall under its burdens. That argument cannot be used for the plaintiff here. In the subsequent case, Rex v. Mosley, 2 B. & C. 226, where the same enactment was to be construed, the question was considered as *res judicata*.

Sir *W. W. Follett*, in reply. The distinction taken between the words now in question in 46 G. 3, c. lxxxix. s. 53, and the enacting words discussed in the two cases last cited, did not form part of the ground of decision in those cases. And the word "tenants" there would have included the persons holding or enjoying incorporeal hereditaments, if the enactment had, in other respects, been framed so as to include them. The decision in *Rex v. The Trustees for paving Shrewsbury*, 3 B. & Ad. 216, turned upon the exception following the words "and hereditaments." So far as it bears on the present case, it is favorable to the plaintiff. From sect. 60 of stat. 46 G. 2, c. lxxxix., it appears that the legislature had stat. 43 Eliz. c. 2, in view; and it may be inferred that they did not mean to introduce liabilities not contemplated by that act.

Lord DENMAN, C. J. I think the plaintiff is entitled to judgment. It is true that he does, in one sense of the words used in stat. 46 G. 3, c. lxxxix., "enjoy" a "hereditament;" but we must take the words, as was done in *Rex v. The Manchester and Salford Waterworks Company*, 1 B. & C. 630, and *Rex v. Mosley*, 2 B. & C. 226, with reference to the other words used in the same part of the act. The words now in question "inhabit, hold, occupy, possess, or enjoy any land, house, shop, warehouse, or other building, tenement, or hereditament," are large, and so they should be, to make a person rateable who was not so under the statute of Elizabeth. I cannot say what would be rateable, under the words here used after "land, house, shop, warehouse, or other building," unless it were the kind of hereditaments to which this case relates: but there are other clauses in the act which limit the sense; and I think the last clause of sect. 53, which fixes the rate there mentioned "upon or according to the annual rent or value of all messuages, lands, tenements, and hereditaments, as shall be held or occupied within such parts of the said parish as are not within the said liberties," show that the former more general words apply only to what may be the subject of corporeal occupation. It is true that this language occurs with reference to one rate only; but it would be irrational to suppose that the words were used for the purpose of excepting the payments for market toll from that particular rate.

LITTLEDALE, J. I am of opinion that the word "hereditament," in section 53 of stat. 46 G. 3, c. lxxxix. is to be confined to such things as are the subject of actual occupation. In stat. 11 G. 3, c. 15, s. 34, it is clearly so confined (his Lordship then commented on this clause). And, in section 53, of the subsequent act, the last clause differs from the previous ones in which "hereditaments" are mentioned, if that word, in the previous clauses, is to have the extended sense which has been insisted upon. It may be said of tolls that they are "hereditaments" to be "held," according to the language used in the last clause of sect. 53, but the words "held or occupied within such parts of the said parish" imply something local, which the payments in question are not. The direction in sect. 60, referring to the statute of Elizabeth, is general, and, in the absence of any provision to a different effect, shows, I think, that the subject-matter of regulation is the same as under that statute. The present act does not seem to me to extend it. In sections 69, 70, and 71, "hereditaments" is applied to things which are the subject of occupation. The word being thus confined in so many clauses, I think that the legislature must be taken, in using it, to have contemplated those things only which are the subject of occupation. There does not appear to me to be any intimation of a design, in this act, to make persons liable to rates, who were not so under the former law.

PATTESON, J. I think the plaintiff is clearly entitled to recover. He was not liable to be rated for the tolls down to 1770, nor does anything appear in the statute 11 G. 3, c. 15, passed in that year, which could render him liable in respect of the payments to be made to him under that statute. We are then called upon, under the subsequent act, to introduce such a liability by virtue of the word "hereditament." But the rate authorized by the clause in which that

word occurs is a new rate, sanctioned by a local and personal act, which passed, as far as we know, behind the back of the owner of this market; and I cannot believe that, in an act so brought in, such an intention was entertained. If it was, it is strange that the words should not have been clearer: for words intended to lay a charge on the subject, which he was not liable to before, ought [*928] to be clear and intelligible. *If "hereditament," in the clause in question, meant hereditaments generally, why was the previous enumeration made? I think that "hereditament" here means things ejusdem generis with those previously mentioned, according to the mode of construction adopted in *Rex v. The Manchester and Salford Waterworks Company*, 1 B. & C. 630, and *Rex v. Mosley*, 2 B. & C. 226. In *Rex v. The Trustees for paving Shrewsbury*, 3 B. & Ad. 216, the word "hereditaments" was not taken in a sense extending beyond the descriptions of property with which it was associated; the property held rateable was ejusdem generis with "meadows and pastures." We are not, therefore, obliged to adopt a construction of the clause now in question which would be contrary to the ordinary meaning of the language used, and to justice and fairness.

COLERIDGE, J. It seems conceded, on the one side, that "hereditament" may mean, and, on the other, that it does not necessarily mean, the kind of property now in question. The onus of showing what is its proper sense in the present case lies upon those who seek to impose a new burden. In stat. 11 G. 3, c. 15, the thirty-fourth section, which imposes the paving rate, uses the word in a manner evidently showing that something corporeal and local is intended. And it is clearly used in a like sense in the latter part of section 53 of stat. 46 G. 3, c. lxxxix. I think, therefore, that the defendants fail in making out that the legislature uses the word in the sense which they would ascribe to it.

Judgment for the plaintiff.

[*929] *The KING v. The Inhabitants of OLDLAND. May 4.

A pauper settled in O. met with an accident while resident in M., which made him chargeable, and was relieved by M. The pauper being incapable of removal in consequence of the accident, an order of removal to O. was made, and immediately suspended: Held that, under stat. 35 G. 3, c. 101, s. 2, O. was liable to the expenses incurred by M. after the order.

On appeal against an order of two justices removing Samuel Vox from the parish of Monythusloyne in the county of Monmouth to the hamlet of Oldland in the parish of Bilton, Gloucestershire, the sessions confirmed the order, subject to the opinion of this Court on the following case:—

Some considerable time before the happening of the accident after-mentioned, the pauper, being then settled in the hamlet of Oldland, resided in the parish of Monythusloyne for the purposes of his employment after-mentioned; and he continued so to reside there till the time of the making the order appealed against. During his residence in M. he was employed in a colliery there; and, in the course of such his employment, he, on the 29th of May, 1832, met with an accident by which his thigh bone was broken. He was thereupon carried to the nearest and most convenient dwelling-house in M.; a surgeon was sent for by the parish officers of that parish: and the expense of 10l. 2s. 6d. was afterwards, and by reason of the accident, incurred by them in his cure and maintenance. The pauper had not before been chargeable to M. On 30th of May, 1832, the pauper then being, by reason of the accident, incapable of being removed, or of being brought before a justice for that purpose without endangering his life, his examination was duly taken; and thereupon the order in question was made by two justices of the county of Monmouth; and an

[*930] *order of suspension was immediately endorsed thereon by the said justices. On 31st of October following, the pauper being fit to be removed,

the same justices took off the suspension, and made an order on the appellants to pay 10*l.* 2*s.* 6*d.* for the expenses incurred under the suspension of the first order as aforesaid.

The question for the opinion of the Court was, whether, at the time of the order of removal, the pauper was removable from Monythusloyne so as to charge the appellants with the costs incurred under the suspension.

Greaves (with whom was *Talbot*), in support of the order of sessions, after referring to stat. 35 G. 3, c. 101, ss. 1 and 2, and stat. 13 & 14 C. 2, c. 12, s. 1, was stopped by the Court.

Sir *John Campbell*, Attorney-General, and *Nicholl*, contra. This party was a casual pauper. [PATTESON, J. Can an inhabitant of a parish be a casual pauper there?] In 2 Nolan's Poor Laws, 437 (ed. 4th), the definition is quite general. "Where a poor person, not settled in a parish, becomes chargeable, from accident, sudden calamity, or any other circumstance, he falls within the description of casual poor, and the parish in which he is detained becomes bound to relieve and take care of him." In 4 Chitty's Burn's Justice, p. 234, Poor, ch. iii. 8, 1 it is said,¹ "Whosoever is by sudden emergency or *urgent [931] distress deprived of the ordinary means of subsistence, has a right to resort for immediate relief to the overseers of the poor of the parish in which he may happen to be at the time when he is thus bereft of support, whether he has acquired a settlement there or not; and it is the bounden duty of the overseers immediately and without waiting for an order of relief, to render the necessary assistance in such cases. There is no statute in express terms to this effect, but it is clearly implied by various enactments regulating the mode of administering the parish funds, and authorizing justices of the peace to enforce this obligation upon overseers when they refuse relief to destitute applicants." This applies as strongly when the pauper is resident, without being actually settled, in the parish, as when he is casually passing through it at the time of the accident. It is added, in the same book, "It is true that the parish upon which such demand is made, may in *ordinary* cases get rid of the burden by an order of removal, when the pauper has a known settlement elsewhere. But relief in the mean time cannot lawfully be denied to the absolutely necessitous, and when the necessity arises from bodily accident, or any sudden calamity which renders the removal of the pauper dangerous or improper, the parish in which the accident has happened, must bear the charge of his support during his illness *and until his recovery." [932] And again, 4 Chitty's Burn, ch. vi. 2, 6, p. 575 (ed. 26th), "If a [932] pauper meets with an accident in a particular parish, that parish is bound to provide for him as casual poor until he is cured; nor can they relieve themselves by removing such pauper into an adjoining parish, or his proper parish." The only consistent principle is that, where accident produces the necessity, the burden is *pro tanto*, cast upon the parish where the accident happens. *Simmons v. Wilmot*, 3 Esp. N. P. C. 91, is an instance of this. In *Atkins v. Banwell*, 2 East, 505, it was held that the parish where a pauper is settled is, in the absence of express promise, under no legal liability to remunerate a parish in which the pauper happens to be resident, for expenses incurred in providing him with medicine upon a sudden attack of illness. In *Lamb v. Bunce*, 4 M. & S. 275, it was held that the overseer of a parish, to which a pauper was conveyed upon an accident happening to him, was liable to remunerate the parish surgeon for

¹ 26th ed. In the 28th edition of the same work (ch. I. ii. 15, 1, vol. iv. p. 89), the following distinction is drawn:—"It is true, that where an inhabitant of the parish is so afflicted, an order for his removal may be obtained, and execution of it suspended, and then the expenses incurred will be repaid by the parish in which the pauper is settled, if he was afterwards removed to it. But no such order can be obtained, where the pauper was accidentally in the parish, and has not come there to settle. Without such order, the parish in which the accident happens has no legal claim on the parish in which the pauper is settled; but if an overseer authorizes directly a surgeon to attend a non-resident parishioner, he is liable to the surgeon."

his attendance, from the mere circumstance of his knowing of such attendance, and not repudiating it. *Tomlinson v. Bentall*, 5 B. & C. 738, shows that the officers of the parish where the accident happens are liable, and cannot discharge themselves by removing to another parish. In *Gent v. Tompkins*, 5 B. & C. 746, note (a), it was held that the overseer of a parish where a pauper was settled could not be made liable to a surgeon for attendance upon the pauper in another parish where he had met with an accident, except by express promise. And if the parish cannot be made liable directly by action of assumpsit, neither can it by the process of *removal and suspension: thus the statute of [*933] limitations, 21 Jac. 1, c. 16, s. 3, enacting that "all actions" of certain kinds shall be brought within the times named, is held to prevent a debt against which the time has run from being a good petitioning creditor's debt. Then it can make no difference whether a pauper be in the parish temporarily, or *animus morandi*. And then stat. 35 G. 3, c. 101, s. 2, cannot apply, since the pauper was not removable at all. That statute does not enlarge the power of removal.¹ Besides it speaks only of cases where the pauper is "brought before any justice or justices of the peace." [PATTESON, J., referred to stat. 49 G. 3, c. 124, c. 4.] That enables a single magistrate to examine a pauper who is too infirm to be brought up to the petty sessions: but both that statute, and stat. 35 G. 3, c. 101, s. 2, apply only to cases where there is a *bonâ fide* intention to remove to the settlement parish, not to a case like this, where there has been merely a formal order with the view of suspending it immediately, for the purpose of charging the settlement parish. There could have been no removal here, either before or since stat. 35 G. 3, c. 101; the case finds that the pauper was incapable of being removed without endangering his life. [PATTESON, J. Can it depend on the degree of illness?] The line may be drawn, wherever it is impossible to remove without danger: had there been a removal here, and had death ensued, it would have been murder or manslaughter. *Rex v. St. James in Bury St. Edmunds*, 10 East, 25, shows that the pauper *was [*934] not removable in consequence of the chargeableness arising from the accident. It is true that that case was decided on the absence of *animus morandi*; but at least it shows that the charge falls on the parish where the accident happens: and in 4 Chitty's Burn, p. 237, ch. iii. 8, 1 (ed. 26th), this remark is made on the case:—"But it is evident that the learned Judge" (LE BLANC, J.) "could not mean that the expenses incurred in a sickness or infirmity, produced by sudden accident, should be defrayed by the pauper's own parish." In *Rex v. St. Lawrence Ludlow*, 4 B. & Ald. 661, it was held that, in case of accident, the expenses could not be thrown, by the parish to which the pauper was conveyed, on the parish where he was settled, by making an order of removal and suspending it. There also there was certainly no *animus morandi*; but the case shows, as before, the liability of the parish where the pauper is. The inference drawn from all the cases in 4 Chitty's Burn, p. 237, ch. iii. 8, 1 (ed. 26th), is this;—"The various *dicta* upon this subject seem to establish that a pauper, become so under such circumstances, obtains a settlement *pro tempore*, in the parish where the accident has left him to be relieved; and that his settlement in his own parish is suspended till the cause of its interruption is removed." Indeed it is doubtful whether the words of stat. 35 G. 3, c. 101, s. 2, "sickness or other infirmity," comprehend a casualty like this. In ordinary language they could not. And in an earlier statute, in *pari materia*, stat. 22 G. 3, c. 83, s. 38, the cases are distinguished; the words are "meeting with any accident, or being afflicted with any dangerous sickness or bodily infirmity." [*935] *The moral obligation seems here peculiarly to attach to the parish in which the pauper has been resident, and which has had the benefit of his services.

Lord DENMAN, C. J. I cannot feel a doubt on this case. There was, as the

¹ See Lord ELLENBOROUGH's judgment in *Rex v. Alvey*, 8 East, 566; and ABBOTT, C. J.'s judgment in *Rex v. St. Lawrence, Ludlow*, 4 B. & Ald. 668.

law once stood, a danger that a pauper might be removed too soon. To prevent this, stat. 35 G. 3, c. 101, s. 2, required that, where the pauper was unable to travel, by reason of sickness or other infirmity (which I take to extend to all infirmities, however produced), the justices should suspend the order; and then the parish to which the suspended order of removal is made, is to pay the charges occasioned by the suspension. *Rex v. St. James in Bury St. Edmunds*, 10 East, 25, and *Tomlinson v. Bontall*, 5 B. & C. 738, are inapplicable: the pauper here had come to settle. All that had been done is therefore right; and the settlement parish must pay the expenses.

LITTLEDALE, J. It is reasonable that these charges, during the suspension, should be paid by the settlement parish. I cannot assent to the distinction between infirmity produced by sickness and that produced by accident. Any infirmity, however produced, is within the meaning of the act.

PATTESON, J. I am of the same opinion. If we held otherwise, we should be acting in contradiction to the object of the stat. 35 G. 3, c. 101. The second section recites that poor persons are often removed during sickness, to the danger of their lives. This pauper might have *been removed, but for the danger to his life arising from this accident. He had come to settle, [*936] within the meaning of stat. 13 & 14 C. 2, c. 12, s. 1, and had become chargeable; how, is immaterial. He was therefore liable to be removed, if that could be done without danger. It is the very case provided for by stat. 35 G. 3, c. 101. If it was illegal to remove, before that statute, it could not be less illegal after it. But then it is said, that the parish in which the accident happens, is liable: true: it is so, till the order of removal, whether the pauper be resident there or not. But, if the accident happens in a parish where he is not resident, there is no power of removal, because the pauper has not come to settle within the meaning of stat. 13 & 14 C. 2, c. 12, s. 1. Then it is said that he was casual poor. If casual poor means a pauper not resident in the parish where he meets with the accident, I agree that he cannot be removed; but if it mean a person meeting with an accident anywhere, I do not agree. A pauper is never casual poor in the parish where he resides; when he happens to be in a place where he is not settled, he may perhaps be called casual poor, but I think that he is not so then, properly speaking.

COLERIDGE, J. The question is, whether this pauper was casual poor, so as to charge the appellant parish. First, was he removable? If removable, he must be so independently of stat. 35 G. 3, c. 101. Now, before that statute, two magistrates might have made an order to remove him; because he had come *animo morandi*, and was chargeable. Under the circumstances of this case, such removal could not be carried into effect. *Till it was carried into effect, [*937] the expenses were to be borne by the parish where the pauper was; for every parish must pay for its own paupers. Then stat. 35 G. 3, c. 101, did not give a power of removal where it did not exist before; but it enabled magistrates to suspend the order, and charge the expenses occasioned by the suspension, on the settlement parish. The question then is, under stat. 35 G. 3, c. 101, s. 2, not whether it was proper to make the order, but whether it was proper to suspend it: of that I cannot doubt. This infirmity made just one of the cases provided for.

Order of sessions confirmed.

The KING v. The Inhabitants of IGHTHAM. May 4.

The sessions quashed an order of removal which assumed an imperfect contract of apprenticeship; and they stated the following facts for the Court. Pauper's brother worked with W., a carpenter, as apprentice, under a verbal contract; on his leaving W., he applied for pauper to be taken in his place. W. said he would take no more apprentices unless they would agree to work on his land, as well as at the carpentry business, saying, "I will have no more apprentices, unless he is agreeable to do other work as well; I will take him to do work as a servant." W. occupied three or four acres of hop ground. It was agreed that pauper should live with W. three years, to

learn the business of a carpenter, and to do any other work W. required: pauper to have 9s. a week the first year, 10s. the second, 11s. the third, and to be paid for over work at the same rates. He entered into W.'s service in pursuance of the agreement, boarding and lodging at his own expense. The question for the Court was stated to be, whether the pauper acquired a settlement by living with W. under these circumstances; if so, the order of sessions to be confirmed; if not, to be quashed. This Court quashed the order of sessions.

On appeal against an order of two justices, whereby John Webb was removed from the parish of Ightham to the parish of Sundridge, both in the county of Kent, the sessions quashed the order, subject to the opinion of this Court upon the following case:—

The respondents proved a settlement by birth in the appellant parish. The appellants set up a subsequent settlement in the respondent parish, under the following *circumstances. William Webb, the brother of the pauper [938] John Webb, worked for Wright, a carpenter residing at Ightham, as an apprentice, for three years, under a verbal contract of apprenticeship, and in 1804, when the pauper was about twenty years old, applied to Wright to take the pauper in his place: to which Wright answered "No;" that he would take no more three years' apprentices unless they would agree to work on his land, as well as at the carpentry business. "I will have no more apprentices for three years, unless he is agreeable to do other work as well; I will take him to do work as a servant." Wright occupied three or four acres of hop ground. William Webb assented; and it was agreed that the pauper should live with Wright for three years, to learn the business of a carpenter, and to do any other work he required him to do, and to be paid 9s. a week the first year, 10s. a week the second year, and 11s. a week the third year. It was further agreed that, if the pauper did any overwork at any time, he was to be paid for it in addition, according to his rate of wages at the time. Wright added that the pauper might have Sunday to himself, if he asked leave. The pauper entered Wright's service in pursuance of this agreement, and served three years, boarding and lodging at his own expense, with a journeyman of Wright's.

The question for the opinion of this Court was, whether the pauper acquired a settlement in Ightham by living with Wright under the circumstances above stated. If the Court should be of opinion that he did, then the order of session was to be confirmed; if the Court should be of opinion that he did not, then the order of sessions to be quashed.

[939] **Bodkin* and *E. Perry*, in support of the order of sessions. It is a question of fact whether there was a hiring and service; and the sessions, by quashing the order, find that fact affirmatively; *Rex v. St. Andrew the Great, Cambridge*, 8 B. & C. 664. In *Rex v. Great Wishford*, ante, p. 216, it was said that the line of demarcation was not plain between cases in which this Court was and was not bound by the finding of the sessions: but it appears, from that case, that the finding will be supported unless necessarily wrong. Here the facts show a hiring and service. The master repudiates the contract of apprenticeship and insists upon the pauper's doing work as a servant; and the pauper assents and works accordingly. *Rex v. Combe*, 8 B. & C. 82, will be relied upon on the other side: but there it appeared that the alternative of apprenticeship and service had been expressly put to the parties, and the former adopted. In *Rex v. Edingale*, 10 B. & C. 739, the Court confirmed the finding of sessions against the contract of hiring and service: there the employment was solely in the trade which was to be learned: and *BAYLEY, J.* said, "If it were a mere question of fact, we ought, before we reverse their decision, to see clearly that there were not sufficient premises to warrant that conclusion." The present case resembles *Rex v. Hitcham*, Bur. S. C. 489, where the pauper was to learn the trade and also to work in the farming line; and it was held to be a hiring and service. Learning is incident, more or less, to almost all services. The question is, whether it be the primary object. Here the master's language dis-

not render the appointment valid, unless the parties acquiescing have knowledge of all the circumstances under which the choice was made. Therefore, where one of two arbitrators objected to S. as umpire, and afterwards the two arbitrators tossed up, and the other arbitrator won, and named S., and the attorney of one of the parties, knowing that the arbitrators had tossed up, but not knowing that one of them had objected to S., proceeded in the reference, it was held that the irregularity was not cured. And this, though the ground of the arbitrator's objection to S. was negatived by affidavit.

DISPUTES having arisen between Jamieson on the one side, and Binns and Dean on the other, they, by agreement, referred all matters in dispute to the arbitration of Marler and Wright, or to the award and umpirage of such person as they should appoint to be umpire between them. Marler and Wright appointed Southam to be umpire; and he afterwards made his award. In Michaelmas term last, Sir *W. W. Follett* obtained a rule, on the part of Jamieson, calling upon Binns and Dean to show cause why the award or umpirage should not be set aside, on the ground, among others, that the umpire was not duly appointed by the choice of the arbitrators, but that his appointment was decided by chance. Each of the two arbitrators, originally named, had proposed several persons as umpire, but the arbitrators had been unable to agree: Wright, the arbitrator named by Binns and Dean, had proposed, among other persons, Southam; but Marler, the arbitrator named by Jamieson, had objected to Southam for reasons stated in the affidavit in support of the rule. Wright and Marler finally agreed that each should write down two names, that then each should strike out one of the four, and that it should be decided by tossing up, whether Wright or Marler should choose one of the two remaining names. Wright won the *toss, and named Southam. Jamieson swore that he had never assented to the nomination of Southam, and that he proceeded in the reference without being aware of the manner in which he had been appointed. Mr. *Earle*, the attorney who attended the arbitration for Jamieson, swore that he himself had never assented to the appointment of Southam, but attended under the impression that his client was bound by the appointment. The affidavits filed in answer stated that *Earle*, before he attended the reference, had been informed of the manner in which Southam had been appointed, and never objected; and that, on the contrary, he had taken part in endorsing the appointment on the agreement of reference; but it did not appear that he knew of Marler having objected to Southam as an umpire; and it was denied, by the affidavits, that Marler had so objected. The affidavits also negatived the facts upon which Marler's objections to Southam were stated, in the affidavits on the other side, to have been founded.

Sir *J. Campbell*, Attorney-General, and *W. H. Watson* now showed cause. It was decided in *Ford v. Jones*, 3 B. & Ad. 248, that the arbitrators must not choose an umpire by chance. But in the matter of *Tunno and Bird*, 5 B. & Ad. 488, the Court so far qualified that doctrine as to hold that, if a party himself assents to such a method of choice before it actually takes place, he cannot afterwards object to it. Here the agent of Jamieson, knowing how the choice had been made, proceeded in the reference: that is a ratification, and must have the same effect as an assent before the choice. [PATTESON, J. *Ford v. Jones*, 3 B. & Ad. 248, seems inaccurately reported, as to *the fact of knowledge by the parties.]* The assent of the parties cures irregularities which consist in failing to pursue the precise terms of the reference. Thus, if the umpire is to be appointed before proceeding in the reference, and the arbitrators enlarge the time before such appointment, the appointment is irregular; yet this is cured by the assent of the parties with knowledge; In the matter of *Hick*, 8 Taun. 694. So in *Wells v. Cooke*, 2 B. & Ald. 218, where the umpire was appointed by lot, the argument in support of the award failed only because the knowledge of the parties was not proved; it may be inferred from the re-

¹ See the remarks of the learned Judge in *In the matter of Tunno and Bird*, 5 B. & Ad. 498; and the note in the same page.

port that, if the knowledge had been shown, the irregularity would have been cured. [PATTESON, J. That is never a very sound argument.]

Sir *W. W. Follett* in support of the rule. The argument urged in support of the award assumes that *Earle* had full knowledge of the facts: but he did not know that one of the arbitrators objected to the umpire; and, if he had known it, he probably would not have proceeded in the reference. [Lord DENMAN, C. J. If two persons named for umpire be equally fit, and there be no reason for preferring one to the other, it seems as if an appeal to chance, or some accidental circumstance, must decide the choice.] The parties stipulate for an exercise of the judgment of both arbitrators in the choice, and here they have not had it.

Lord DENMAN, C. J. It certainly is not desirable that chance should ever [*948] be resorted to: such a proceeding is apt to lead to issues of fact upon the affidavits, which we can hardly decide, and to a waste of time and money. In the matter of *Tunno and Bird*, 5 B. & Ad. 488, an award was upheld because the parties on both sides, being fully aware of all the circumstances, proceeded with the reference. But here, supposing the attorney's assent to be sufficient to bind the party, an important circumstance was not disclosed, namely, that the umpire had been personally objected to by the arbitrator, who afterwards, most improperly, consented to toss up. That was not brought to *Earle's* knowledge; if it had been, the point now suggested in support of the award would have arisen.

LITTTLEDALE, J. The facts here were not all communicated, for the attorney did not know that one of the arbitrators objected to the umpire who was chosen.

PATTESON, J. I hoped that in the matter of *Tunno and Bird*, 5 B. & Ad. 488, had settled the law. But the decision there went on the assent with knowledge of all the facts. Without such knowledge, it must not be taken that an assent is valid: in truth it is no assent.

COLERIDGE, J. Such a choice can be made good only by consent; and consent can exist only where there is knowledge of all the facts.

Rule absolute.

[*949]

*Ex parte PERING. May 5.

A patent for the exclusive use of an improvement in the invention of anchors contained a proviso for avoiding the patent, if the patentee should not supply for his Majesty's service all such articles of the invention as should be required, on such reasonable terms as should be settled by the Lords of the Admiralty. The latter used the invention, but did not take the articles from the patentee. The Court refused to issue a mandamus to them, to settle the terms according to the patent.

On the 6th of October, 1830, letters patent were granted to Richard Pering, for the exclusive privilege of an invention for improving the construction of anchors. The patent contained a proviso for making void the same, if the patentee, his executors, &c., should not supply, or cause to be supplied, for his Majesty's service, all such articles of the said invention as he or they should be required to supply, in such manner, and at such times, and at and upon such reasonable prices and terms, as should be settled for that purpose by the Lords Commissioners of the Admiralty, for the time being.

Sir *W. W. Follett* now moved for a mandamus, commanding the Lords of the Admiralty to settle the prices and terms, according to the patent. The affidavit in support of the rule stated the grant of the patent, and that the Admiralty had had anchors constructed according to the invention, and had refused to give the patentee adequate remuneration. Sir *W. W. Follett* contended that the terms of the patent must be construed as imposing a duty on each side; or that, at all events, the Lords of the Admiralty were not entitled to use the invention instead of making the arrangement contemplated by the patent.

Lord DENMAN, C. J. It is clear that this application is not warranted by the terms of the patent. The defendant has supplied nothing.

*LITLEDALE, J. The claim seems to be in the nature of a quantum meruit for the use of the patent. We cannot grant the mandamus. [950]

PATTERSON, J. The claim, if valid, must be founded on a contract. But we cannot grant a mandamus to a public board, ordering them to carry a contract into effect.

COLBRIDGE, J., concurred.

Rule refused.

STEEPLE v BONSALE. May 6.

Three pleas were pleaded in bar to a declaration in trespass containing one count, and issues joined on them. By order of Nisi Prius, a verdict was taken for 100*l.* damages, subject to the award of a barrister, to whom the cause and all matters in difference were referred, with power to direct what should be done by the parties. He directed a verdict for the plaintiff on two issues, and for the defendant on the third, adding that, if there had not been the third issue, he should have awarded 1*s.* damages to the plaintiff on the other issues:

Held, that it was not competent to the plaintiff to move for judgment non obstante veredicto on the third issue.

And this without reference to any special clause in the order of reference, restraining the parties from bringing a writ of error, &c.

By an award made in this case, it was recited that, at the Derby Spring assizes, 1835, the cause came on to be tried, whereupon it was ordered, by consent, &c., that a verdict should be entered for the plaintiff, damages 100*l.*, subject to the award of a barrister, who should be at liberty to direct for whom and for what sum the verdict should be finally entered; to settle all matters in difference between the parties; and to order and determine what he should think fit to be done by either party, respecting the matters in dispute, and in respect of the way claimed by the defendant. The award then went on as follows: "Whereas in the said action three issues *were joined¹ between [951] the said plaintiff and the said defendant, one relative to a certain private way alleged to have been used for twenty years and upwards, another relative to a certain public way, and another relative to a certain consent and agreement: now, I do award a verdict for the defendant upon the issue relative to the said consent and agreement, and for the plaintiff upon the other issues: if there had been no issue relative to the said consent and agreement, I should have awarded 1*s.* damages to the plaintiff upon the other issues." The arbitrator then directed the execution of a certain deed. The award was dated June 8th, 1835. In Trinity term, 1835, *G. T. White* obtained a rule nisi for judgment non obstante veredicto on the third plea.

Kelly and *N. R. Clarke* now showed cause.² If the plea be bad, it was for the arbitrator to give judgment non obstante veredicto; and award is final as to both law and fact; *Ashton v. Poynter*, 2 Dowl. P. C. 651; 3 Dowl. P. C. 201; *Symes v. Goodfellow*, 2 New Ca. 532. If there be any error in the arbitrator's proceedings, of which the Court will take notice, the objection should be taken by a motion to set the award aside. Supposing this rule to be made absolute, as no damages are awarded, there must be a writ of inquiry, so that the award would be treated as not final, whereas the motion assumes that it is final, for it recognises the finding on the issues. If the award be not final, there should be *a new trial, not a judgment non obstante veredicto. Indeed, as there [952] are no damages, there cannot be judgment for the plaintiff, but only a venire de novo; *Clement v. Lewis*, 3 B. & B. 297; *Tidd's Practice*, 920, 921, (9th ed.) In *Mosely v. Davies*, 11 Price, 162, the Court of Exchequer refused to arrest judgment on an issue directed by the equity side of the Court, con-

¹ The declaration was trespass quare clausum fregit, and contained only one count. The first two pleas were to the whole declaration; the third (as to the consent and agreement) to a part only; but the Court did not enter into any question arising on the particular form of the issues.

² Before Lord DENMAN, C. J., LITLEDALE, PATTERSON, and COLBRIDGE, Js.

sidering that it would be incompatible with established usage, and with the object of such issues. A judgment non obstante veredicto may be moved for at any time before judgment is actually entered up : a motion to set aside such an award as this must be made, by analogy to stat. 9 & 10 W. & M. c. 15, s. 2, before the end of the term after the publication of the award.¹

Sir *W. W. Follett* and *G. T. White*, *contra*. The Court will not allow a judgment to stand, upon a record substantially wrong. [*Wightman*, *amicus curiæ*, mentioned that, in a case before the Judges of Chester, where a cause had been referred under the usual order, the rule of reference was ordered to be amended, after an award in favor of the plaintiff, by striking out the clause restraining the parties from bringing a writ of error,² on the ground of hardship and probable inadvertence, the defendant stating that, at the time when the [*953] cause was referred, it did not occur to him that the *order of reference would contain such a clause.]³ Here it may be understood that the arbitrator has put the facts on the record for the judgment of the Court ; else his statement of what he would have found is nugatory. Why should the parties be prevented from taking the opinion of the Court as to the legal effect of the finding in the award ? The case *In the matter of Mackey*, 2 A. & E. 356, goes beyond the present. The judgment is the act of the Court, not of the arbitrator. The Court will not allow an erroneous judgment to be recorded. [*COLERIDGE, J.* The Court does not of itself take notice of what is on the record : there must be thousands of defective records on which judgment has passed.] *Our. adv. vult.*

Afterwards, in this term (May 9th), Lord DENMAN, C. J., delivered judgment as follows :—We think that it was not open to the plaintiff to come to the Court in this case. The arbitrator's power was complete and final. He had power to do what the Court could do ; and his award therefore puts an end to the proceedings. Rule discharged.

¹ See dictum of PARKER, J., in *Macarthur v. Campbell*, 5 B. & Ald. 519 ; *Allenby v. Proudlock*, 4 Dowl. P. C. 54.

² Some discussion arose, in the present case, as to the effect of such a clause ; and it did not distinctly appear, by the recital in the award or by affidavit, what the precise words of the rule of reference here were ; but the Court decided the question on the general power of the arbitrator, independently of any clause restraining the parties from bringing a writ of error.

³ The cause was *Fairfield v. Wright*. It was afterwards argued in error in this Court, *Wright v. Fairfield*, 2 B. & Ad. 727.

[*954]

*HOUGH and Others v. MAY. May 6.

To *assumpsit* for work and labor in making a railing, defendant pleaded, that before the action he had paid to plaintiff the sum of 8*l.* 11*s.*, and plaintiff had received and accepted the same, in payment and discharge of 8*l.* 11*s.* Replication, that defendant did not pay to plaintiff the said sum of 8*l.* 11*s.* in manner, &c.:

Held, that the defendant did not support his issue, by showing that, before the action, he had sent plaintiff a cheque on his banker for 8*l.* 11*s.*, stated in the body of the cheque to be "balance account railing ;" and that plaintiff held such cheque at the commencement of the action. A cheque so delivered, to operate as payment, must at any rate be unconditional.

And (per *LITTLEDALE, J.*) a party to whom a cheque is sent may commence an action before he sends it back :

Held also, that it was no misdirection to leave it to the jury, only, whether the plaintiffs received the cheque as money.

ASSUMPSIT for work and labor, and materials found, and on an account stated. Second plea, as to 8*l.* 10*s.*, parcel, &c., that the defendant, after the making of the promises, &c., and before the commencement, &c., to wit, on, &c., "paid to the plaintiffs the sum of 8*l.* 11*s.*, and the plaintiffs then received and accepted the same, in payment and discharge of the said sum of 8*l.* 11*s.* in the introductory part of this plea mentioned." Verification. Replication, "That

the defendant did not pay to the plaintiffs the said sum of money in the said second plea mentioned in discharge of the said sum of 8*l.* 1*1s.*," in manner, &c. Conclusion to the country. There were other issues on the record.

On the trial before the Under-Sheriff of Middlesex (April 14th, 1836), it appeared that the action was for an iron railing put up by the plaintiffs for the defendant. The defendant's case, in support of the issue on the second plea, was that he had sent to the plaintiffs, on the 7th of November, 1835, a cheque drawn by the defendant on his bankers for 8*l.* 1*1s.*, which cheque had remained in the plaintiffs' hands since then, the action having been commenced on the 10th of the same month. The plaintiffs produced the cheque upon the defendant's calling for it. It was as follows :

*7 Nov. 1835.

[*955]

Messrs. Dorrien & Co.

Pay Messrs. Hough & Co. balance account railing or bearer 8*l.* 1*1s.*

£8 1*1s.* 0*d.*

WILLIAM MAY.

On the 13th of November, the plaintiffs' attorney wrote to the defendant, stating that, as the defendant had not sent the amount, as requested in a letter of the 6th, he had issued a writ ; adding " the cheque you sent to Messrs. Hough is ready to be returned." No question was raised as to the date of the receipt of the cheque by the plaintiffs ; but they contended that this evidence did not sustain the issue on the defendant's part. As to this, the under-sheriff desired the jury to say whether the plaintiffs received the cheque as money. The jury found that they did not ; and, the other issues being found for the plaintiffs, they had a verdict for 8*l.* 1*8s.* ; the under-sheriff reserving leave to move to reduce the verdict to 7*s.*, if the Court should be of opinion that the cheque was payment. In this term *T. F. Ellis* obtained a rule for reducing the damages accordingly, and also for a new trial, on the ground that the question was improperly left to the jury.

Petersdorff now showed cause. It is not necessary to discuss what would have been the effect of the defendant's sending a cheque in the ordinary form to the plaintiffs, and their retaining it without presentment. Here the cheque purports to be drawn for the balance : the plaintiffs could not, at any rate, be bound to present a cheque so drawn, as the presentment would operate as an admission by them that the balance was only 8*l.* 1*1s.* (He was then stopped by the Court.)

**T. F. Ellis*, contra. The plaintiffs would not be bound by the words, [*956] any more than a party could be held to admit any fact stated on a bank note handed to him and used by him. No authority can be shown for maintaining that such a document would be evidence against the plaintiffs. Then the case is the same as with a common cheque ; and the effect of the production of such an instrument in the hands of the plaintiffs is explained by *PATTESON, J.*, in *Pearce v. Davis*, 1 M. & Rob. 365 ; see *Boswell v. Smith*, 6 C. & P. 60. " It operates as payment, until it has been presented and refused ; and even if payment of it be refused, the refusal must be proved to have taken place before action brought." If the plaintiffs were to recover in this action for the amount, they might issue execution, and then present the cheque, or they might hand it over for a valuable consideration, and thus receive payment twice. But, besides, the plaintiffs on this record are estopped from disputing that they received the cheque as payment. The plea alleges, first, that the defendant paid the 8*l.* 1*1s.* in payment and discharge, &c. ; secondly, that the plaintiffs received and accepted the same in payment and discharge, &c. Of these two allegations, the first only is traversed : the only question therefore is, whether the defendant sent the cheque as payment, as to which there can be no doubt ; for he must have sent it for the purpose of its being used in the ordinary way ; and, if used in the ordinary way, that is, if presented and cashed, it would have satisfied the debt ; and the defendant must have understood that, the moment he appropriated the sum at his bankers, by handing over the cheque, the debt was so far *satisfied, in default (according to *PATTESON, J.*, in *Pearce v. Davis*, 1 M. & Rob. [*957]

865), of subsequent presentment and refusal. If the plaintiffs objected to the form of the cheque, they should not have accepted it in payment, as they admit themselves on the record to have done. But, if this be not conclusive from the nature of the transaction, at any rate, the question for the jury was, not whether the plaintiffs received the cheque as money, but whether the defendant so paid it. There was therefore a misdirection.

LORD DENMAN, C. J. The question is, whether the plaintiffs have been paid 8*l.* 11*s.* To make the delivery of a cheque a payment, it should at least be unconditional. As this cheque is framed, it would be evidence against the plaintiffs, if they made use of it. The case might be different, if it were unconditional; but, even then, the party receiving it would be entitled to exercise his discretion as to presenting it.

LITTTLEDALE, J. The case would be different, if the plaintiffs had received the cheque as money; but all that appears is, that it was sent to them by the defendant. They say, "We never authorized the sending of this cheque to us, and we shall commence an action." Perhaps a party ought, under such circumstances, to send the cheque back: but here the plaintiffs offer to do so; and they were not bound to suspend the commencement of the action till they had returned the cheque. Again, I rather think that the condition inserted in the [*958] cheque might be evidence against the plaintiffs if they presented *it. On both grounds, therefore, this rule must be discharged.

PATTESON, J. The rule must be discharged on both grounds. On this issue it is not sufficient to prove that the cheque was sent by way of payment; but it should be shown that the circumstances were such as would make the cheque a payment by the defendant to the plaintiffs. To call upon the plaintiffs to present such a cheque, is like requiring a party, to whom money is paid, to give a receipt in full for all demands. I do not say that everything written upon the cheque would be evidence against the plaintiffs; but here the words are, "balance account." The plaintiffs could not safely use such a cheque.

COLERIDGE, J. Suppose this cheque had been presented, and it had been afterwards a question for a jury whether the plaintiffs had been paid in full. They would see that, before the action was brought, the plaintiffs had accepted and made use of a cheque professedly given for the then balance. The defendant must have intended the cheque to have that effect; and, the question arises on this record being whether the defendant had made the cheque money, the form of the cheque prevents its having that operation. Rule discharged.

[*959] *MARY AGNES SILK v. HUMPHERY, Esquire, and PEEK, Esquire. May 6.

In an action against the sheriff, for a penalty under stat. 32 G. 2, c. 28, ss. 12, 1, for taking plaintiff, when arrested, within twenty-four hours, to prison, the plaintiff not having refused to be carried to a safe and convenient dwelling-house of her own nomination, defendant pleaded that he informed plaintiff that she might be carried to a safe, &c.; that plaintiff thereupon consented to be carried to the dwelling-house of L.; that defendant carried her thither accordingly, and offered to permit her to remain there for the rest of the twenty-four hours, but the plaintiff then requested to be taken to prison:

Held, on motion for judgment non obstante veredicto, a good plea, the circumstances being equivalent to a refusal:

Held, also, issue being joined on the allegation of the consent to go to L.'s house, that the consent to be proved was not such consent as a person would give who had the option of being at large; but that the question was, whether plaintiff consented to go to the particular house, as a person would consent, who was obliged to be in confinement somewhere:

Held, also, that the fact of the sheriff suggesting L.'s house, did not prevent the consent from being free, within the meaning of the issue.

The sheriff is entitled to exercise a reasonable discretion in determining whether a house, Vol. XXXI.—27

nominated by a prisoner under arrest, as a safe and convenient dwelling-house, be a safe house for the custody of the prisoner.

If a prisoner request to be taken to a house for the purpose only of consulting a person there, that is not a nomination of a house within the statute.

DEBT for the penalty of 50*l.* on stat. 32 G. 2, c. 28, ss. 12, and 1. The declaration stated the issuing of a *capias* out of this Court, at the suit of Henry Morland against the plaintiff, endorsed for bail; its delivery to the defendants, being sheriff of Middlesex, to be executed; that the defendants, by virtue thereof, took and arrested the plaintiff, and had and detained her in custody at the suit of Morland; and, by virtue, &c., carried the plaintiff, so arrested, &c., to a certain gaol or prison, within twenty-four hours from the time of the said arrest, though she, the plaintiff, did not refuse to be carried to a safe and convenient dwelling-house, of her own nomination or appointment, within three miles from the place where the plaintiff was so arrested; such place not being a city, borough, corporation, or market town, and such dwelling-house not being the house of the plaintiff, contrary to the form, &c.: whereby, and by force, &c., the defendants *forfeited and became liable to pay for the said offence to the plaintiff, being the party thereby aggrieved, the sum of 50*l.*, &c. [*960]

Plea. That the defendants, at the time of the arrest, informed the plaintiff that she might be carried to a safe and convenient dwelling-house, of her own nomination or appointment, within three miles from the place where she was so arrested, such dwelling-house not being the house of the plaintiff; and that the plaintiff thereupon consented and agreed to be carried to the dwelling-house of one William Levy, and that the defendants accordingly carried the plaintiff to the said dwelling-house of the said W. L., and were then ready and willing, and offered, to suffer and permit her to remain and continue in the said last-mentioned dwelling-house for twenty-four hours from the time of the said arrest; but that the plaintiff, afterwards and whilst she was at the said dwelling-house of the said W. L., and within twenty-four hours from the time of the said arrest, to wit, &c., requested the defendants to carry her from the said last-mentioned dwelling-house to the said gaol or prison in the declaration mentioned; whereupon the defendants, in compliance with the said request of the plaintiff, and by her express direction, did carry her to the said gaol or prison, within twenty-four hours from the time of the said arrest, as in the declaration mentioned: verification. Replication, That the plaintiff did not consent and agree to be carried by the defendants to the house of the said W. L. in manner and form, &c. Conclusion to the country. Similiter.

On the trial before COLERIDGE, J., at the Middlesex sittings after Easter term, 1835, the defendant's counsel *began, and called a witness who was present at the time of the arrest, and who stated, that Hulland, the officer who made the arrest, told the defendant she must go to prison, or find some one to bail her; to which she answered, that she did not know that she had any friend to bail her, and that Mr. Copeland was her attorney; that she sent a note to Copeland, the answer to which was that he could not come; that Levy's name was mentioned; that the plaintiff wished to remain in the house where she was arrested, but Hulland said he could not wait any longer, he did not wish her to go to his house, but he would recommend her to go to Levy's in Newman Street, as it was near to Morland's, and his own house was distant from it; that the plaintiff went to Levy's willingly; that the witness called a coach at her request; that she expressed no wish to go anywhere else; that no constraint was used by Hulland; and that they remained two or three hours at the house where she was arrested for the accommodation of the plaintiff. Another witness called for the defendants stated, that the plaintiff wished to go to Copeland's, but Hulland would not let her, and would only let her go to a lock-up house. A witness for the plaintiff stated that Copeland, in his answer, had desired the plaintiff to go to his house; and that, on the plaintiff's requesting to go thither, the bailiff refused, and said she must go to prison, and that

the men would have enough to do, if they took prisoners over the town, adding, "I'll take her to Newman Street, which is handy for her friends to see her." The learned Judge told the jury, that the only question for them was, whether the plaintiff consented and agreed to go to Levy's; that the words of the issue [*962] could not mean *that she was delighted to go; that, to whatever house she went, she would have felt some reluctance; that a natural disinclination to go was to be expected in a female so circumstanced; that the question was, whether she went to that particular house unwillingly, or wished to go to another house; that the sheriff had a right to have a voice in the selection of a house, and might not have thought Copeland's a safe house. And he added, according to the note of the plaintiff's counsel (see pp. 965, 972, post), that, if the plaintiff meant to stand on the statute, she ought to have said, "Now I have named a convenient house, I will go for the penalty." Verdict for the defendants.

In Trinity term, 1835, *Knowles* obtained a rule for a new trial, on the grounds of the verdict being against evidence, and of misdirection; or for judgment non obstante veredicto.

Alexander now showed cause. First, the verdict was supported by the evidence. The issue was, whether the plaintiff went to Levy's house willingly. There was express evidence that she did so; and the replication admits that she had notice of her privilege of nomination. It is true that the officer had previously refused to take her to Copeland's, who was her own attorney. He was entitled to object to that, inasmuch as he might consider it an insecure place, and in that point of view he would be justified in not incurring any risk of escape; besides which, it does not appear that she had named it as a house of custody. It is also true that the officer named Levy's house, with his own, to the plaintiff; *but her choice of Levy's house afterwards was not the less [*963] made by her consent and agreement: no other house was excluded, and there was direct evidence that no compulsion was used. Secondly, the jury were rightly directed. The issue was, whether the plaintiff went to Levy's house with her own consent and agreement; and so the jury were distinctly told. Nor can any valid objection be made to the construction put upon the act by the learned judge. Thirdly, as to judgment non obstante veredicto. On this record, assuming the plaintiff's consent to go to Levy's house to have been proved, the sheriff has incurred no penalty. *Hutson v. Hutson*, 7 T. R. 7, was cited on moving for the rule. That was a motion to set aside a judgment and execution on a warrant of attorney, on the ground that it had been executed by the defendant while in custody at the plaintiff's suit, there being only the plaintiff's attorney present, though the defendant declined sending for his own attorney, and said he was satisfied with the presence of the plaintiff's attorney. Lord KENYON said that there was great weight in the observation that the defendant should be considered incapable of waiving the benefit of the rule. In fact, however, the rule was not made absolute, except upon a denial by the defendant of the facts sworn to on the part of the plaintiff, which constituted his excuse. In *Gillman v. Hill*, 1 Cowp. 141, the Court refused to set aside a judgment on a warrant of attorney, where it appeared that the defendant had executed it without having his own attorney present, because he had been informed that it would be void; Lord MANSFIELD saying, "that no rule of the Court [*964] *shall be made an instrument of fraud." From these cases it appears that the rule, requiring the presence of the defendant's attorney may be dispensed with by the defendant's express assent, or by conduct from which his assent may be presumed. In *Walker v. Gardner*, 4 B. & Ad. 371, a judgment was set aside because the attorney who attended on the part of the defendant had been brought by the plaintiff's attorney, and had not been previously known to the defendant. But that is a very different case from the present; and,

¹ See R. Hil. 2 W. 4, I. 72; 3 B. & Ad. 384; and, for the earlier rules, see *Jervis's New Rules*, p. 61, note (v), 8d ed.

though TAUNTON, J., there adopts Lord KENYON's remark before mentioned, in *Hutson v. Hutson*, 7 T. R. 7, the rule cannot be considered inflexible. *Dewhurst v. Pearson*, 1 C. & M. 365, S. C. 3 Tyrwh. 242, is not applicable; there it was held that the mere submission of the prisoner did not amount to a consent, and that he could not be said to have "refused" to be carried to a safe and convenient dwelling-house till the officer had requested him to nominate. So in *Simpson v. Renton*, 5 B. & Ad. 35, it was said that there could be no refusal by the prisoner till he had been requested to nominate; and that a mere omission by him to nominate did not authorize the officer to carry him to gaol. But here is an express assent to the particular house. Further, the plaintiff, having assented, does not appear on the record to have been "aggrieved," which is indispensable to her right of action under sect. 12 of stat. 32 G. 3, c. 28. The Courts have required that this essential ingredient should appear, in many cases which have been decided on statutes using similar language; as [*965] *Rex v. Ingleton*, 1 Wils. 139, and *Rex v. Dewhurst*, 5 B. & Ad. 405, [S. C. 2 N. & M. 253, on stat. 5 & 6 W. & M. c. 11, s. 3; *Rex v. The Justices of Essex*, 5 B. & C. 431 (confirmed by *Rex v. The Justices of the West Riding*, 7 B. & C. 678, on stat. 55 G. 3, c. 68, s. 3; *Rex v. Blackawton*, 10 B. & C. 792, see *Batchelder v. Hodges*, ante, p. 592, on stat. 55 G. 3, c. 51, s. 14: which cases are confirmed by the distinctions pointed out by the Court in *Rex v. The Justices of Somersetshire*, 7 B. & C. 681, note (a), on stat. 17 G. 2, c. 38, s. 4.

Knowles, contra. First, the verdict is against the evidence. It cannot be contended that the plaintiff has no remedy unless she has used bodily force to resist. There was a case of compulsion, short only of that. She was not allowed to go to Copeland's house. Was this house otherwise than "safe and convenient," because he was her attorney? The object of the act is, that the prisoner may have the opportunity of consulting with his own attorney, in order to procure bail. Secondly, there was a misdirection. The learned judge told the jury that, if the plaintiff meant to stand on the statute, as to her nominating Copeland's house, she ought to have insisted on it expressly, and have said that she would go for the penalty. That is contradicted by *Simpson v. Renton*, 5 B. & Ad. 35; the proposal to nominate must come from the officer. [COLERIDGE, J. If I made that remark, I must have coupled it with others in explanation. The plea alleges that the defendant did give the information; which is not traversed.] The prisoner is not bound to tell the officer that he will *go for the [*966] penalty; he may know nothing about it. [Lord DENMAN, C. J. Suppose the judge merely said, the demand must be such as to bring to the officer's mind that he will be liable to the penalty if he refuse.] The learned judge also said, that the sheriff had a right to have a voice in the selection of the house; but the statute gives the nomination to the prisoner. [COLERIDGE, J. I meant merely that he had a right to exercise a judgment whether it was safe and convenient.] Thirdly, the plaintiff is entitled to judgment non obstante veredicto. She could not waive her right. The object of stat. 32 G. 2, c. 28, is the "relief of debtors with respect to the imprisonment of their persons:" and the preamble of sect. 1 recites that "many persons suffer by the oppression of inferior officers in the execution of process for debt, and the exaction of gaolers to whom such debtors are committed." Then the enactment in the same section forbids the officers to take a prisoner, who has not refused to be carried to a house named by himself, to prison, for twenty-four hours, even though such prisoner may prefer a prison to a lock-up house. Lord KENYON's dictum in *Huston v. Huston*, 7 T. R. 7, justifies this construction. [LITTLEDALE, J. That case, as well as some others cited, was on an application to the summary jurisdiction of the Court under its own rule; this is an action for a penalty.] The courts favor an extensive application of the rule. In *Walker v. Gascoyne*, 2 W. Bl. 1297, it was held that a party was protected by it as a prisoner, though only within the rules. So, in *Parkinson v. Caines*, 3 T. R. 616, of a prisoner in the custody of the marshal.

[*967] *Lord DENMAN, C. J. The replication admits that the plaintiff was informed that she might be carried to a safe and convenient dwelling-house of her own nomination. It is suggested that the jury were misdirected. They were told that the refusal of the plaintiff must be more than her natural repugnance to go to any place of confinement. Putting a fair construction on this charge, I think the direction perfectly correct. She is not to go to prison till she has refused to nominate: she should then tell the officer, you must take me to such a house. She need not use the very words of the act; but she must name a safe and convenient house. If the jury think she has done so, and that the officer has improperly refused, he is liable to the penalty. It seems to be supposed that the attorney's house was assumed not to be a safe and convenient dwelling-house, because it was not a place of custody. I do not think it necessary that the house named should be a lock-up house. If there were any house named, which was safe and convenient, I think the officer would not be justified in refusing. Then it is said, that there was a miscarriage on the part of the jury, they having found that she consented to go to Levy's house, whereas she only went to avoid a worse evil. She was under arrest; and it is said that a choice was allowed her only between going to Levy's house and another. It was a question for the jury, whether she chose freely; her choosing in order to avoid prison could not make it less a free choice. The jury therefore were justified. They had to inquire as to the consent, not of a party who could go at large, but of one who was to be confined in some place or other. Then comes [*968] the important question upon the record. *It is said that the plaintiff could not divest herself of her own remedy; that, if she did not expressly refuse to nominate a house, her consent to go to prison came to nothing; for that there was no power to take her thither, in the absence of such a refusal. But the question is, whether this plea be not equivalent to an allegation of her having refused to go to a house nominated by herself. Suppose the officer to say, I will not now take you to prison; I will compel you to stay here. What right could he have to insist on that? Or why was he to incur the expense of her remaining at Levy's house, after she had desired to quit it? She refuses to remain at the house which she has nominated; that is the same as if she refused to nominate. The plea therefore is good.

LITTLEDALE, J. I am of opinion that this rule must be discharged. As to the question, whether the verdict was against the evidence, the question for the jury was whether the plaintiff consented to go Levy's house. It was not necessary that she should use any particular form of consent. But it is said that she had no choice, and that, therefore, she did not consent. She proposed to go to the house of her own attorney. I think, as the learned Judge said to the jury, that the sheriff has so far the control as to be entitled to make a reasonable objection. And it seems to me that the attorney's house is not a safe and convenient house; for, if the prisoner's friends knew that the prisoner is at a place to which they have access, they may attempt a rescue: whereas, if the prisoner be taken to the house of a disinterested person, that may be as convenient as a lock-up house. But, in fact, it does not appear that [*969] the plaintiff asked to go to the attorney's house for the purpose of remaining there during the twenty-four hours. She seems to have wanted only to consult him. And, though the attorney might be willing to give her advice upon her going to the house, yet, on the whole, I do not think the sheriff was bound to assent to the proposal. Then two other houses were discussed; and, of these, she seems to have preferred Levy's. She named none herself: the officer named both. I think the jury were warranted in their verdict. As to the direction to the jury, the principal objection seems to be, that the learned Judge intimated that the sheriff might nominate the house. But I do not consider that what he said amounted to that. Then as to the question on the record. The declaration is quite proper. On the plea, the question arises whether it is a sufficient answer to the declaration, that the plaintiff, being informed that she

might nominate a house, chose Levy's house, and afterwards requested to be taken thence to prison, it not being alleged that she refused to nominate a house. Does the plea falsify her non-refusal? Did she, upon the statement in this record, refuse? She does refuse, if she desire to be taken to prison from the house which she has nominated. The plea therefore falsified the non-refusal sufficiently. Then it is argued that, in several cases, this Court has kept a strict watch, and rightly, to secure its own rules being attended to for the protection of prisoners. But this is an action upon the statute; and it is answered by showing that the party was taken to the house named by herself, and thence, at her own request, to prison. Under the rules of this Court, it is said, a prisoner has not been allowed to waive his own rights. That question *does not arise here. Under the statute, a prisoner may [970] abandon his right to nominate a house, and, if he do abandon it, he is to go to gaol. The plea is therefore good.

PATTESON, J. I think this rule must be discharged. The only question for the jury was, whether the plaintiff consented to go to Levy's house. It is admitted that she was informed that she had a right to nominate. But Mr. Knowles says, the finding of the jury, that the plaintiff consented to go to Levy's, is against the evidence; not because she was removed, and resisted the removal by force (and that, indeed, is not necessary), but because she did not go to Levy's house till she had found that the officer would not take her to a house which she had named. That assumes the fact that she had named some safe and convenient dwelling-house. But this assumption is not justified by a fair construction of the evidence. She does not appear to have required to go to Copeland's house, as a house to stay at, but because she wanted to consult him. For what is the answer made, when she desired to go thither? One of the men said, "We should have enough to do, if we took prisoners all over the town." It is clear that officers are not bound to take prisoners to every house to which they wish to go for any purpose whatever, but only to a safe and convenient dwelling-house, for the purpose of their remaining there during the twenty-four hours. And the plaintiff did not require to go so to Copeland's. There was, therefore, so far, no constraint; for she had named no house. Then the officer's own house is proposed; but it was said that that was too far from Morland's house, and, therefore, *not likely to be convenient. Then she was told that Levy's house was near, and she did not refuse this. The [971] verdict is, therefore, not against the evidence. But it is contended that there was a misdirection. I cannot see that there was. The substance of the direction seems to have been, that the jury must be satisfied with the proof of such consent as would be given, not by a person who had the choice of staying at home, but by one who must, at any rate, be kept in safe custody. That is perfectly correct. It is also perfectly correct to say that the officer ought to have a voice in choosing the house. If not, a house might be chosen where a rescue was easy. Then as to judgment non obstante veredicto. It is on the record that the defendants told the plaintiff that she might be carried to a safe and convenient dwelling-house, that she, thereupon, consented to go to Levy's house (which is the same as if she had nominated that house), and that she requested to be taken from thence to prison. Thus she countermanded, as it were, her previous nomination. It is said that the condition of a prisoner, with regard to the statute, is like his condition with regard to the rule of Court, which was referred to, and that he cannot waive his right. In some sense, I agree to that. Perhaps it might not be sufficient for a prisoner to say, "I know the act; but I do not wish to avail myself of it;" though, indeed, it might be said, that even this was very like a refusal to nominate: it is, however, difficult to say that a prisoner can waive the benefit of the act. But the act leaves him an option. It enacts merely that he shall not be taken to prison within the time unless he refuse to be carried to a house of his own nomination. He may refuse in many ways. He may nominate and then refuse to go: *or he may refuse to [972] nominate; or he may nominate and go and then refuse to stay. The

last is the case now before us; and it is, in effect, a refusal to nominate. As to the question, whether the record shows that the plaintiff is a party aggrieved, I need not discuss it. If the plea be bad, she is a party aggrieved: if it be good, she is not.

COLERIDGE, J. I think the verdict should not be disturbed. It is contended that the prisoner did not consent to go to Levy's house till her reasonable request to go to Copeland's was refused. But she never dreamed of going to Copeland's as an intermediate house to stay at till her going to prison. Copeland was sent for by her, and would not come, but sent her a message, proposing that she should come to him. The answer, given to the request which she thereupon made, shows the real effect of that request. That being so, she had not nominated a safe and convenient dwelling-house. The officer then names two, and suggests, as a reason for her preferring Levy's house, that it is nearer to Morland's, and one from which she may send to her friends. Then the officer says she went willingly. And she therefore consented, in the only sense in which the issue can be understood. It would not have been a consent, in the case of a perfectly free person; but, keeping in view her situation, it appears from the evidence on both sides that she went of her free will. As to the supposed misdirection, I have no note of what I said, the day happening to be one on which, owing to the state of business, I was pressed for time, and could not take a note, as I usually do. But, with respect to the remark that the sheriff is entitled to *have a voice in the selection of the house, I adhere to it. It is [*973] to be safe; that is, safe for the sheriff, not the prisoner. As to the plea, I think it scarcely admits of a question. The plaintiff is informed that she may be carried to a safe and convenient dwelling-house of her own nomination; she consents and agrees to go to Levy's house: when she is there, the defendants offer to let her remain for the rest of the twenty-four hours; she refuses, and requests to go to prison. If that be not a good answer, in what a condition are sheriffs placed? Would the officer have been justified in keeping the plaintiff at Levy's house? If not, the plea is an answer. Rule discharged.

MORTIN v. BURGE. May 7.

On the trial of a cause, a verdict was taken for 3000*l.* subject to a reference, the arbitrator to direct a verdict for plaintiff or defendant, as he should think proper; and to determine all matters in difference, except as to costs, the settlement of which was provided for by the order of reference. The arbitrator directed a verdict to be entered for plaintiff (not saying for how much), and that defendant should, at a time and place named, pay plaintiff or his attorney 260*l.* :
Held, an uncertain award.

THIS cause came on to be tried at the Maidstone Spring assizes, 1835, when a verdict was taken for the plaintiff, damages 3000*l.*, costs 40*s.*, subject to the award of an arbitrator, who was empowered to direct a verdict to be entered for the plaintiff or defendant, as he should think proper, and to whom all matters in difference between the parties were referred, to order and determine what he should think fit to be done by either of them respecting the matters in dispute. Each party was to pay his own costs of the cause and reference, and the expenses [*974] of the award in equal moieties; *and power was given to the arbitrator to enlarge the time for making his award. The arbitrator made and published his award, dated 9th of December, 1835, and, after reciting the order, and certain enlargements of the time, he awarded as follows:—"That a verdict shall be entered in the said cause for the plaintiff; and that said George Burge shall and do, on the 19th day of December instant, between the hours," &c., "well and truly pay or cause to be paid unto the said Thomas Mortin or his attorney, at," &c., "the sum of 260*l.* 12*s.* 6*d.* of lawful money of Great Britain. In witness," &c. A rule was obtained in the next term, January 29th, for setting aside the award, on the grounds, first, that the time for making it had not been properly enlarged; and secondly, that the award was uncertain.

Platt and *Channell* now showed cause. First, no objection can be urged which does not appear on the face of the award, the application not having been made within the first four days of the term after the award was published. [LITTLEDALE, J. For many years after I came to the bar, no objection of this kind was heard of. I do not think there is any such rule on the subject as the plaintiff would insist upon.] *Rawsthorn v. Arnold*, 6 B. & C. 629; See *Macarthur v. Campbell*, 5 B. & Ad. 518; 2 A. & E. 62; *Allenby v. Proudlock*, 4 Dowl. P. C. 54, shows the practice on the subject. The award itself is sufficiently certain, when read in connexion with the order of reference. No discretion is given to the arbitrator as to costs. Nothing appears to which his direction, for the payment of 260*l.* 12*s.* 6*d.*, can apply, except the amount of the verdict.

**Ogle*, *contra*. The reference is of the cause and all matters of difference. The verdict was taken for 3000*l.* Consistently with this award [*975] it might be meant that the verdict should stand for that sum, and 260*l.* 12*s.* 6*d.* be paid for the other matters in difference. If it was to be paid as recovered by the verdict, the arbitrator ought not to have fixed a day for the payment.

Lord DENMAN, C. J. I am at a loss to say, upon this award, whether the arbitrator meant that the 260*l.* 12*s.* 6*d.* should be substituted for the nominal verdict taken, or be paid in respect of matters in difference. I think the award cannot be supported.

LITTLEDALE, J. The arbitrator should have stated for what sum the verdict was to be entered. He very likely meant that it should be for 260*l.* 12*s.* 6*d.*; but that is surmise. The rule must be absolute. Rule absolute.¹

¹ PATTESON and COLERIDGE, Js., had left the Court.

*The KING v. The LORDS COMMISSIONERS of the TREASURY. [*976]
May 7.

In re SMYTH.

A party to whom a superannuation allowance has been granted in pursuance of a Treasury minute, according to stat. 50 G. 3, c. 117, in respect of an office held during pleasure, has no vested interest in such allowance: but the minute may be revoked at will by the Lords of the Treasury.

Although such party contributed to the superannuation fund under stat. 3 G. 4, c. 118, while the clauses as to such contribution were in force.

Where a Treasury minute had been revoked under the above circumstances, this Court refused a mandamus calling on the Lords of the Treasury to restore such minute to their books, and to submit an application to parliament, in the estimates for the current year, for a grant on account of the allowance sanctioned by such minute.

THE Court having, in Michaelmas term last, made a rule absolute for a mandamus to the Lords Commissioners of the Treasury, to issue a minute, directing payment to W. C. Smyth, of his arrears of pension from April 5th, 1826, to October 10th, 1835 (*Rex v. The Lords Commissioners of the Treasury*, p. 286, ante), a copy of the rule was served on the solicitor of the Treasury, and the Lords Commissioners paid the arrears, and continued paying the pension down to the 5th of April, 1836. On the 9th of April, the assistant secretary of the Treasury wrote to Mr. Smyth as follows:—

“Sir, The Lords Commissioners of his Majesty’s Treasury having had before them the minute of this Board, of 6th October, 1826, in which their Lordships expressed their opinion that, under the circumstances therein stated, a vote should be submitted to parliament for granting to you a retired allowance of 166*l.* per annum, and having also fully considered your whole case and conduct with reference to your proceedings against the paymasters of Exchequer bills and this board, I am commanded by their Lordships to acquaint you that, being of opinion that the directions of that *minute should be revoked, and that no application should be submitted to parliament for [*977]

a grant on this account in the estimates for the present year, their Lordships have directed those estimates to be prepared accordingly, omitting therefrom the sum heretofore included on account of that allowance.

"I am, Sir," &c.

In this term, April 26th, *J. Jervis* obtained a rule nisi for a mandamus to the Lords Commissioners to restore to its place in the minute book of the Treasury the minute made therein on or about the 6th day of October, 1826, in which the then Lords of the Treasury expressed their opinion that, under the circumstances therein stated, a vote should be submitted to parliament for granting to the said William Carmichael Smyth a retired allowance at the rate of 166*l.* per annum, and to submit an application to parliament for a grant on this account, in the estimates for the present year.

The affidavit of W. C. Smyth, on which the rule was obtained, set forth the facts detailed on the former application, down to Mr. Anson's last letter, with the additional matter stated above; and Mr. Smyth added that, as long as he enjoyed the office of Paymaster of Exchequer bills, he regularly paid a portion of his salary to the superannuation fund created by stat. 3 G. 4, c. 113.

An affidavit in opposition to the rule, by Mr. Unwin, clerk in the Treasury, set forth a minute of the Treasury board, of March 29th, 1836, in pursuance of which the letter of April 9th was written, and which, after referring to the minute of October 6th, 1826 (for recommending *the grant of a pension [978] to Mr. Smyth), proceeds as follows:—

"My Lords having fully considered the whole case and conduct of Mr. Carmichael Smyth, with reference to his proceedings affecting the paymasters of Exchequer bills, and this board, their Lordships are of opinion that the directions of that minute should be revoked, and that no application should be submitted to parliament for a grant on his account in the estimates for the ensuing year, about to be laid on the table of the House of Commons. My Lords have therefore to desire that the estimates may be prepared accordingly, by omitting therefrom the sum heretofore included on account of that allowance. Acquaint Mr. Carmichael Smyth accordingly."

It was also stated by Mr. Wood, an accountant in the Exchequer bill office, that all such portions of Mr. Smyth's salary as had been deducted, and contributed to the superannuation fund, had, as the deponent believed, been repaid to Smyth on or about February 3d, 1825, in pursuance of stat. 5 G. 4, c. 104, s. 3.

Sir John Campbell, Attorney-General (with whom was *Wightman*), now showed cause, and contended that the Court had no authority to issue the mandamus as prayed. And he referred to *Smyth v. Latham*, 1 Cro. & M. 547; 3 Tyrwh. 509. The Court called upon

J. Jervis and *Welsby* in support of the rule. *Smyth v. Latham*, 1 Cro. & M. 547; 3 Tyrwh. 509, decided that the plaintiff was removable at pleasure from his [979] office of paymaster, by the Lords *of the Treasury. But the question here is whether, after he has been so removed, and a pension has been granted him pursuant to act of parliament, the Lords of the Treasury can strike him off the pension list. [Lord DENMAN, C. J. What right have we to tell any man that he shall, as a member of parliament, do such and such things?] The application is, that Mr. Smyth's name may be put into the estimates. When they are presented, parliament will deal with them as it thinks proper. [COLERIDGE, J. What power have we to make any one submit estimates at all?] Stat. 50 G. 3, c. 117 (see stat. 4 & 5 W. 4, c. 24), restrained the discretion formerly exercised as to the allowance of pensions, by the enactments, in section 1, for laying before parliament the annual increase and diminution, with the grounds, and other circumstances. The exhibiting of such accounts, with respect, among other things, to the superannuation allowances, became then a statutory duty. Stat. 3 G. 4, c. 113 (see stat. 4 & 5 W. 4, c. 24), which directs payments to be made out of salaries, in certain proportions, to raise a superannuation fund, recognises a title, in the persons making such payments, to the al-

lowances out of the fund. Sect. 1 recites the necessity of reducing some of the superannuation allowances grantable by the previous act. No statutory provision would have been requisite for that purpose, if the Lords of the Treasury had had the discretionary power now contended for. The recital speaks of persons "holding situations entitling them to have such allowances granted to them." Sect. 3 enacts that, from and after 5th July, 1822, no superannuation allowance shall be granted unless by the King in council, or the Treasury; and, by sect. 4, no such grant is to be made except under certain *conditions as to age, certificate of infirmity and services, or service performed to the satisfaction of the Lords of the Admiralty or Treasury, to be testified by their minute. Discretion being thus taken away as to granting allowances, it cannot be supposed to continue as to withholding them. Sect. 6 requires an account to be made up to every 5th of January, and laid before parliament, of the total amount of superannuation allowances payable on the 5th of January preceeding, the names of persons receiving such allowance who have died during the year, and the amount of allowance payable to every such person, and the name of every person to whom a superannuation allowance has been granted during the year, and the annual amount of such allowance. Sections 9 to 12, which provide for contributions to the superannuation fund, and for making certain stated deductions for the fund from all salaries in respect of which superannuation allowances may be granted, show that the legislature contemplated a vested right in the allowances. Where it is intended to give a discretionary power, that power is given in express words, as in the latter clause of sect. 14. It is true that, by stat. 5 G. 4, c. 104, the enactments of 3 G. 4, c. 113, as to deductions and contributions for a superannuation fund, are repealed, and it is ordered that the contributions already made shall be repaid; but that does not take away the vested right which the contributors had acquired in their allowances. The party now applying has, therefore, a legal right; and he has no remedy but by the present course. Unless his name be in some manner inserted in the estimates, his case cannot be considered by parliament. It is the duty of the commissioners to make the minute; it is, incidentally, their duty to lay the name of the party before parliament, though they may not be *compellable to add any statement of reasons. The grounds (as far as they appear) for the proceeding taken by the Treasury are in part such as the Court has already deemed insufficient for withholding the pension. [PATTERSON, J. We decided nothing in the former case respecting the title to this pension. We held only that the party was entitled to have a sum of money which the Lords Commissioners had admitted to be in their hands for his use.] [980]

Sir John Campbell, Attorney-General, contended, in answer, that the statutes referred to were all in restraint of the power of the Crown to grant pensions; and the pensions granted by the Crown, before those statutes, were during pleasure, not for life. He also referred to *Gitley v. Lord Palmerston*, 3 B. & B. 275.

Lord DENMAN, C. J. (stopping Sir J. Campbell). There is not the smallest foundation for this motion. The party applying should have shown some words, in one of the statutes, requiring the Lords of the Treasury to do the particular acts insisted upon. But he has failed to point out any such words. It does not appear that the grant to which it was resolved, by the minute of 1826, to lay before parliament, was not altogether a grant during pleasure, and revocable the day after. If so, it would be absurd to require that the board should recall the act of revocation, in which they had exercised the discretion that belonged to them. The first branch of the rule before us is, that the Lords Commissioners should be called upon to restore to the minute book of the Treasury, the minute of October 8th, 1826, expressing their opinion *that a vote should be submitted to parliament for granting Mr. Smyth a retired allowance. For [982] this no ground is laid. The Lords Commissioners had an option then, to decide whether or not a vote on this subject should be placed before parliament, it is equally in their discretion now to say that, under present circumstances, no such vote shall be submitted. I do not say whether the Court has any power to issue

a mandamus for the purpose of interfering with the books of the Treasury. Here, at any rate, it has not. The second branch of the rule is for calling on the Lords Commissioners to submit an application to parliament for a grant on account of this pension, in the estimates for the present year. What power we have to call upon them to submit a vote to parliament, I cannot see. I can draw no such inference in favor of the vested right which has been insisted upon, from the language of stat. 3 G. 4, c. 113. The superannuation allowance seems to me to be held on the same tenure as the office itself, namely, during pleasure. I cannot discover in the sixth section any ground for requiring this vote to be submitted. It enacts that the total amount of superannuation allowances shall be annually laid before parliament; but that does not affect the question, what the amount shall be? It is not even required that the names of those entitled to allowances shall be annually submitted. The names of which the insertion is required, are those of the persons, receiving allowances, who have died, and the persons to whom allowances have been granted, during the year. At all events this does not vary the tenure on which the allowance is held. We cannot say, because a person's name was once held fit to be submitted to parliament for an allowance, that such allowance shall be submitted in the estimates now.

[*983] *These reasons render it unnecessary to enter into more general considerations, which also might possibly furnish an answer to the present application.

LITLEDAL, J. I am of opinion that there was no vested right in this case, and that the minute of 1826 left the Lords Commissioners at liberty, in a future year, to retain or to strike out the name of the party. And, even if they were compellable to restore the minute, that would not accomplish the object contemplated, unless the party's name were submitted to parliament, which must be done, if at all, under stat. 3 G. 4, c. 113, s. 6. But that section would not compel the Lords Commissioners to mention this party's name, even if the minute were restored. We have no authority to require that they shall submit the proposition suggested.

PATTERSON, J. The application is extraordinary; and the party has failed to lay any foundation for it. No clause of any act has been cited, to show that an allowance of this kind, once granted, is to continue for life. It is held by the same tenure as the office itself was, namely, during pleasure. And, if the minute conferring the pension did not give a vested interest, none could be acquired by contributing to the superannuation fund. As to the latter part of the motion, there is nothing to show that the Lords Commissioners have not done all that is required of them by stat. 3 G. 4, c. 113, s. 6; and there is no pretence for calling upon them to make the proposed application to parliament.¹

Rule discharged.*

¹ COLERIDGE, J., had left the Court.

* See the next two cases.

[*984] *The KING v. The LORDS COMMISSIONERS of the TREASURY.
May 7.

In re HAND, Gent., One, &c.

Under stats. 50 G. 3, c. 117, and 3 G. 4, c. 113, the Lords of the Treasury were not authorized to grant retired allowances for life. A grant of such allowance made by them in general terms, was subject to the discretion of parliament voting the supplies from year to year, and was revocable by the Lords of Treasury.

And, where the Lords, after granting such allowance on the abolition of an office, had revoked the grant, but the allowance had been erroneously inserted in the estimates of the year, voted by parliament, and included in the appropriation act, this Court refused to inquire into the propriety of the revocation, and would not grant a mandamus to the Lords for payment of the arrears, it being proved that the sum so voted had never come into their hands, and had been newly appropriated by a later act of parliament.

A RULE nisi was obtained in this term, for a mandamus, calling upon the Lords Commissioners of the Treasury to issue a Treasury minute or authority to

the Lords Commissioners of the Admiralty, the treasurer of the navy, or other proper officer, directing or authorizing him or them to pay, or cause to be paid, to Robert Hand, the arrears of his pension or retired allowance of 240*l.* per annum, from the 25th of December, 1832, to the 25th of March, 1836, as granted to him by the Lords Commissioners of Admiralty.

By Mr. Hand's affidavit, it appeared that the office of sealer to the great seal was granted to him, subject to an existing life estate, by the Lord Chancellor, in 1801, and confirmed to him by patent, to be exercised by himself or by deputy, for his life; and that he entered upon the office, and into the receipt of the fees and emoluments, in 1810. In 1805, before the date of the patent, he was appointed clerk in the navy pay-office, an employment which required his constant attendance. The affidavit then mentioned the passing of stat. 3 G. 4, c. 113, "to amend an act passed in the fiftieth year of his late Majesty, for directing that accounts of increase and diminution of public salaries, pensions, and allowances, should be annually laid before *parliament, and for regulating and controlling the granting and paying such salaries, pensions, and allowances;" [*985] and it set out sect. 1 of the act, regulating the future amount of superannuation allowances, and several other sections (sects. 2 to 7, and sects. 10, 12, and 15), fixing the amount, &c., of such allowances, and establishing a fund for paying them, by contributions and deductions from salaries. The Navy Pay Office was one of the departments included (by schedule) in these provisions. The affidavit also referred to sects. 1 and 3 of stat. 5 G. 4, c. 104, which repealed the former enactments as to contribution from salaries, and directed that all contributions and deductions made under the previous act, should be refunded. None, however, had been made from Hand's salary. In August, 1832, the Lords of the Admiralty, having determined on placing several clerks of the Navy Pay Office, and among them, Mr. Hand, on superannuation allowances, gave him notice that, in consequence of the consolidation of the civil departments of the navy, and the abolition of his office, his services were no longer required, and they had granted him "a pension of 240*l.* per annum." Hand ceased to be a clerk from the date of the notice. His full salary, till that time, was 400*l.* a year. In the navy estimates, laid before parliament the next year (ordered to be printed, February 1833), the pension granted to Hand was inserted under the head "Civil Pensions and Allowances," among "Pensions granted on Reduction of Office." It was stated as follows:—

	Served Years.	Pension.
"Robert Hand, clerk	27	£240."

By an appropriation act, 3 & 4 W. 4, c. 96, passed August 29th, 1833, it was enacted, in sect. 10 (which *with others of the same act, was referred to in the affidavit), that out of the supplies granted to his Majesty in the [*986] then session of parliament there should be issued and applied any sum or sums of money, not exceeding 220,342*l.*, to defray the charge of civil pensions and allowances which should come in course of payment during the year ending March 31st, 1834. And, by sect. 20, that the supplies provided (as in the act before mentioned), "shall not be issued and applied to any use, intent, or purpose whatsoever other than the uses, intents, and purposes before mentioned, or for the other payments directed to be satisfied thereout by any act or acts, or any particular clause or clauses for that purpose contained in any other act or acts of this session of parliament." Hand received the pension from the time of his retiring from the Navy Pay Office till the discontinuance of the pension as after stated.

By stat. 1 & 2 W. 4, c. 56 ("to establish a Court in Bankruptcy"), the Lords of the Treasury were enabled (sect. 53) to grant compensation to certain officers of the Lord Chancellor and of the Court of Chancery, whose fees would be abolished by the operation of the act. The office of sealer to the great seal, which Hand held then and at the time of the present application, was among those included in this enactment; and, in pursuance of it, the Lords of the

Treasury, by a minute of January 24th, 1833, awarded to Hand 449*l.* per annum so long as he should continue in office, the said annuity or compensation to commence from January 11th, 1832.

In March, 1833, Hand received a letter, addressed to him by direction of the Lords of the Treasury, wherein, after noticing the last-mentioned grant, they [987] stated that, adverting to the fact of his holding the said office of *sealer, amounting in emolument to 700*l.* per annum, they had thought proper to direct the Lords of the Admiralty to discontinue the annual payment of 240*l.* per annum made to him from the Navy Pay Office. From the date of that letter, Hand received no further payment on account of the last-mentioned annuity; and he now stated that he was informed, and believed, "that from time to time sufficient sums of money have been voted by parliament to, and received by, government, to be appropriated for the payment of civil pensions granted by the authority of government, out of which they could provide for and pay to him, this deponent, the arrears" of the last-mentioned annuity, "without prejudice to the other demands on the public service." And that the pension of 449*l.* was granted for life without qualification, and solely as a compensation for the fees of which Hand was deprived by the establishment of the Court of Review.

On the 2d of December, 1835, Hand presented a memorial to the Lords of the Treasury, praying that they would reconsider his claim, and order the arrears of his pension to be paid, and the payments continued for the future, or that they would refer the case to the law officers of the Crown. The answer was, that it did not rest with the Treasury Board to direct compliance with the prayer of the memorial for payment of the pension. Hand afterwards presented a memorial to the Lords of the Admiralty, stating the above facts, and ending with a similar prayer to the above. The answer was, that the Lords of the Admiralty did not admit the claim, and had no funds in their possession which they could legally apply to meet it.

[988] In opposition to the rule, Mr. Briggs, accountant-general *of the navy, deposed that it was part of his duty to prepare, for the purpose of being laid before parliament, the estimates of moneys required for the service of the naval department of the kingdom for each financial year, which is computed from March 31st: that in such estimates the amount of the sums voted in the estimates of the preceding year for superannuations and pensions is stated under their respective heads, and abatements made therefrom to the amount of such like allowances as, during the preceding year, have ceased to be payable, by death or otherwise: that in the account annually laid before parliament, as required by stat. 2 W. 4, c. 40, relating to the civil departments of the navy (s. 30), the balance is stated between the sum appropriated to each head of service for the preceding year, and the sum expended under such head of service, which balance is afterwards reported to the Lords of the Treasury, in order that it may be made available as part of the ways and means of the ensuing financial year: that the deponent was, by an order of the Lords of the Admiralty, dated August 2d, 1832, directed to pay Hand the pension of 240*l.*; and that, by an order from them of February 1st, 1833, he was directed to cease paying it, and it was accordingly discontinued: that the estimates are prepared in January of each year, and that the account therein contained, of the amount of pensions which have ceased, is made up to the 31st of December preceding; and that consequently, notwithstanding the last-mentioned order, the amount of Hand's pension of 240*l.* was reckoned in the estimates for the financial year, beginning April 1st, 1833, and was included in the vote of parliament for that year; but that [989] the pension has not been included in any subsequent *estimate, nor any money voted or appropriated by parliament to answer it: and that, although sufficient money was appropriated for the payment of such pension from March 31st, 1833, to March 31st, 1834, yet the amount, being unpaid, formed part of the sum of 168,579*l.*, which was placed at the disposal of the Lords of the Treasury in February, 1835, and became no longer available to or disposable

said estate or interest, by the making of any such cut, sluice, bridge, road, or other work, every such person or persons shall be compensated by the said company for such injury; and such compensation shall, in case of disagreement, be ascertained by a jury in the manner herein directed for ascertaining the value of premises to be taken by the said company, under the authority and for the purposes of this act."

William Hartree and Ann Lammiman are the surviving trustees under certain indentures of lease and release (dated the 18th and 19th of April, 1828), of the fee-simple of a public house called The Wheat Sheaf: and Ann Lammiman is the occupier and tenant for life of the said public house, and carries on the trade of a victualler therein.

The message is included in the first schedule to the act 9 G. 4, c. cxvi., and is situate at the corner of Star Street, and of another street called Lower Turning. Star Street ran to the southward from the premises in question to Wapping Wall. Lower Turning was carried on to the westward, by a street called Milk Yard, to New Gravel Lane; and, to the eastward (before the making of the works executed under this act), by a continuation called Brewhouse Yard (now destroyed), *to another street, forming a further continuation to the eastward, called Lower Shadwell. From the line of streets [*167] comprising Milk Yard, Lower Turning, and Brewhouse Yard, there ran (until the making of the last-mentioned works), four streets to the northward, viz., Farmer Street, Shakspeare's Walk, Great Spring Street, and Fox's Lane, giving access to carriages and horse and foot passengers, by various lines (described in the case and in a plan annexed) from Star Street, and the premises now in question, to New Gravel Lane on the west, and Shadwell High Street on the north. Star Street was a much frequented thoroughfare from Shadwell High Street, southward, to Wapping Wall and the Thames.

The London Dock Company, in pursuance of the last-mentioned act, purchased lands and a great number of houses and buildings, which they pulled down; and made a new entrance to their docks, consisting of a cut with locks and other works. The cut ran from east to west, to the north of Milk Yard and Lower Turning, and parallel to them,¹ passing opposite to the premises now in question. It was enclosed by a paling, which ran at the average distance of twenty-two feet from the north side of those premises. The houses forming the north side of Milk Yard and of Lower Turning had been pulled down by the company, in execution of stat. 39 & 40 G. 3, c. 47, before 1813: the paling stood in part upon the ground thus left vacant. Two bridges were made over the cut, at New Gravel Lane and Fox's Lane, and at distances (as appeared by the plan) of 300 or 400 feet, east and west of the Wheat Sheaf.

*The consequences of these alterations were stated as follows:— [*168] That the premises in question were now confined to only one approach from the north by New Gravel Lane; that the company had, in effect, stopped up Farmer Street, Shakspeare's Walk, and Great Spring Street at their southern extremities, and Lower Turning at the east (those streets being intercepted, at the points mentioned, by the cut and paling); and that, by reason thereof, the occupiers of the premises in question could not pass from Star Street along Shakspeare's Walk, or get into Farmer Street or Great Spring Street, or approach Shadwell High Street through any of those streets, without taking a circuitous route by one of the above-mentioned bridges. And that, in consequence of the pulling down of houses and buildings under the present act, and the destruction of streets, courts, lanes, and alleys, the said Ann Lammiman, as the occupier of the said public house and premises, "lost several customers who were inhabitants of houses so pulled down, and in the

¹ It did not continue in a parallel line to Lower Turning, but made a bend to the southeast, so that the paling after-mentioned cut off the line of that street on the eastward.

posing the former decision, in favor of Mr. Smyth,¹ to be maintainable, it differs entirely from the present, because there the money claimed was in the hands of the Lords of the Treasury, and they sought, before paying it, to impose a condition which the Court thought improper. Here there are no funds. As to the year's pension actually voted by parliament, if a right to it did at any [*992] *time exist, it was taken away by the appropriation act, 5 & 6 W. 4, c. 80, which made it a part of the ways and means for the year ending in 1836. Stat. 4 and 5 W. 4, c. 24 repeals stat. 3 G. 4, c. 113, but is similar in many of its provisions; and in sect. 22, it recognises the power of government to make a diminution in the number and amount of retired allowances.

Sir W. W. Follett and J. Jervis, contra. The clerkship to which Mr. Hand had been appointed in the Navy Pay Office was abolished when he had served twenty-seven years, and was willing to continue his service. He was then entitled, under the acts regulating pensions, to the retired allowance which was granted him. He held also a grant for life of the office of sealer to the great seal; that was among certain offices which were subjected to loss of fees, for which loss the legislature, by stat. 1 & 2 W. 4, c. 56, directed compensation to be made; and, the profits being ascertained, a compensation was granted accordingly. This grant affords no ground in justice for taking away the other. The compensation to Mr. Hand, as sealer, was in respect of emoluments which he derived, not from the Crown, but from suitors. Then, as to the right of this Court to interfere. The pension of 240*l.* was granted by a Treasury warrant, pursuant to statutes 50 G. 3, c. 117, and 3 G. 4, c. 113. Before those acts, the King might have charged his revenue with a pension for life. There is nothing in the acts to show that a pension granted as this was, in general terms, was revocable, more than it formerly would have been. It is said that the office was held at pleasure, and that therefore so is the pension; but there [*993] is nothing to support this latter position. At least, if *the pension be at pleasure, it is not at the pleasure of the Lords of the Treasury. By stat. 3 G. 4, c. 113, the Lords of the Treasury are empowered to fix the amount of allowance to be granted, in the first instance: that is the extent to which they may exercise a discretion. By s. 6 of that act, an account is to be made up to the 5th of January in each year, "specifying the total amount of superannuation allowances payable under the provisions of this act in each department, on the 5th day of January in the preceding year, the name of every person receiving such allowance who may have died in the course of the year, together with the annual amount of the allowance which was payable to such person, and also the name of every person to whom a superannuation allowance may have been granted in the course of the year, and the annual amount of such allowance; and such account shall be laid before parliament on or before the 25th day of March in each year," &c. Thus the name of the person, to whom an allowance has been granted, is to be laid before parliament when the grant takes place, but not again till his death; and a direction is given for informing parliament of pensions ceasing by death, but not of pensions discontinued. It is therefore contemplated that the allowance, once granted, shall continue during the party's life. There is no reason for supposing that pensions, which are compensations for past services, were meant to be discretionary.

As to the particular claim in this case, two questions arise. First, as to the sum actually voted and appropriated in 1833. That was a grant made by parliament for an express purpose, and by sect. 20 of the appropriation act of [*994] that year it is enacted, that the supplies thereby granted *shall not be applied to any purpose other than those mentioned in the act, or in any other act of that session. That takes away any discretionary power that might be supposed to exist under stat. 3 G. 4, c. 113, of diminishing the allowance. Secondly, as to the amount claimed for the subsequent years, it is said that no

¹ Rex v. The Lords of the Treasury, ante, p. 286.

mentioned in the case, have done that which, but for the statute, they could not have done; and the intention of the legislature was that, in so proceeding, they should not enjoy the protection of the act without making a recompense to the parties injured, and who, if the act had not passed, would have had a remedy by action or indictment. [COLERIDGE, J. Suppose, without obtaining an act of parliament, they had bought the soil.] If they had then destroyed the ways over it, the present claimants might have recovered for the particular damage resulting to them, as in *Wilkes v. Hungerford Market Company*, 2 New Ca. 281. There the defendants, in completing some buildings under the Hungerford Market Act, 11 G. 4, and 1 W. 4, c. lxx. (local and personal, public), had obstructed a highway, not by the buildings which they were authorized to erect, but by a board which they kept up for an unreasonable time, and had thereby not only interfered with the public right of passage, but injured the plaintiff in his trade; and on this latter account it was held that he might maintain an action. *Wiggins v. Boddington*, 3 C. & P. 544, shows that, if parties exercising a power given by statute use it excessively and unreasonably, an individual may recover for damage thereby occasioned to him.

If sect. 89, of the act now in question, does not apply to the present case, it would be difficult to say precisely what were the injuries against which it was meant to provide; and it might even be contended that, if the *cut had been brought close to these premises, and every way to them stopped, [*172] no compensation could have been claimed.

Sir F. Pollock, *contra*. It cannot be correct to say that every person who suffers a diminution in the pecuniary value of his estate by the company's works is entitled to compensation under sect. 89. If it were so, then, if, under an act containing such a clause, a new street were built in the same situation relatively to an old one as Regent Street to Bond Street, an inhabitant of the old street might demand compensation for injury to his estate and interest. So the shopkeepers on the south side of St. Paul's churchyard might claim satisfaction under such a clause, if the north side were to be thrown entirely open. [PATTESON, J. Opening a rival way is not the same as stopping up an existing one. Lord DENMAN, C. J. The injury there is accidental; here is a direct exclusion from access. COLERIDGE, J. No act of parliament would be necessary for the opening. PATTESON, J. There is no right to a monopoly of business on the south side: but here there was a right to the access.] According to the argument for these claimants, the possibility that a man might establish a public house on his land would give him a title to recompense for a diminution of its pecuniary value. The intention in sect. 89, was to guard the company against capricious and unlimited demands, on account of matters in which parties had no vested right, and which formed no part of their estate or interest in the land, like the advantages lost in the supposed cases of Regent Street and St. Paul's churchyard. Sect. 54 expressly includes every kind of injury or damage; sect. 89 is limited by *the words "in his estate or interest;" [*173] and the injuries for which it provides are such as accrue "by," and not "in consequence of," the making of any such cut, &c.; and nothing is said there of good-will. Two injuries are alleged here as grounds of the claim; the destruction of buildings and the stoppage of ways. The first head of complaint is clearly within the principle of the decision in *Rex v. The Commissioners of the Nene Outfall*, 9 B. & C. 875, where it was held that a rector could not demand compensation for loss in consequence of land being made no longer productive of tithe. No injury is done here to the estate in fee, or for life. The property is not said to be damaged, except as a public house; and injury in that respect can be only matter of good-will. As to the stopping of ways, a party sustaining damage individually by that proceeding, if it be not authorized by law, may maintain an action, as where a ditch is made across the way, by which a man's leg is broken; but his right in that respect does not depend upon his having a house in the neighborhood. The way is no part of his estate

Lords of the Treasury had power to make a grant for life of the pension claimed. It appears to me that they could not; and therefore the foundation of the claim fails. The office was abolished by a competent authority. The compensation was not made by way of bargain. The abolition was complete; and it was for the Lords of the Treasury to give an equitable compensation. It appears that they made a warrant for that purpose; and, if they had power to grant a pension for life, there might be ground for the position that they had done so; but I do not find anything in the acts of parliament to give them such a power. Mr. Hand was told, in August, 1832, that he would receive a pension in lieu of the emoluments of the office he then held; that is, that the amount of such [*997] *pension would be included in the estimates laid before parliament in the following year. That was done; but early in 1833 it was revoked. We have no right to inquire whether there was reasonable ground for such a proceeding. He was, in fact, told that it would take place. The grant to him of 240*l.* was indeed included in the estimates for 1833-4, and voted by parliament; but I think it has been satisfactorily explained that that was a mistake, that the sum did not enter into account as paid, and that the 240*l.* was altogether excluded from the estimates of the following year. And then it appears that an unappropriated amount, of which this formed part, was subsequently disposed of as part of the ways and means. There being no power to grant this pension for life, the vote of parliament did not bind the Treasury to continue it, but only gave power to the Crown to do so; and the sum has now been voted to another purpose.

LITTLEDALE, J. The Lords of the Treasury had no funds for this pension but such as might be voted by parliament; they could only authorize a party to receive an allowance for life if such vote should pass, and so long as parliament should continue such vote. As a pension, they had no power to grant it, nor funds to charge it upon. After they had made this grant, they for some reason thought proper to revoke it. The estimates were by that time made up; and, in consequence, this sum was included in the parliamentary grant for the year. But it is explained that the amount was afterwards thrown into the general fund applicable to other services, and never reached the Lords of the Treasury for the purpose in question. Under these circumstances we cannot grant a mandamus.

*PATTESON, J. I am of the same opinion. I do not think we ought to [*998] inquire whether the Lords of the Treasury were right or not in revoking the warrant for this pension. There is nothing in the acts of parliament enabling them to grant a pension specifically for life. It is contended that a mere grant would operate to that extent by implication. Perhaps the legislature contemplated that the allowances, when granted, would so continue; but there is no enactment to that effect. The employment which this party had, as a clerk in the Navy Pay Office, was scarcely an office at all; but, at any rate, we cannot say that, because a pension was granted in respect of it, that pension was for life. The pension was paid prospectively from August, 1832, and had been revoked before it was voted by parliament. Even if the Lords of the Treasury had power to grant a pension for life, there was nothing in the circumstances of this grant to render it irrevocable. The appearance of Mr. Hand's name in the estimate for 1833-4, and the want of any statement on the subject in the later estimates, have been explained. And, if he was not entitled to claim this allowance for the year in which it was voted, a fortiori he cannot claim it for a subsequent year.¹

Rule discharged.²

¹ COLERIDGE, J. had left the Court.

² See the next case.

*Ex parte SARAH EASTER RICKETTS, Administratrix of BEVAN. [*999]
May 9.

Deductions having been made from a naval officer's half-pay in pursuance of a general order from the Admiralty, application was made on his behalf to have the amount of such deductions restored, and the Lords of the Admiralty stated, in answer, that they had given directions for restoring it. Afterwards they retracted this consent, giving as a reason that it would subject them to many similar applications. After the officer's death, his administratrix moved for a mandamus to the Lords of the Admiralty to restore the deducted sums, on the ground that they had admitted the right to them and the possession of applicable funds.

Held, that there was no vested right in the half-pay, entitling the administratrix to a mandamus.

J. JERVIS in this term (April 16th) moved,¹ for a rule to show cause why a mandamus should not issue calling on the Lords of the Admiralty to make an order for the payment of 394*l.* arrears of half-pay of Lieutenant Bevan deceased, to his administratrix Sarah Easter Ricketts. It appeared by affidavit that, from 1818 to 1831, Lieutenant Bevan was on half-pay, and, having become lunatic, was maintained, under the direction of government, in Haslar Hospital. From 1819 to 1831, a moiety of his half-pay was deducted, pursuant to an order from the Admiralty with reference to such cases. Applications were made by his relatives to have it restored, but without success. In June, 1831, the regulation established by the above order was discontinued, and the abatement on the half-pay reduced to 1*s.* 6*d.* per day. Lieutenant Bevan died in August, 1831. Mrs. Ricketts afterwards applied to the Lords of the Admiralty for a repayment of the moiety of half-pay withheld from 1819 to 1831. This was at first refused; but, in answer to a subsequent application, the Secretary to the Admiralty wrote to Mrs. Ricketts's agent a letter, dated January 11th, 1832, *as follows:—"Sir,—My Lords Commissioners of the Admiralty, having had under their further consideration the circumstances [*1000] attending the late Lieutenant Bevan's case, command me to acquaint you that they have given directions to restore to his legal representatives the sum which may have been deducted from his half-pay since his first admission into the lunatic asylum at Haslar, over and above the abatement of 1*s.* 6*d.* a day which is now charged against the half-pay of officers received into the lunatic asylum. I am, &c." Shortly afterwards, however, the agent received another letter dated January 20th, 1832, from the Secretary, in which he referred to his former letter as stating that the Lords of the Admiralty "had directed the Victualling Board to repay to the representatives of the late Lieutenant Bevan the amount of half-pay retained for his maintenance in the lunatic asylum at Haslar;" and he added that in consequence of a representation from the Victualling Board that the admission of this claim would bring forward ninety other claimants, the — Lords of the Admiralty, though disposed, out of compassion, to make the payment, did not feel authorized, in such a case, to deviate from the established regulations. Mrs. Ricketts stated in her affidavit that she had received, through her agent, among other payments on Lieutenant Bevan's account, one, about July, 1831, and another about July, 1832, which, as she was informed and believed, were in part satisfaction of the moiety of half-pay withheld as above mentioned.² No other payment appeared to have been made on this account. J. Jervis contended that the affidavits showed an admission on behalf of the *Lords of the Admiralty that they had the money claimed, and were [*1001] bound to pay it; and he urged that an officer's claim to his half-pay was a legal right, on which a mandamus might be grounded. [COLERIDGE, J. Can it be said that there is a legal right in half pay? In Flarty v. Odium, ³

¹ Before Lord DENMAN, C. J., PATTESON, and COLERIDGE, Js.

² No further explanation was given as to these payments; nor were they relied upon in the argument of counsel.

T. R. 681; (see page 995, note (e), ante), it is called a voluntary donation.] While the officer is on the half-pay list, there is a contract between him and government. If not, whence does government derive its right to call upon him for his services? [Lord DENMAN, C. J. It does not appear to me at present that there is any legal claim; but, before we decide upon the application, we will take time to ascertain what ground the right can be rested upon.]

Cur. adv. vult.

Lord DENMAN, C. J., now delivered the judgment of the Court. At the time when this motion was made, we thought that there was no *prima facie* case, but considered it best to look further into the statutes. Mr. *Jervis* did full justice to his clients, in presenting it to us; but we are of opinion that there is no pretence for saying that the half-pay was so vested as to entitle an administrator to call upon a public board to pay it over. There will therefore be no rule.

Rule refused.¹

¹ See the two preceding cases, and *Rex v. the Lords Commissioners of the Treasury*, page 286, ante.

[*1002] *BLEWETT v. TREGONNING. May 9.

Under the Rules Hil. 4. W. 4 (General Rules and Regulations, 8), where plaintiff has obtained a verdict, but defendant has obtained a rule nisi for a new trial, which after the lapse of a year has been discharged, and in the mean time defendant has died, the Court will order judgment to be entered *nunc pro tunc*, though more than two terms have elapsed since the discharge of the rule, if it appear that the delay was occasioned by taxation of costs, and no fault be specifically imputed to the plaintiff.

THIS cause was tried at the Spring assizes for Cornwall, 1834. Of the issues, which were ten, nine were found for the plaintiff and one for the defendant; and in the ensuing term the plaintiff obtained a rule nisi for judgment, *non obstante veredicto*, on the last issue; and the defendant obtained a rule nisi for a new trial in case the plaintiff's rule should be made absolute. In March, 1835, the defendant died. In Trinity term, 1835, cause was shown; the plaintiff's rule was made absolute, and the defendant's rule discharged. *Blewett v. Tregonning*, 3 A. & E. 554. The plaintiff taxed his costs (which amounted to 356*l.*), and the taxation was attended by a clerk of the defendant's agent. In this term a rule was obtained, calling on the personal representatives of the defendant to show cause why the plaintiff should not be at liberty to enter up judgment on the several issues, with *1*l.** damages, as of Easter term, 1834. It did not appear by any particular statement that the plaintiff had been dilatory in prosecuting the taxation, or in applying for this rule.

Butt now showed cause. The application is made too late. By the General Rules and Regulations, Hil. 4 W. 4, 3, 5 B. & Ad. ii., all judgments are to be entered of record of the day when signed, and shall not have relation to any other day. It is, indeed, provided, "that it shall be competent for the Court or a Judge to order a judgment to be entered *nunc pro tunc*;" but it is im-

[*1003] portant *that the Court should lay down some rule for the application of that proviso. Before the new rules, a reasonable limit was given to the liberty of entering judgment, where a party died after verdict, by stat. 17 C. 2, c. 8, s. 1, which enacted that the death should not be alleged for error if the judgment were entered within two terms after the verdict. Here, the judgment ought to have been entered within two terms after the decision upon the cross rules. An application which affects the disposal of assets ought not to be made at this distance of time. No reason is given for the delay which has taken place; but a party wishing to avail himself of the proviso in the new rule, ought to show facts that may bring him within it. If he does not, the analogy to stat. 17 C. 2, c. 8, should prevail. [The Court conferred with the Master as to the circumstances of the taxation.]

Sir W. W. Follett, contra. The plaintiff was entitled to judgment, but could

not have it while the defendant's motion was depending, which motion proved unfounded. When the case was ultimately decided, he was entitled to stand in the same situation as when the verdict was given; but he could not make this application till the costs were taxed.

Per Curiam. ¹

Rule absolute.

¹ Lord DENMAN, C. J., LITTLEDALE, PATTERSON, and COLERIDGE, Js.

*CAHILL v. MACDONALD and Others. May 9. [*1004]

If a defendant obtain an order calling on plaintiff to give security for costs, and directing that defendant shall have seven days to plead after such security given, and defendant afterwards, and before security given, craves oyer, the time for pleading runs from the day when oyer is granted, if subsequent to the giving of security or rescinding of the order, and not, in that case, from the time when such security is given or order rescinded.

THIS was an action commenced in February, 1835, on a life insurance policy. The plaintiff resided in Ireland. A declaration having been delivered, it was directed, by order of a Judge, dated April 13th, 1835, that the defendants should have seven days to plead after security for costs given, upon the usual terms. On the 16th of April, 1835, it was ordered by a Judge that the defendants should have oyer and a copy of the policy, without prejudice to their application for security for costs. An order for giving security for costs was made afterwards, and rescinded April 9th, 1836. Oyer of the policy was given, April 11th, 1836. On the 18th of April judgment by default was signed, the defendants not having pleaded. On the 20th of April a rule of this Court was obtained, to show cause why the judgment should not be set aside for irregularity, as having been signed too soon.

Sir W. W. Follett now showed cause. By the order of April 13th, 1835, the time allowed for pleading was seven days after security for costs should be given. The time for pleading expired on the 16th of April, 1836, seven days after the order for giving security for costs was rescinded. [LITTLEDALE, J. Where a defendant craves oyer, the rule is, that he has as many days to plead after oyer granted as he had when he demanded it.] The rule does not apply here, by reason of the previous order. And the affidavits show (he referred here to statements which it has not been thought necessary to detail) that, before oyer granted, the defendants had all the information necessary to enable them to plead. [*1005]

Sir J. Campbell, Attorney-General, contra. The defendant had, by the rules of practice, seven days for pleading after oyer granted, because they had that time, at least, for pleading, when they demanded oyer. It would have been the same if security for costs had been given. The time expired on the 18th, not sooner.

Per Curiam.

Rule absolute.

¹ Lord DENMAN, C. J., LITTLEDALE, PATTERSON, and COLERIDGE, Js.

Ex parte BINNS. May 9.

Where an attorney had ceased taking out his certificate, and practised in a Hundred Court (the practice of which was regulated according to that in K. B.) for the recovery of debts under 5*l.*, and not elsewhere, the Court would not allow him to be readmitted without paying his full arrears of certificate duty.

R. V. Richards moved that Mr. Charles Binns might be readmitted an attorney of this Court without paying arrears of certificate duty. He was admitted in 1818, and practised with a certificate, till 1829. He then (by reason of the

state of his affairs) ceased renewing his certificate, after which he occasionally practised in one court (but no other), viz., "the Court for the Hundred of the High Peak, in the county of Derby, for the recovery of debts under 5*l*." His affidavit stated that "the practice of this Court is regulated in its various processes according to the principles and practice of the Court of King's Bench: that the attorneys of the Hundred Court are also advocates for the suitors, and are regulated in their pleadings and observe the same rules as are observed by advocates [*1006] *and counsel at the bar of the superior courts." Mr. Binns further stated, that he continued to practise in the Hundred Court after ceasing to take out his certificate, in ignorance that such practice would be construed to come within the purview of the acts requiring a certificate; that he had so done, contemplating readmission, and wishing to keep up his knowledge, but not with a view to profit; and that he had ceased as soon as he found that the practice would endanger his readmission.

Lord DENMAN, C. J. I fear we have no choice. He must pay all the arrears of duty for the time during which he has practised without a certificate.

LITLEDALE, PATTESON, and COLERIDGE, Js., concurred.

To be readmitted on payment of the arrears of duty, and twenty shillings fine, see *Ex parte Thomson*, 5 Dowl. P. C. 275.

Ex parte MILLER. May 9.

An attorney who had practised regularly under a certificate, in this Court and the Court of Common Pleas at Lancaster, and had subsequently discontinued practice, and been employed as superintendent of collieries, and had afterwards been readmitted an attorney in the Court of Common Pleas at Lancaster, all previously to R. Hil. 6 W. 4, 6, was, after that rule, readmitted an attorney of this Court, without the affidavit required by the rule.

Joseph Addison moved for a readmission of an attorney upon an affidavit that he was admitted in the Court of Common Pleas at Lancaster, and in this Court in 1829, and had practised in both under a certificate, regularly taken out, till December, 1831, when he ceased to practise, and became a superintendent of [*1007] *collieries, in which employment he continued until the latter end of 1834, and that he was then readmitted an attorney in the Court of Common Pleas at Lancaster, upon the usual notices, &c., required by that Court. The affidavit required by the rule of Hilary term 6 W. 4, 6, *anté*, p. 747, had not been filed.

Per Curiam.¹ This case is not affected by the recent rule of Court: let him be readmitted.

¹ Lord DENMAN, C. J., LITLEDALE, PATTESON, and COLERIDGE, Js.

SUMPTION v. MONZANI.

A prisoner in execution for a debt not exceeding 20*l*. cannot be discharged under stat. 48 G. 3, c. 123, s. 1, unless he has been actually within the walls for twelve months: residence within the rules is not sufficient.

C. C. Jones moved that the defendant might be discharged out of the custody of the marshal under stat. 48 G. 3, c. 123, s. 1, he having been imprisoned for twelve months in execution for a debt not exceeding 20*l*.

Archbold appeared on notice to oppose the application, and referred to an affidavit by which it appeared that the defendant, during the twelve months, had been out of the actual prison and within the rules. This case falls within the principle of *Boughy v. Webb*,¹ which was before LITLEDALE, J., in

¹ The order was as in the text. According to the report in 4 Dowl. P. C. 320, the learned

be proved by other persons, and an order of bastardy could not therefore be made upon her oath alone." And in *Goodright dem. Stevens v. Moss*, 2 Cowp. 591, it was held to be quite clear that the mother might be examined as to the time of the birth, though her evidence on that subject tended directly to bastardize the issue: the rule of decency and morality, afterwards laid down, is confined to the fact of connexion: collateral circumstances may be proved by either parent. There could not be any objection to Tickle's proving the fact of his absence from Sourton at a certain period, though, when coupled with proof as to the birth of the child, it afforded proof of non-access by him at the time when the child was begotten. [PATTESON, J. It will not be disputed that the parents may bastardize their issue by any evidence except of non-access.] In *Rex v. Luffe*, 8 East, 193, where an order of justices was made concerning a bastard child, born July 13th, 1806, of Mary Taylor, and the order stated that it appeared to the Justices, "upon the oath of the said Mary Taylor, as otherwise," that she had not had access to her husband from April, 1804, till June, 1806, this Court held the order maintainable on the supposition that Mary Taylor was not the only witness *called, and that she was examined "only as to those facts which she was [*187] competent to prove." In the subsequent case of *Rex v. Kea*, 11 East, 132, which may be cited on the other side, it would seem that the wife's evidence (the reception of which was held to vitiate the order of sessions) went to the very fact of non-access. Here, the whole of Tickle's evidence, as stated in the case, would not, by itself, have demonstrated that fact.

There is a recognised distinction between evidence proving a fact, and evidence tending to prove it. It was held in *Rex v. Cliviger*,¹ that a wife could not give testimony even tending to criminate her husband; but that doctrine was questioned in *Rex v. All Saints, Worcester*, 6 M. & S. 194; and in *Rex v. Bathwick*, 2 B. & Ad. 639, it was held that the tendency to criminate is no objection to the wife's evidence where there is no direct charge or proceeding against the husband. The wife, according to that case, might, on the trial of an appeal, give evidence tending to show that her husband had been guilty of bigamy; for neither her statement at the sessions, nor the decision there, could have been received in support of an indictment against him for that crime.

Crowder, contra, was stopped by the Court.

LORD DENMAN, C. J. It is desirable to show, in a case of such importance as this, that we adhere to the old rule of law, without any doubt. The rule, cited in 2 Starkie on Evidence, p. 139, note (x), (2d ed.), from *Goodright dem. Stevens v. Moss*, 2 Cowp. 591 (supported also by *Rex v. Kea*, 11 East, [*188] 132, cited in the same note), is that parties shall not be permitted after marriage to say that they had no connexion. Then, it being clear and indisputable law that, for the purpose of proving non-access, neither husband nor wife can be a witness, the question is whether the circumstances of the present case bring it within that rule. I wish the statement sent up to us had been clearer; but it is impossible not to see that the husband, being called for a different purpose, was cross-examined directly for the purpose of proving non-access. It is not necessary to say that, if he had been asked the questions that were put to him, with a different object, the answers would not have been evidence: but, when he was asked where he lived at a particular time, with the avowed purpose of proving the fact of non-access, the rule prohibiting such inquiry became applicable. The sessions have expressly said that they are satisfied with the proof of non-access, if they were right in admitting Tickle's evidence, without which it was not sufficiently proved. They have, therefore, admitted the husband to prove what, by a rule of law, clear and undoubted and of obvious public utility, they could not receive as evidence from him. The order of sessions must be quashed.

LITLEDAL, J. I agree in the rule cited in 2 Starkie on Evidence, from *Goodright dem. Stevens v. Moss*, 2 Cowp. 591, that neither the wife nor the hus-

¹ 2 T. R. 268. LITLEDAL and COLERIDGE, Js., referred to *Hood's Case*, 1 Moody's C. C. 281, and *Smith's Case*, *Ibid.* 289.

LITLEDALE, J. As to the first point, the learned Judge having exercised the discretion vested in him, his decision should not be reviewed. With respect to the description of the attorney's abode, the sufficiency or insufficiency of it was a matter quite in the discretion of the Judge. No general rule can be laid down. The Strand, and Holborn, for instance, are the only streets of that name; but there are streets which are of the same name as many others. So there is only one Gray's Inn. The Judge must decide these cases, which differ from cases on enactments prescribing the mention of a parish. Here the necessity is the less, because, by applying at the Master's office, and in other quarters, information may be obtained. Our decision should be, not to set aside the Judge's order, but to amend it, by converting it into an order to set aside the copy of the writ. The endorsement is not part of the writ, but something put on the writ: but as the plaintiff did not make this point before the Judge, he must pay his own costs.

PATTESON, and COLERIDGE, Js., concurred.

"Ordered, that the order of the honorable Mr. Justice WILLIAMS, made," &c., "be amended, by directing the copy and service of the writ issued in this cause to be set aside; and that no costs be allowed on either side."

[*1016] *STOCKDALE v. TARTE and Others. May 9.

In an action for libel, the declaration stated that plaintiff and M. had been duly convicted of conspiring to extort money from C., and received judgment, but that defendant published that the counsel, who moved for judgment, had stated plaintiff to be the writer of a letter which was in fact written by M., issue was joined on a plea of Not Guilty. Plaintiff, at the trial, proved the publication and the indictment and sentence, the letter being set out in the indictment as an overt act of the conspiracy, and called the counsel as a witness, who deposed that he had in fact made the statement. Held, that on this evidence it was properly left to the jury whether the publication was a libel, and the jury having found a verdict of Not Guilty, that this was not contrary to the evidence.

THIS cause was tried before Lord DENMAN, C. J., at the Middlesex sittings after Hilary term last, when a verdict was found for the defendants on two pleas pleaded to the whole action. On a former day of this term,¹ the plaintiff in person moved for a new trial on several grounds. The rule was refused except on the points mentioned in the judgment, as to which the Court took time to consider. These will appear sufficiently from the judgment; it is not thought necessary to mention those on which the rule was refused.

Lord DENMAN, C. J., now delivered the judgment of the Court. This was an action for libel. The pleas were, Not Guilty, and a justification, that the alleged libel was a true report of what passed in a court of justice.² The jury have found a verdict on both pleas for the defendants. All questions were disposed of by the Court at the time of the motion, except those which arise upon the verdict of Not Guilty.

The points are, whether I was right in leaving the question of libel or no libel to the jury; and, if so, whether their verdict is against evidence. It is to be observed that, as the jury have found a verdict for the defendants upon the plea [*1017] of justification, which verdict *there is no pretence for disturbing, the plaintiff, even if he had a verdict upon the plea of Not Guilty, could have no damages nor judgment. Still, if there be misdirection, he is entitled to a new trial; or, if the verdict on that plea be against evidence, it may be fit that he should have such rule on payment of costs.

The present declaration sets out with alleging that the plaintiff had been duly convicted of conspiring with one Montprivat to extort money from a husband

¹ Friday, April 22d. Before Lord DENMAN, C. J., LITLEDALE, PATTESON, and COLERIDGE, Js.

² There were other issues found for the plaintiff.

by threatening to calumniate his wife, and received the judgment of this Court for his said offence. And the grievance complained of is, that the defendants stated that the learned counsel who moved for judgment against them had declared the plaintiff to be the writer of one letter, which was not in fact written by him, but by his co-conspirator.

The plaintiff's evidence on the trial proved the great probability of the counsel alluded to having in fact stated that the letter was that of the plaintiff and not of Montprivat. That learned counsel, now Lord ABINGER, appeared as a witness for the plaintiff, and made this statement; and the jury expressly found their verdict accordingly on the issue of justification. Moreover, the evidence of the indictment and sentence, evidence also adduced by the plaintiff, showed that the letter was set out as an overt act of the conspiracy whereof he was convicted, and consequently that it had appeared to be, in one sense, his letter.

Under these very particular circumstances, the plaintiff's own allegations making them a necessary part of his case and proof, we think that the character of the publication was properly part of the issue of Not Guilty, and that the question was properly left to the jury upon *that plea; and that their verdict was warranted by the evidence. Therefore no rule will [*1018] be granted. Rule refused.

The Earl of Scarborough *v.* Doe dem. Savile (in Error), decided in the Exchequer Chamber during this term, is reported, *antè*, vol. iii. p. 897.

The following cases, which stood over for consideration, after argument, and in which judgments were given in this term, viz.:

The Governor, &c., of the Poor of Bristol *v.* Wait,

Rex *v.* The Churchwardens of Dursley,

Rex *v.* The Principal, &c., of Barnard's Inn,

Owen *v.* Body, and

Graves *v.* Hicks, in which a certificate was sent to the Vice-Chancellor in Hilary vacation, will be found in the next volume.

*MEMORANDA.

[*1019]

IN Hilary term, 1836, the Lords Commissioners having resigned the Great Seal, the Right Honorable Sir Charles Christopher Pepys, Master of the Rolls, was appointed Lord High Chancellor, and created a Baron of the United Kingdom, by the name, style, and title of Baron Cottenham, of Cottenham in the county of Cambridge.

In the same term, Henry Bickersteth, Esq., one of his Majesty's Counsel, was appointed to succeed Sir C. C. Pepys, in the office of Master of the Rolls; and was created a Baron of the United Kingdom, by the name, style, and title of Baron Langdale, of Langdale in the county of Westmoreland.

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E., being owner of a house, enlarged it, and inserted a window at one end, in the part added, and, at another end, carried out the side walls, between which two windows formerly stood in a straight line, five feet, converting this end into a bow, and inserting two bow windows, in the same direction, but not in the same situation, as the two former. *Held*, that whatever privilege against the obstruction of light the windows of the original house possessed, this privilege did not apply to the three new windows.

Before E.'s house was built, the land on which it was built, together with some adjoining land, belonged to R., who conveyed the land on which the house was afterwards built to C., and C. agreed to sell to E., who entered and built the house. Afterwards, and before the enlargement above mentioned, R. joined in a conveyance with C. (each as to his own estate), by which the house, with all lights and easements appertaining, and an additional part of R.'s land, were granted to E. E. having afterwards enlarged (as above described): *Held*, that neither R., nor his assignees, were precluded from obstructing the three new windows by building on the land adjoining.

After the enlargement, E. assigned to O., and R. afterwards assigned an additional piece of the adjoining land to O.; this piece lay to the north of O.'s house, and, in the conveyance, its southern boundary was described to be "the dwelling-house of O." *Held*, that this did not operate as a recognition of the house in its then state, so as to preclude R., or his assignees, from obstructing the new windows by building on other part of the adjoining land south of O.'s house.

In the case stated for the Court, by which it was agreed that the Court might draw

conclusions of fact as a jury, it was stated that R., at the time of his original conveyance to C., was desirous of selling his land in building lots. The Court refused to take this into consideration, in interpreting the effect of the conveyance, which did not mention this, but called the land conveyed, "arable land;" and they held, that R. was not precluded by this conveyance from obstructing the lights of the house afterwards built.

After the conveyance by R. and C. to E., R. was told, by E.'s architect, that alterations were going on, but R. did not know the precise alteration intended to be made as to the windows. R. was told of the precise nature of other alterations, to which he assented, reserving to himself leave to build on his own ground, up to the wall of the house, in a part which did not contain the new windows. The Court refused to infer, as a fact, such a legal instrument as might be necessary to convert O.'s house into a dominant, and B.'s land into a servient, tenement with respect to the lights. *Blanchard v. Bridges*, 176.

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Defendant, being indebted to plaintiff in 150*l.*, and being employed by T. to perform works for which he was receiving a percentage, wrote an order to T. to pay plaintiff 150*l.* out of the first moneys due to defendant. Afterwards, being indebted to B. in 97*l.*, he executed a deed reciting the above facts, assigning and transferring to B. such sums as then were or should become due to him, defendant, from T., in trust, first, to pay plaintiff the 150*l.*, and, secondly, to retain the residue towards payment of the 97*l.*; with covenants that he would not receive the money, nor revoke, &c., that he had right to assign, had not incurred, and for further assurance. Defendant afterwards received 150*l.* from T.; and plaintiff sued him for money had and received, and on an account stated: *Held*,

(1.) That the action lay for the 150*l.*, though no proof was given of T.'s assent to the order; and though, at the time of making the order, nothing was due from T.; and though, at the time of making the deed, there was not 150*l.* due from T., and it was, at such times, uncertain to what extent defendant would be employed by T.; and though plaintiff was not a party to the deed.

(2.) That plaintiff was entitled to give secondary evidence of the order, upon proof of a bona fide search for the original among plaintiff's papers only.

(3.) That such secondary evidence was furnished by a paper, admitted by defendant's attorney to be a true copy of an affidavit sworn, but not filed, by defendant in proceedings against another party, such paper stating the order to have been written by the defendant, and setting it out, though no evidence was given that the attorney had compared the paper with the original affidavit or order.

(4.) That on such secondary evidence, it must be presumed that the order was properly stamped.

(5.) That the deed was not a mortgage, but an absolute assignment of the defendant's earnings.

(6.) Upon its appearing that, at and since the time of executing the deed, less than 500*l.* was due from T. to defendant, and that not so much as would make up 500*l.* was likely to be earned from that time to the conclusion of defendant's employment with T.: *Held*, that the deed required no more than a 3*l.* stamp, under stat. 55 G. 3, c. 184. Sched. Part. I. tit. *Conveyance*. *Poolley v. Goodwin*, 94.

3. Money extorted under color of legal proceedings. *Pleading*, I. 1.
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- IV. Executory contract; liability of one party after partial non-performance by the other.

Declaration stated that defendant, being indebted to certain persons, agreed to repay plaintiff the amount of all accounts which he should settle for defendant; and also to pay plaintiff 40*l*. a quarter on stated days, till the said debts should be fully settled; and plaintiff agreed to advance to defendant 1*l*. per week, and certain other sums, out of the sums of 40*l*.; that, in consideration of plaintiff's promise, defendant agreed to perform the contract on his part; that plaintiff paid debts for defendant to divers persons (naming them) to the amount of 28*l*.; that the whole amount of debts was not yet settled; and that several sums of 40*l*. had become due from defendant under the agreement, which had been paid to the amount of 160*l*. only, but the rest were unpaid.

Plea, as to two of the sums of 40*l*., that before they became due, plaintiff had omitted to pay certain of the debts due to creditors of defendant (naming them), other than the creditors named in the declaration, which he might have paid; and had also omitted, after the last payment of 40*l*., to pay defendant 1*l*. per week; wherefore defendant in a reasonable time, and before the two sums in question were due, rescinded the contract.

Replication, that, before and at the time of the last payment of 40*l*., defendant was indebted to plaintiff in the sum of 50*l*. and more, in respect of the moneys paid by plaintiff for defendant, as in the first count mentioned; and that the said 40*l*. was insufficient to discharge the amount in which defendant was so indebted to plaintiff, and for which the agreement was a security;

Held, that the plea was bad, as showing, at most, only a partial failure of performance by the plaintiff, which did not authorize the defendant to rescind the contract.

Quære, whether the replication was good. *Held*, by COLERIDGE, J., that it was bad. *Franklin v. Miller*, 599.

ATTACHMENT.

- I. Against bankrupt attorney, for non-payment of money.

Money was invested in stock, pursuant to a will, for the benefit of a legatee. An attorney obtained the legatee's authority, and a power from her trustee, to sell out the stock, representing that it might be better invested in a mortgage, and that he would find a proper security. The money was sold out, and the proceeds received and held by the attorney, he paying interest on the amount to the legatee, who did not know that the money had not been reinvested. Inquiries being afterwards made, he admitted, after some evasion, that he had not reinvested the sum; but, upon being further urged, promised that he would do so, and at length proposed a mortgage (which was thought insufficient) on property of his own. No further satisfaction being offered, the legatee moved the Court against him, and a rule was made, by consent (the attorney having filed no affi-

davit), ordering that he should reinvest the money in stock, on or before the 24th of June then next, and pay costs; and, on default, that an attachment should issue against him. The money was not reinvested, nor costs paid, and on June 25th a fiat in bankruptcy issued against the attorney, who, in October, obtained his certificate. The rule, and allocatur were served, and the costs demanded, in August. On motion made afterwards for an attachment pursuant to the above rule:

Held, that, under these circumstances, the certificate was no answer to the application, and that the attachment might issue. *In re Newbery*, 100.

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- I. Notice previous to admission.

1. A party applying, on the first day of Easter term, to be admitted an attorney in that term, had affixed his notices in a name which he had taken since the expiration of the articles, having served in another name, to which his notices did not refer. The Court allowed him to be admitted, after affixing notices in both names for the rest of Easter term. *In re Ridley*, 780.

2. The Court allowed an attorney to be admitted without a full term's notice, where all the other requisites had been complied with, and it appeared to be essential to his interests in his profession that he should sail for India before the regular time of notice would expire. The application was made on the second day of the term, and the admission was ordered to be on the last day of the same term. *In re Hancock*, 779.

3. Three days' notice must be given to the Master, under the rule of Hil. 6 W. 4, by persons applying to be admitted attorneys, exclusive of the day on which the notice is given, and of the first day of the term to which it relates. *In re Prangley*, 781.

- II. Certificate: neglect to renew, its effect.

1. Where an attorney had ceased taking out his certificate, and practised in a Hundred Court (the practice of which was regulated according to that of the K. B.) for the recovery of debts under 5*l*., and not elsewhere, the Court would not allow him to be readmitted without paying his full arrears of certificate duty. *Ex parte Binns*, 1005.

2. An attorney who had practised regularly under a certificate, in this Court and the Court of Common Pleas at Lancaster, and had subsequently discontinued practice, and been employed as superintendent of collieries, and had afterwards been readmitted an attorney in the Court of Common Pleas at Lancaster, all previously to R. Hil. 6 W. 4, 6, was, after that rule, readmitted an attorney of this Court, without the affidavit required by the rule. *Ex parte Miller*, 1006.
- III. Readmission of. See *Antd*, II.

IV. Power to bring action on his bill pending order for taxation.

An attorney's bill was referred to taxation by a Judge of the Court of Common Pleas, who directed that the rule should not be acted upon till the attorney should have had time to make a certain motion to that Court. The motion was disposed of; and, on the second day afterwards, the client not having proceeded with the taxation, the attorney arrested her for the alleged amount of the bill. A Judge of the Court of King's Bench, on summons, set aside the proceedings and discharged the defendant out of custody, with costs, ordering the plaintiff also to pay the costs of the summons. *Held*, that the discharge was right; and the Court would not review the order as to costs.

In discharging the rule for rescinding the Judge's order, it was made a condition that the defendant should not prosecute an action for a malicious arrest. Afterwards, the attorney's bill was taxed, and the balance due to him found to be only 369*l.*, he having arrested for 800*l.* The Court, on motion, refused to release the defendant from her undertaking not to prosecute the action.

Seemle that, if a client obtain an order for taxing an attorney's bill, and take no further step for several weeks, the attorney cannot treat the order as waived, and arrest, but should himself cause the bill to be taxed, before proceeding against the client. *Shireff v. Lady Gresley*, 338.

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Where arbitrators have decided the choice of an umpire by tossing up, the acquiescence of parties, subsequently to the choice, and before the reference is proceeded in, does not render the appointment valid, unless the parties acquiescing have knowledge of all the circumstances under which the choice was made.

Therefore, where one of two arbitrators objected to S. as umpire, and afterwards the two arbitrators tossed up, and the other arbitrator won, and named S., and the attorney of one of the parties, knowing that the arbitrators had tossed up, but not knowing that one of them had objected to S., proceeded in the reference, it was held that the irregularity was not cured. And this, though the ground of the arbitrator's objection to S. was negatived by affidavit. *In re Jamieson and Binns*, 945.

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2. How far decision of award will be referred to facts stated upon it.

An action on the case against an attorney, for negligently preparing a conveyance of land to the plaintiff, was referred to an arbitrator with all matters in difference. The plaintiff's case on the reference was, that many words in the deed were written on erasures, which were not noticed in the attestation; that the deed was in other respects incorrect and improperly prepared; and that, by reason thereof, the plaintiff was prevented from mortgaging. The arbitrator ordered a verdict to be entered for the defendant, and awarded that it was proved before him that the erasures in the conveyance mentioned in the pleadings were made before the deed was executed.

On motion to set aside the award, on the ground that the facts therein stated did not warrant a finding for the defendant:

Held, that the above statement of fact by the arbitrator did not show that his decision proceeded on that fact; and, therefore, that no ground appeared for reviewing his award. *Lancaster v. Hemington*, 345.

3. Uncertainty as to damages awarded.

On the trial of a cause, a verdict was taken for 3000*l.* subject to a reference, the arbitrator to direct a verdict for plaintiff or defendant, as he should think proper; and to determine all matters in difference, except as to costs, the settlement of which was provided for by the order of reference. The arbitrator directed a verdict to be entered for plaintiff (not saying for how much), and that defendant should, at a time and place named, pay plaintiff or his attorney 260*l.*:

Held, an uncertain award. *Martin v. Burge*, 973.

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BANKRUPT.

I. Payments to, when within Bankrupt Act.

Giving cash for a bank post bill is a payment within the protection extended by stat. 6 G. 4, c. 16, s. 82, to "all payments ready and bona fide made" to any bankrupt before the commission.

N. committed an act of bankruptcy, and on the same day absconded with two 500*l.* bank post bills drawn in London, payable to himself, which he afterwards endorsed in blank. At Gloucester, where a branch bank of the Bank of England is established under stat. 7 G. 4, c. 46, s. 15, he delivered the bills to S., saying he wanted gold for them. S., who was known at the branch, delivered

them to the agent there, and received 1000*l.* in gold, first endorsing them, at the agent's desire, to the Governor and Company of the Bank of England. S. paid over the whole 1000*l.* to N., having no interest in the bills, and having acted merely as his friend and agent. The commission had not then issued. Neither S. nor the bank agent knew of the act of bankruptcy. The bills were sent to the Bank of England from the branch, uncanceled. The practice at the branch banks, when bills are changed there, is, to take an endorsement, and send them up uncanceled: *Held*,

First, that the delivery of the 1000*l.* to S. for the bills was a transaction between the Bank of England and N. the bankrupt, by their respective agents.

Secondly, that the changing of the bills, whether considered as a purchase of them, or as a payment in discharge of the liability of the Bank, was not a valid transaction, unless protected by sect. 82 of the Bankrupt Act, as a payment made without notice of an act of bankruptcy.

N. absconded (as above stated) March 12th. Application was made by solicitors on the 16th to the Bank of England to stop the bills, describing them, and stating that N. had absconded with them. On the 8th of April the same solicitors again applied at the bank to the same effect, and it was then stated that a fiat of bankruptcy against N. was expected by every post. The bills were changed at Gloucester, April 12th:

Held, that there was sufficient notice to the Bank of England to take away the protection of 6 G. 4, c. 16, s. 82; and that such notice to the bank operated as notice to the branch bank, a reasonable time having elapsed for transmitting it before the bills were received there from S. *Willis v. Bank of England*, 21.

II. What sufficient notice of act of bankruptcy. *Anté. I.*

III. What constitutes reputed ownership. *Vendor and Vendee*, II.

IV. When goods in order and disposition of bankrupt within 72d section of Bankrupt Act. *Vendor and Vendee*, I.

V. When bankruptcy not sufficient answer to order of court to pay money. *Attachment*, I.

VI. In whom is vested bankrupt's estate in customary freehold before admittance of assignees. *Manor*, II.

BARN.

Under what circumstances a chattel removable by a tenant at expiration of tenancy. *Landlord and Tenant*, XII.

BILLS OF EXCHANGE AND PROMISSORY NOTES.

I. What constitutes a promissory note. *Stamp*, II.

II. When promissory note may be stamped as a mortgage. *Stamp*, II.

III. Endorsee of bill, how far affected by fraud of preceding endorser. *Post*, IV.

IV. Notice of non-payment of foreign bill, how to be given.

In giving notice of non-payment to the drawer of a foreign bill, resident abroad, it is sufficient to inform him that the bill has been

protested, without sending a copy of the protest.

In an action by the endorsee of a bill who has given value, if his title be disputed on the ground that his endorser obtained the discount of such bill in fraud of the right owner, the question for the jury is, whether the endorsee acted with good faith in taking the bill. The question whether or not he was guilty of gross negligence is improper. Gross negligence may be evidence of mala fides, but is not equivalent to it. *Goodman v. Harvey*, 870.

V. Discharge of one of two joint and several makers of a note.

In assumpsit on a promissory note, it was pleaded that, R. owing plaintiff 299*l.*, plaintiff agreed with R., S. R., and defendant, that they should give plaintiff, and he should accept, their joint and several note for 299*l.* as a satisfaction and security for the debt, which was done. It was further pleaded that, the note being due, and the debt unpaid, and plaintiff having sued the three makers, it was agreed that the action should cease, and that the three makers should give their three joint and several notes for 52*l.* 18*s.* 8*d.*, at thirteen months, and 110*l.* 13*s.* 4*d.* and 56*l.* 13*s.* 8*d.* at longer periods, as a satisfaction and security for 200*l.* parcel of the debt due from J. R., with interest; and the notes were so given. It was further pleaded that, the first note being due and unpaid, and the second (now sued upon) not yet due, S. R. agreed with the plaintiff to pay, and did pay him 100*l.* in discharge of S. R.'s liability on the three last-mentioned notes, and plaintiff accepted the same in such discharge, and gave up to S. R. the first of the three notes, endorsed upon the note now sued upon a receipt of 47*l.* 1*s.* 4*d.* on account, erased S. R.'s name from this note, and discharged him from further liability thereon. These facts being admitted, and it being answered that the last-mentioned transaction with S. R. took place without defendant's knowledge or consent, which was not denied:

Held, that the discharge of S. R. by plaintiff discharged the defendant. *Nicholson v. Revill*, 675.

VI. How far one of two joint and several makers of promissory note a competent witness for the other. *Evidence*, VII. 2 (2).

VII. How identity of prior and subsequent endorser to be averred on pleadings. *Pleading*, XI.

VIII. On issue as to endorsement of bill, on which party proof lies.

Assumpsit by endorsee against acceptor of a bill of exchange. Plea, that the bill was an accommodation bill, endorsed to plaintiff's endorser for the purpose of its being discounted for defendant's use; that it was endorsed to plaintiff in fraud of defendant, and that plaintiff took the bill, by such endorsement, after it was due. Replication, that the bill was endorsed to plaintiff before it became due, he not knowing the premises, without this, that plaintiff took it after it was due.

Issue thereon:

Held that, at the trial, it lay on the defendant to begin, by proving that the bill was due when endorsed. *Lewis v. Lady Parker*, 838

IX. In hands of a tortious holder, how recoverable.

If a party receiving a bill payable to order, for the purpose of getting it endorsed for another person, procures the endorsement, pays in the bill to his own account at his banker's, with intent to appropriate the proceeds, and, before the bill is due, draws upon such account (though not specifically upon the credit of the bill), and his draft is honored, an action of trover may be commenced against him before the bill is due, but not an action for money had and received. *Atkins v. Owens*, 819.

X. Giving cash for bill, how far a bonâ fide payment within protection of Bankrupt Act. *Bankrupt*, I.

BILL OF PARCELS.

How far considered a warranty. *Warranty*.

BISHOP.

Consistory Court of, whether a superior court. *Prohibition*, I.

BONA FIDES.

- I. How far a justification of libel. *Libel*, I.
- II. How far it supports title of endorsee of bill received from fraudulent endorser. *Bills of Exchange and Promissory Notes*, IV.
- III. What is a bonâ fide payment within protection of Bankrupt Act. *Bankrupt*, I.

BOND.

- I. What omissions in a bond will be supplied by inference.

To a declaration against a sheriff for an escape on mesne process, defendant pleaded that, before the alleged escape, and before the expiration of eight days from the arrest, he took a bail bond, duly subscribed with a condition according to the form of the statute, &c., and assigned it to the plaintiff, which the plaintiff took; and the replication traversed that any condition was subscribed according to the form of the statute, &c.

Held, that the defendant did not support his issue, by producing a bail bond, which was regular in all respects except that, in the recital of the condition, the writ, &c., was said to have been delivered "to the said —;" and that, in the operative part of the condition, the words were "if the said — do cause special bail, &c.," the prisoner's name being omitted in those two places only. *Holden v. Raphael*, 228.

II. Replevin.

1. Duty of sheriff in taking. *Sheriff*, I., 2.
2. Action on; damages how to be estimated. *Sheriff*, I., 2.

BURGESS.

- I. Election of, by an unlimited body; what constitutes a valid meeting. *Corporation*, I.
- II. Right of, to inspect voting papers under stat. 5 & 6 W. 4, c. 76, s. 35. *Corporation*, III.

CAPIAS AD SATISFACIENDUM.

Discharge out of custody for irregularity, when it may be. *Practice*, VIII., 1 (2).

CASE, SPECIAL.

When Court will judge as to correctness of inference from facts drawn by the Sessions. *Poor*, III., 4 (2); VII.

CENTRAL CRIMINAL COURT.

Venue in indictment, how far conclusive as to place of trial. *Venue*.

CERTIFICATE.

- I. Of Attorney; non-renewal of, its effect. *Attorney*, II.
- II. Of Judge, as to costs, under stat. 43 Eliz. c. 6, s. 2, how far conclusive. *Costs*, VI.
- III. Of Justices.
 1. As to completion and repairs of highway. *Highway*, V. 1.
 2. For sale, after stopping up highway. *Highway*, VII. 3 (2).

CERTIORARI.

- I. Prosecutor *pro rege*, when entitled to.

The rule, that a statute taking away certiorari does not bind the crown unless named, is not limited to cases where the crown has an actual interest, but extends to all prosecutions in the name of the king.

And the rule in favor of the Crown is not defeated by the prosecutor having become nominally defendant; as where a conviction has been quashed at sessions, with costs to be paid by the prosecutor, and he seeks to quash the order of sessions. *Rex v. Boulbee*, 498. (See remainder of placitum, *Conviction*, II.)
- II. Application for, when Court will notice facts stated on affidavit. *Highway*, VII. 3 (2).
- III. Recognizances previous to removal. *Post*, IV.
- IV. Removal of indictment by one of several defendants, its effect on the others.

Under stat. 5 & 6 W. 4, c. 33, as well as by the antecedent practice, a certiorari obtained by one of several defendants removes the indictment as to all, and the previous recognizances of all are discharged, though the parties not applying for the certiorari do not give any fresh security.

Application being made, under such circumstances, for a *procedendo*, unless the defendants not suing out the certiorari would enter into recognizances, the Court refused a rule to show cause. *Rex v. Bosall*, 513.

CHEQUE.

Delivery of, how far it constitutes payment.

To assumpsit for work and labor in making a railing, defendant pleaded, that before the action he had paid to the plaintiff the sum of 8l. 11s., and plaintiff had received and accepted the same, in payment and discharge of 8l. 11s. Replication, that defendant did not pay to plaintiff the said sum of 8l. 11s. in manner, &c.:

Held, that the defendant did not support his issue, by showing that, before the action, he had sent plaintiff a cheque on his banker for 8l. 11s., stated in the body of the cheque to be "balance account railing;" and that plaintiff held such cheque at the commencement of the action. A cheque so delivered,

to operate as payment, must at any rate be unconditional.

And (per LITTLEDALE, J.) a party to whom a cheque is sent may commence an action before he sends it back:

Held also, that it was no misdirection to leave it to the jury, only, whether the plaintiffs received the cheque as money. *Hough v. May*, 954.

CHURCH.

Rate. See *Mandamus*, II. *Prohibition*, I.; *Rate*, I.

CHURCHWARDENS.

- I. Power to lease pariah property. *Landlord and Tenant*, V.
- II. How far entitled to books of surveyor of highway on his quitting office. *Highway*, VIII. 1.
- III. Accounts of; what objections may be made to them. *Mandamus*, II. 5.

CLIFTON.

(*Gloucestershire*.) What justices have jurisdiction over. *Statute*, XLI. 2.

COMMON.

Presumption of law as to property in uncultivated parts of common.

An inclosure act directed, that commissioners should award to a corporation, who were owners of the soil of certain commons, a twentieth part of the commons, by way of compensation. The corporation, who were plaintiffs in an action of trespass, *quare clausum fregit*, having given evidence of acts of ownership in the *locus in quo*, the defendant, to show that their right to it had been compensated for by allotments made by the commissioners, gave evidence that these allotments amounted to a twentieth part of the commons. In contradiction to this evidence, plaintiffs proved that a part of the land, which they alleged to be the common, consisted of uncultivated strips of land between the cultivated parts of the common and the lands of private proprietors, called balks; and plaintiffs gave some evidence of property in these balks. The judge having left the question of property in the *locus in quo* generally to the jury, who found for the plaintiffs: *Held*, that it was not ground for a new trial, that the judge did not tell the jury that, in presumption of law, the balks belonged to the owners of the adjacent land, unless the contrary were proved. *Quere*, as to such presumption. *Bailiffs of Godmanchester v. Phillips*, 550. (See remaining parts of placitum, *Evidence*, VII. 2 (1.) and *Corporation*, II. 1.)

COMPENSATION.

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Recovery of money extorted under compulsion of colorable legal process. *Pleading*, I. 1.

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CONSENT.

By party arrested, to dwelling-house to which to be taken; what constitutes. *Sheriff*, I. 1.

CONSISTORY COURT.

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CONSOLIDATION.

Rule in insurance cases.

Two actions having been brought by the same plaintiff against different defendants, on the same policy of insurance, the court consolidated them, after a declaration had been delivered in one, and an appearance entered in the other, at the instance of the defendant in the latter action, though the plaintiff objected. *Hollingsworth v. Brodric*, 646.

CONTEMPT OF COURT.

Purging of, how shown.

On attachment for a contempt where the defendant has been examined on interrogatories, and the Master of the Crown Office directed to report thereon to the Court, if he reports that the defendant has cleared himself of the contempt, the Court will not enter into a discussion of the correctness of such report, unless it appear, by the interrogatories and answers (*Semble*, not by affidavit), that the Master has been mistaken.

It is not sufficient ground for a review that the Master's report appears contradictory to the opinion of a judge who granted the attachment. *Rex v. Morley*, 849.

CONTRACT.

- I. Of sale; bill of parcels how far a warranty. *Warranty*.
- II. Executory, for sale of goods.
 1. Construction of. *Vendor and Vendee*, I.
 2. When property vests in vendee. *Vendor and Vendee*, I.
- III. What breach by one party will entitle the other to rescind the contract. *Assumpsit*, IV.
- IV. Implied.
 1. Between what parties it arises. *Pleading*, II.
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- V. Discharge of one of two joint and several contractors, effect of. *Bills of Exchange and Promissory Notes*, V.

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What sufficient to support trover. *Landlord and Tenant*, XII.

CONVEYANCE.

By what words right of way passes. *Way*, 1.

CONVICTION.

1. Form of; how penalty against several to be awarded.

A statutory conviction of A. and B. for an

offence several in its nature (as an assault under stat. 9 G. 4. c. 31), adjudging that they, the said A. and B., for their said offence, do forfeit the sum of, &c., and in default of payment be imprisoned for the space of, &c., is bad, inasmuch as the penalty ought to be imposed on the parties severally, and not jointly. And a party committed under such a conviction may recover in trespass against the committing magistrate. *Morgan v. Brown*, 515.

II. Appeal against; what objections may be taken at trial.

By the Game Act, 1 & 2 W. 4, c. 32, the justices, before whom any person is summarily convicted in penalties under that statute, may adjudge that such party shall pay the penalty immediately or at a future time, and, in default of payment, be imprisoned for a certain period; and it is enacted, that the conviction may be drawn in a certain form (corresponding with the above provision): that the party convicted may appeal to the sessions, giving notice to the complainant of the cause and matter of appeal, within three days after the conviction; and that no such conviction shall be quashed for want of form. A party, summarily convicted under the act, appealed, giving notice of several objections on the merits. By the conviction, when returned to the sessions, it appeared that the party was adjudged to pay the penalty forthwith, and that nothing was said of imprisonment in case of default. The sessions quashed the conviction on this ground, stating in their order that they quashed it for want of form. The objection was not taken in the notice of appeal, nor did it appear that the appellant, when he gave the notice, had means of knowing how the conviction would be framed.

Held, that, assuming the conviction to be defective in substance, the sessions had no power to quash it on this objection, no notice of it having been given. *Res v. Boulbee*, 498. (See remainder of placitum, *Certiorari*, l.)

CORPORATION.

I. Election into, by unlimited body; what constitutes a valid meeting.

To a quo warranto for exercising the office of mayor of a borough, the defendant pleaded that by charter the corporation had power to elect a burgess for mayor; and that, by custom, there was an indefinite number of free burgesses, and the mayor, bailiffs, and burgesses, being duly assembled, might elect whom they would for burgess; that he was elected burgess at a meeting duly assembled, according to the custom of the borough, and was afterwards duly elected mayor according to the charter. The Crown traversed the fact that the meeting, at which he was made a burgess, was duly assembled. It appeared, at the trial, that the meeting was not held on a day appropriated to the purpose of electing burgesses; and the jury found that the custom was to elect burgesses for the time being, who were indefinite in number; and that every resident burgess was to be served with a personal notice of the meeting, and, if he required it, of its object; but that the custom must be taken with the qualification that an accidental omission to serve a resident

burgess, was not a violation of it. It also appeared that R., a resident burgess, had told the officer whose duty it was to serve the notices, that he need not serve him, as he was frequently absent, and could hear tell of what was going on. The officer did not serve R., who was, in fact, in the borough at the time of the meeting. The jury found expressly that the omission to serve R. was accidental:

Held, that the qualification of the custom, as to accidental omissions, was bad in law; and that the omission to serve R. was not accidental. *Res v. Langhorn*, 538.

II. Corporate meeting, who must attend.

1. When number of members limited.

The charter of a corporation created two bailiffs and twelve assistants, and enacted that the bailiffs and assistants for the time being should be the common council of the borough; that the bailiffs and assistants, for the time being, or the greater part of them, of whom (eorum, quorum) the bailiffs should be two, should make by-laws, should elect the recorder and town-clerk, and should elect the bailiffs annually; if a bailiff died in office or was removed, the successor was to be chosen by the assistants for the time being, or the greater part of them; the assistants nominated in the charter to hold for life unless removed by the bailiffs and assistants for the time being, or the greater part of them, of which part the bailiffs should be two, and to be removable by the bailiffs and assistants for the time being, or the greater part of them (without the quorum clause); and in that case, or in case of death, the successor was to be elected by the bailiffs and assistants then living or remaining, or the greater part of them (without the quorum clause), and so from time to time: *Held*, that a meeting, at which the two bailiffs and only six assistants were present, was not a regular corporate meeting for the purpose of accepting a resignation of a freeman, although the number of assistants was reduced below twelve by deaths; and that, consequently, a freeman was not made a competent witness by his resignation being accepted, and the acceptance entered in the book of the corporation at such meeting. *Bailiffs of Godmanchester v. Phillips*, 550. (See remaining parts of placitum, *Evidence*, VII., 2 (1), and *Common*.)

2. When number of members unlimited.

Ante, I.

III. Right of burgesses to inspect voting papers.

Seemle, that, under the Municipal Corporation Act, 5 & 6 W. 4, c. 76, s. 33, the town-clerk is not compellable to allow two burgesses at once to inspect the voting papers deposited with him after an election of town-councillors, or to give more than one of the papers to one person at the same time; but that he is bound to allow any burgess, who brings a list of his own, to compare it with the papers produced by the town-clerk, and mark it according to what he finds there. *Res v. Arnold*, 657.

IV. Jurisdiction of Justices within Clifton, (Gloucestershire). Statute, XLI., 2.

V. Corporation seal; attesting witness whether dispensed with. *Evidence*, II., 1.

VI. Member of, when a competent witness in action by Corporation. *Evidence*, VII., 2 (1.)

VII. Municipal Corporation Amendment Act. *Statute, XII.*

COSTS.

I. Of action.

1. Power of Court over.

In an action for work, labor, and materials, the plaintiff delivered a particular, claiming 1303*l.*, and stating that the full particulars could not be comprised in three folios. On summons for a better particular, with dates and credits, the plaintiff said he had no credits to give, and the summons was dismissed. The cause was afterwards referred, with all matters in difference; the costs to abide the event of the award. The plaintiff, in opening his case before the arbitrator, admitted payment of several sums, and claimed only 400*l.* The arbitrator awarded 63*l.* to the plaintiff for his alleged causes of action, and 9*l.* to the defendant for matters not in question in the suit.

Held, that the Court could not stay the taxation of the plaintiff's costs and order each party to pay his own.

Per PATERSON, J. A plaintiff is not bound, in his particular, to state the items of reduction which he admits; it is sufficient if he states the items of his own demand, and the amount admitted as going in reduction. *Smith v. Eldridge*, 64.

2. Of ejectment: payment of costs of former action before bringing of second action. *Ejectment, IV.*

3. Of different issues.

(1.) Construction of award.

In trespass quare clausum fregit, defendant pleaded to the whole action, (1.) Not guilty; (2.) Soil and freehold; (3.) Private right of way; (4.) Public right of way. By order of Nisi Prius, the cause was referred to a barrister, the costs to be in his discretion, and to be recovered as if they were costs in the cause. The fourth issue was withdrawn from the cause by consent; but the arbitrator was to decide on the costs of the cause as if it had remained. The arbitrator awarded that the verdict on the first and second issues should be entered for the plaintiff, with nominal damages, and the third for the defendant; and that the plaintiff should pay the defendant his costs in the cause, such payment to be made on the expiration of fourteen days from the taxation.

Held, that the plaintiff was entitled to his costs on the first and second issues, and that each party was to bear his own costs of the fourth issue; the award being tantamount to a direction that the costs in the cause should abide the event of the cause. *Allenby v. Pseudlock*, 326.

(2.) In replevin.

Where several pleas were pleaded under stat. 4 Ann. c. 16, and one party obtained a verdict on some of the issues, entitling him to the general costs of the cause, he was liable to pay the opposite party on the issues found for him, not only his costs of the pleadings, but his costs of preparing evidence on those issues. There was no difference in this respect between replevin and other actions. And the law was not altered by the General Rule, Hil. 2 W. 4, l. 74. *Spencer v. Hamerton*, 413.

II. Of amendment of rule for judgment. *Mortgage, IV.*

III. Of mandamus. *Mandamus, III.*

IV. Of parties to interpleader rule. *Interpleader, III.*

V. Defendant's costs under 43 G. 3, c. 46, s. 3. What will be presumed after verdict. *Pleading, VIII., 1.*

VI. Judge's certificate for, under 43 Eliz. c. 6, s. 2.

How far conclusive.

Where a Judge has certified to deprive of costs under stat. 43 Eliz. c. 6, s. 2, in a case within the statute, the Court cannot order the plaintiff's full costs to be taxed notwithstanding the certificate, on the ground that the Judge gave an erroneous reason for certifying. *Cann v. Facey*, 68.

VII. When Court will review Judge's order as to costs. *Attorney, IV.*

VIII. Security for: time for pleading. *Practice, XVI.*

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To repair: what implied contract it raises on tenant holding over. *Landlord and Tenant, VI.*

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I. Of Arches. See *Prohibition, I.*

II. Central Criminal. See *Venue*.

III. Consistory, of Bishop. See *Prohibition, I.*

IV. Of Delegates. See *Prohibition, I.*

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As to election of members of a corporation: what good. *Corporation, I.*

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Vesting of bankrupt's estate before admittance of assignees. *Manor, II.*

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I. Unliquidated, whether within Statute of Limitations. *Statute, III., 1.*

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III. In action against sheriff for taking insufficient sureties, how estimated. *Sheriff, I., 2.*

DEBTOR.

Discharge of one of two joint and several debtors, effect of. *Bills of Exchange and Promissory Notes, V.*

DELEGATES.

Court of, whether a superior court. *Prohibition, I.*

DEMISE.

- I. What constitutes a present demise. *Landlord and Tenant*, I.
 II. Of minerals: what interest lessee takes. *Landlord and Tenant*, XI.

DESERTION.

- Of child by father, what is proof of. *Infant*, II.

DEVISE.

- I. What words pass a fee.
 Testatrix devised estates to N. in fee, in trust to receive and apply the proceeds to the use of S., the sister of the testatrix, for her life, and, from and immediately after the decease of S., to convey the same to such uses as S. should by deed or will appoint. There was no devise over. S. died in the lifetime of the testatrix; *Held*,
 1. That the death of S. in the testatrix's lifetime was not an implied revocation of the will.
 2. That the estate devised to N. did not lapse by reason of S.'s death, but vested in N. at the death of the testatrix.
 3. That the estate so vested in N. was an absolute legal fee. *Doe dem. Shelley v. Edlin*, 582.
 II. What evidence admissible to explain ambiguity.
 Devise to A., of the messuage in S. in which testator resided, with the buildings to the same adjoining, and all those several closes in S. aforesaid, called C, D, and E (with the brick-kiln erected thereon), and F, with their appurtenances, *part of the farm and lands then in testator's own occupation*. Devise, further, to B. of a second messuage, and of all other the testator's lands and hereditaments in S. except those before devised to A. Under this will, B. claimed two cottages in S. which, when the will was made, adjoined the messuage resided in by the testator, but were not in his occupation, and were divided by a wall, which he had built, from the messuage.
Held, that the words referring to the testator's own occupation applied only to the premises mentioned after the words "to the same adjoining;" that evidence was admissible to show the situation of the premises, and by whom they were occupied; but that those facts, being proved, did not raise such an ambiguity as warranted the reception in evidence of declarations made by the testator when giving instructions for his will, to show that he intended B. to have the cottages. *Doe dem. Preedy v. Holtom*, 76.
 III. Under power: what sufficient attestation. *Power*, I.
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- Out of custody, of prisoner under civil process. *Practice*, VIII., 1 (2); *Execution*, 2.

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- I. Power of mortgagees to distrain on tenant of mortgagor. *Mortgage*, IV.

- II. What may be given in evidence on issue of rien in error. *Pleading*, XII.

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- Taking party to, on arrest. *Sheriff*, I., 1.

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- I. Right of way, by enjoyment, under stat. 2 & 3 W. 4, c. 71; pleading and evidence relating to. *See Pleading*, VI.
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- Whether a superior Court. *Prohibition*, I.

EJECTMENT.

- I. What constitutes adverse possession. *Adverse Possession*.
 II. Striking out names of lessors of plaintiff at instance of defendant.
 Ejectment was brought against tenant in possession on the several demises of A. and B. Application was made to strike out B.'s name, on affidavit that the tenant claimed under B., that the action was defended to protect B.'s interest against A., and that A. claimed under a conveyance from B., which was asserted to be invalid by reason of fraud.
 The Court granted the application, though B., who was in the East Indies, had not expressly authorized it, grounds being shown for inferring a general authority, in the party making the application, to act for B.'s interest with respect to the premises.
 And this, although it was sworn, in opposition to the application, that the conveyance from B. to A. was bona fide and for good consideration, that B. had covenanted for further assurances to A., that the insertion of the name of B. was necessary to give legal effect to the conveyance, and that A. was in circumstances enabling him to defray the expenses of the proceedings, and to indemnify B. *Doe dem. Hurst v. Clifton*, 809.
 III. Entry of verdict on second demise after execution on first.
 Ejectment being brought on two demises, and a verdict being taken for the plaintiff on one, and for the defendant on the other, and leave being reserved to the plaintiff to move to enter a verdict for him on the second demise, he is not precluded from doing so by his having obtained early execution on the verdict on the first demise, and possession having been taken under it. *Doe dem. Bank of England v. Chambers*, 410. *See remainder of placitum*, *Evidence*, II., 1.
 IV. Stay of proceedings in second ejectment until payment of costs in a former one.
 A. and B. jointly brought two ejectments on the same title, one against C. and the other against D., and recovered in both. In a third, brought by A. and B., on the same title, against C. and D., the defendants had a verdict, and taxed their costs, but never made any express demand of them. The costs were never paid. Four years after the trial of the third cause, B. released to C. and D. his claim to the premises in dispute, in

consideration of money, and of a covenant by C. and D. to suspend their claim against B. for costs. Afterwards A. died; and his son brought ejectment against C. and D. on the title relied upon in the former actions. Upon motion to stay proceedings till payment to C. and D. of the costs recovered by them:

Held, that the facts of this case did not take it out of the ordinary rule, and that the defendants were entitled to the stay of proceedings. *Doe dem. Rees v. Thomas*, 348.

ESTOPPEL.

- I. What parish is estopped from showing after order of removal unappealed against. *Poor*, VI.
- II. How far mortgagor estopped from setting up defect in his own title, as against mortgagee. *Mortgage*, III., 1.
- III. How far person claiming under mortgagor is estopped from setting up prior mortgage as against mortgagee. *Mortgage*, III., 2.

EVIDENCE.

I. Admissions.

1. Of one party to action, how far admissible against other parties claiming through him.

Ejectment against T., the tenant in possession, and L., who came in to defend as landlord. The lessor of the plaintiff having proved his title against L., the latter set up the title of the tenant T., who had paid rent to the lessor of the plaintiff as tenant from year to year. In order to show the determination of T.'s interest, the lessor of the plaintiff produced an admission signed by T. after the commission day of the assizes, whereby he acknowledged having attorned to L., upon L.'s executing a writ of possession in a prior ejectment. *Held*, that this admission was evidence against L. as well as T. *Doe dem. Mee v. Litherland*, 784.

2. By one partner of a firm, how far admissible against secret partners, who had retired. *Landlord and Tenant*, IX.

3. Order of removal acquiesced in by parish, how far conclusive evidence against parish. *Poor*, VI.

4. Proof by one party of execution of deed, through which opposite party claims.

In ejectment, the defendant, upon notice from the plaintiff, produced a deed; and it was proved that the defendant's attorney had stated, before the trial, that the defendant claimed through that deed: *Held*, that this entitled the plaintiff to put it in, without proving the execution, before the defendant's case was opened. *Roe dem. Wilkins v. Wilkins*, 86. (See remainder of placitum, *Adverse Possession*.)

II. Attestation.

1. Who considered attesting witness.

To an indenture of feoffment by the Bank of England, the seal of the Bank was affixed by a paper wafered to the indenture, on which paper was written, "Sealed by order of the Court of Directors of The Governor and Company of the Bank of England, 12th December, 1833. J. K., secretary:" *Held*, that J. K. was not an attesting witness, and that the execution of the feoffment might be proved by the seal, without calling J. K.

Quere, Whether, when there is an attesting witness to the affixing of the seal of a corporation, such witness must be called to prove the deed? *Doe dem. Bank of England v. Chambers*, 410. (See remainder of placitum, *Ejectment*, III.)

2. Proof by attesting witness, when dispensed with. *Ante*, II. 1. *Power*, I.

III. Written entries.

By person not charging himself.

Accounts of rent, signed by a person, styling himself clerk to a steward, but not shown to have been employed by such steward, otherwise than by the accounts themselves, are not evidence, after the decease of both, to prove the receipt, either by the clerk or the steward, of sums of money therein mentioned. *De Rutzen v. Farr*, 53. (See remainder of placitum, *Trial*, New, I.)

IV. Parol evidence to explain written documents.

Ambiguity in will; what evidence admissible to show testator's intentions. *Devise*, II.

V. Execution of documents: when proof dispensed with.

1. Documents more than thirty years old. *Power*, I.

2. Deed put in evidence by one party, through which the opposite party claims. *Ante*, I., 4.

VI. Secondary evidence of written documents.

1. What search for document necessary. *Assumpsit*, II., 2.

2. What admitted as secondary evidence. *Assumpsit*, II., 2.

VII. Competency of witnesses.

1. What examination may be gone into on the voir dire. *Post*, VII., 2 (1).

2. What interest disqualifies.

- (1). Freeman in an action by corporation.

A corporation brought trespass *quare clausum fregit*; defendant, who was not a member of the corporation (before the Rules of Hil. 4 W. 4), pleaded; (1), Not guilty; (2), a right of common appurtenant to a messuage occupied by him. The case of the plaintiffs was, that only freemen had the right of common in respect of such occupation: *Held*, that a freeman of the corporation was not a competent witness for the plaintiffs, though no funds were shown to belong to the corporation; and that stat. 3 & 4 W. 4, c. 42, s. 26 (which passed before the trial), did not remove the objection.

The freeman released to the corporation all his right, title, and interest as a freeman, or as occupier of any commonable messuage, and all interest in the lands, tenements, and other possessions of the corporation, and all right of common in the locus in quo belonging to him as a freeman, and all rights connected with the action: *Held*, that, as he was himself a member of the body to which the release was made, it did not restore his competency.

The witness stated, on the voir dire, that he had been a freeman, but had resigned and been disfranchised at a corporate meeting: *Held*, that the defendant might, on the voir dire, cross-examine him as to the number of persons present at the meeting, in order to ascertain whether it had been a regular meeting.

The witness on being asked, on the voir dire, how many assistants (who formed a constituent part of the meeting), were present, answered, that a book then in Court would show: *Held*, that, on the voir dire, reference might be made to the book to ascertain what number was present. *Bailiffs of Godmanchester v. Phillips*, 550 (See remaining parts of placitum, *Corporation*, II., 1, and *Common*.)

(2.) One of two makers of a joint and several promissory note in an action against the other.

C. and P. made a joint and several promissory note for 200*l.*, with interest. P., being sued solely, pleaded illegality of consideration: *Held*, that C. was not a competent witness to support this plea.

And that it made no difference that C., before action brought, had paid 100*l.* of the note, a year's interest being also due at the time of such payment; inasmuch as C., in case a verdict were given against P., would be liable to contribution in respect of that interest. *Stegg v. Phillips*, 852.

(3.) Parishioner in action by Churchwardens and Overseers. *Landlord and Tenant*, V. 2.

VIII. Stamp.

1. What raises presumption of an instrument being properly stamped. *Assumpsit*, II. 2.

2. When unstamped instrument so far incorporated with stamped instrument as to be admissible in evidence. *Landlord and Tenant*, I. See also *post*, XII.

3. Agreement, for what purpose admissible in evidence without stamp. *Stamp*, III. 3.

IX. Way.

1. What proof will support description of way alleged as an immemorial way. *Highway*, III.

2. What may be given in evidence to prove user of way for forty years.

To support a plea (framed on stat. 2 and 3 W. 4, c. 71, s. 2), of a right of way enjoyed for forty years, evidence may be given of user more than forty years back. *Lawson v. Langley*, 890. See also *Pleadings*, VI.

X. Onus of proof, on which party it lies.

1. Notice previous to binding of parish apprentice, on appeal against order of removal. *Poor*, III. 2.

2. Endorsement after maturity of bill of exchange. *Bills of Exchange and Promissory Notes*, VIII.

XI. Document admitted and referred to by both parties at trial, but not produced in evidence; effect of, after verdict. *Sheriff*, I. 2.

XII. Terms of tenancy arising from old lease, how proved.

Declaration, in assumpsit, that defendant had held lands under a lease from E., on certain terms, which were set forth on the record; that the reversion came to plaintiff; and that defendant, in consideration of an alteration of the rent, promised to hold of plaintiff on the same terms in all other respects; but that defendant broke the terms. Plea, Non Assumpsit. Plaintiff not having proved an express contract to hold of defendant on the old terms. *Held*, that he could not rely upon an implied contract, arising

from the old lease, without putting it in evidence; and that the old lease could not be used as such evidence, unless properly stamped. *Walliss v. Broadbent*, 877.

XIII. What presumption arises from tenant holding over after expiration of notice to quit. *Landlord and Tenant*, IX.

XIV. Payment, how far evidenced by delivery and acceptance of cheque. *Cheque*.

XV. Evidence, how applicable to the record.

1. Variance between pleading and evidence.

(1.) Supplying omissions in bond. *Bond*, I.

(2.) Description of highway by termini. *Highway*, III.

2. Statute of Limitations.

(1.) Evidence to support plea. *Stamp*, III. 3.

(2.) What takes case out of statute.

In assumpsit on a promissory note bearing interest, proof that defendant, being sent to by plaintiff for money, paid 1*l.*, and said, "this puts us straight for last year's interest, all but 18*s.*; some day next week I will bring that up," is sufficient answer to a plea of the Statute of Limitations, no evidence being given of any other debt due from defendant to plaintiff. *Evans v. Davies*, 840. See also *Statute*, XXVIII.

3. Traverse with inducement, what it admits.

In prohibition by a party libelled in the Ecclesiastical Court for non-payment of a church-rate, the plaintiff in his declaration alleged that the parish of W., of which he was a parishioner, was immemorially divided into four townships, the inhabitants of which had been immemorially liable to repair the parish church; that the rate was made for repairing the church, but was assessed upon three of the townships only, omitting H., the fourth; and that defendants had libelled plaintiff, pretending that H. was not liable to such repair, by reason of some supposed law or custom, and had immemorially repaired a chapel of its own. Plea, that there was, and had been immemorially, a chapel in H., where the inhabitants received all divine rites and services, and which they repaired and maintained exclusively by a rate on H., and that from time immemorial no rate had been assessed on any person in H. for the repair of the parish church; without this, that the inhabitants of the four townships were liable to contribute to the repair of the parish church; conclusion to the country, and issue joined thereon.

At the trial, the plaintiff proved that H. was a part of the parish of W.; and it appeared, on cross-examination by the defendants, that H. had its own church or chapel, and churchwardens, and had not, at least for twenty-five years, paid church-rates to the parish. The Judge held that the defendants were entitled to a verdict on this evidence, for that, issue being joined on the traverse, the matter of inducement in the plea was admitted, and the issue confined strictly to the matter of the traverse:

Held, that the plaintiff, joining issue on this traverse, could not be taken to have admitted the previous allegations; that the traverse, if too general, was not immaterial; that the parties must be taken to have intended to put in issue the liability; and that the defendants, on whom the onus of proof

lay, were to prove the matters in the inducement making up the fact traversed. *Held*, also, that the mere fact, of a district in a parish having kept up a chapel of its own without coming on the parish-rates, did not show a custom in such district to maintain its chapel by rates levied on its own inhabitants; and that the traverse was therefore not proved. And the Court granted a new trial. *Craven v. Sanderson*, 666.

4. In particular actions.

(1.) Assumpsit.

[1.] Use and occupation.

What constitutes an hereditament under St. 11 G. 2, c. 19, s. 14. *Landlord and Tenant*, XI.

[2.] New assignment.

What may be given in evidence on plea of Non Assumpsit. *Pleading*, IV., 2.

(2.) Case. Excessive distress.

What may be given in evidence on issue of rief in arrears. *Pleading*, XII.

(3.) Trover.

What amounts to a conversion. *Landlord and Tenant*, XII.

EXECUTION.

Discharge out of custody.

1. Time of application to Court. *Practice*, VIII. 1. (2.)

2. Under stat. 48 G. 3, c. 123.

A prisoner in execution for a debt not exceeding 20*l*. cannot be discharged under stat. 48 G. 3, c. 123, s. 1, unless he has been actually within the walls for twelve months: residence within the rules is not sufficient. *Sumption v. Monzani*, 1007.

EXPENSES.

Of pauper, after suspended order of removal. *Poor*, II.

FATHER.

I. How far entitled to the custody of his child. *Infant*, I.

II. How far liable for necessaries provided for his child. *Infant*, II.

III. What is proof of desertion of child by father. *Infant*, II.

FEE.

What words pass an estate in fee. *Devise*, I.

FIXTURES.

What constitutes. *Landlord and Tenant*, XII.

FRAUD.

I. When proof of, necessary before granting attachment. *Attachment*, I.

II. Endorsee of bill of exchange, how far affected by fraud of preceding endorser. *Bills of Exchange and Promissory Notes*, IV.

GAME.

Conviction under Game Act.

What objections may be taken on appeal. *Conviction*, II.

GENERAL ISSUE.

Defence under, how far affected by new rules of pleading. *Pleading*, V. 1.

GRANT.

By what words a right of way will pass. *Way*, 1.

GUARDIAN.

Who entitled to custody of Infant. *Infant*, I.

HABEAS CORPUS.

Effect of discharge after. *Infant*, I. 1.

HALF-PAY.

Interest of officer in. *Mandamus*, II. 3.

HEREDITAMENT.

What constitutes.

1. Under stat. 11 G. 2, c. 19, s. 14. *Landlord and Tenant*, XI.

2. Under local act. *Statute*, XLV.

HIGHWAY.

I. When road becomes a public highway under stat. 41 G. 3, c. 109. *Post*, V. 1.

II. What proof will support allegation of an immemorial way. *Post*, III.

III. Description of, by termini, what certainty necessary.

An indictment for obstruction of a public way, describing it as from A. towards and unto B., is satisfied by proof of a public way leading from A. to B., though turning backwards between A. and B. at an acute angle; and though the part from A. to the angle be an immemorial way, and the part from the angle to B. be recently dedicated.

B. was a church; the path from A., after passing the point at which the obstruction took place, reached the churchyard, but not the church, before reaching the angle: *Held*, by Lord DENMAN, C. J., and semble, per COLERIDGE, J., that this proof would not have supported an indictment describing the whole as an immemorial way. *Re v. Marchioness Dowager of Devonshire*, 232.

IV. To whom soil of road belongs. *Post*, V.

V. Liability to repair.

1. Way, under stat. 41 G. 3, c. 109.

By an act for inclosing lands in several parishes and townships, it was directed that the allotments to be made in respect of certain messuages, &c., should be deemed part and parcel of the townships respectively in which the messuages, &c., were situate. And the commissioners under the act were directed, in their award, to make such orders as they should think necessary and proper concerning all public roads, "and in what township and parish the same are respectively situate," and by whom they ought to be repaired.

The commissioners by their award directed that there should be certain roads. One of these, called the Sandtoft road, passed between new allotments. The road was ancient. The part of the common over which it ran, before the award, was in the township

of H., and the road was still in that township unless its situation was changed by the local act and the award. The new allotments on each side were declared by the award to be in other townships than H. The award did not say in what townships the road was situated, nor by whom it was repairable.

Held, that the act, by changing the local situation of the allotments, did not, as a consequence, change that of the adjoining portions of road, and therefore that the road in question continued to be in H.

Held, by Lord DENMAN, C. J., that, where the herbage of a road becomes vested, by the General Inclosure Act (41 G. 3, c. 109), sect. 1, in the proprietors of allotments on each side, no presumption arises that the soil itself belongs to such proprietors.

Held, further, by the whole Court, that, under sect. 9 of the General Inclosure Act, a road continued, as well as a road newly made, under the award of commissioners of inclosure, must be declared by justices in special sessions to be fully completed and repaired, before the inhabitants of the district can be indicted for not repairing it. *Res v. Inhabitants of Hatfield*, 156.

2. Turnpike Road.

(1). Where whole road not completed.

Where trustees are authorized to make a turnpike road from A. to C., the entire road must be completed before the public can be compelled to repair any part. Although the road from A. to B. (an intermediate point) has been finished between twenty and thirty years, and repaired from time to time by the public; and although the road at point B. joins another public road which is complete. *Res v. Edge Lane*, 723.

(2). Where branch roads, contemplated by local act, not completed.

Where trustees under a turnpike act are empowered to make a road from A. to B., and a branch from that road to C., the public are not compellable to repair the main road, though complete in its whole extent, till the branch is finished. *Res v. Cumberworth*, 731.

VI. Obstruction.

What points may be made on trial of prosecution for obstructing.

Justices in petty session having made an order for stopping a highway under a local act giving an appeal, and the time for appeal having elapsed, it cannot be contended, on a prosecution for obstructing such way, that the order was bad because the justices were not properly summoned to the petty session.

Under stat. 55 G. 3, c. 68, s. 2, enacting that "when it shall appear, upon the view of any two or more" justices, that a highway is unnecessary, the same may be stopped by order of such justices, the order is not valid if it state only that the justices, having viewed the public roads within the parish, &c. (in which the road lies), and being satisfied that certain roads after mentioned are unnecessary, do order the same to be stopped up: and the objection may be taken on such prosecution, and at such time, as above. *Res v. Marquis of Downshire*, 698. (See remainder of placitum, *post*, VII. 4.)

VII. Stopping up.

1. In what it differs from diversion. *Post*, VII. 3 (2).

2. View by justices, what necessary. *Post*, VII. 3 (2).

3. What order of justices must state. (1.) *Anté*, VI.

(2). In an order of justices for stopping up a highway as unnecessary, under stat. 55 G. 3, c. 68, s. 2, the following recital:—"We, A., B., and C., justices," &c., "assembled at a special sessions held," &c., on, &c., "having upon view found" that a certain part of a highway called, &c., is unnecessary:—sufficiently shows that the justices viewed such highway together, and at the time when the order was made.

Such order, if not made on a joint view, would be bad.

A direction in such order, that the land of the discontinued highway be sold by the surveyors to H. J. A., whose lands adjoin thereto, if he shall be willing to purchase the same, if not, to some other person or persons, for the full value thereof, is sufficient under stats. 55 G. 3, c. 68, s. 2, and 13 G. 3, c. 78, s. 17, though the form of an order given in the schedule (No. xviii.) to the latter act introduces the words "for the full value thereof," after the words "purchase the same," as well as in the subsequent part of the sentence.

It is not necessary to the validity of such an order, that a certificate of sale should be subjoined to it, pursuant to stat. 13 G. 3, c. 78, sched. No. xix.; or that any direction should be given in the order, as to the application of the purchase-money.

A public highway led over the land of H. J. A. He opened another road over his own land, between the same points, which the public used, and they ceased using the former road. Nine years afterwards, he obtained an order of justices for stopping up the old road as unnecessary, under stat. 55 G. 3, c. 68, s. 2. *Held*, by Lord DENMAN, C. J., and PATTERSON, J., that such order might properly be made, and that it was not necessary to proceed as in case of diverting a highway under 13 G. 3, c. 78, s. 16.

Also, by Lord DENMAN, C. J., PATTERSON and WILLIAMS, Js., that the justices might properly state in their order that they had viewed the old road, if they had viewed the ground over which the right of way was although the road itself had gone into disuse.

Also, by Lord DENMAN, C. J., and PATTERSON, J., that an order directing the surveyors to sell the soil of the old highway to H. J. A., whose lands adjoin, if he will purchase, if not, to some other person, for the full value, is not bad, although H. J. A. be himself the surveyor; at least if no fraud appear.

The general rule is, that the Court will not, on application for a certiorari, notice objections raised by affidavit; at least where they might have been brought before the sessions on appeal. As to exceptions, *quere*. *Res v. Justices of Cambridgeshire*, 111.

4. Effect of, on roads in continuation of highway.

By a local inclosure act, incorporating (so far as its provisions were not repugnant) the General Inclosure Act, 41 G. 3, sess. 2, c. 109, it was enacted that certain commissioners might set out and appoint highways over the lands, to be divided, &c., within the parish of E., or over any of the old inclosed

lands in the parish, and divert or stop up any of the present public or private carriage-roads, highways, or footpaths in the parish, observing certain conditions: and that all ways and paths in the parish not so set out or continued should be stopped up and extinguished, and deemed part of the lands to be divided, &c.: provided that no roads through any old inclosures of the parish should be stopped up, diverted, or altered, without an order of two justices.

A road, A, through old inclosures in the above parish, opened into the waste, and, at such opening, joined another road, B, which formed a continuation of A, and ran entirely over waste land. No valid order was obtained for stopping road A. Road B was not set out or continued by the commissioners: *Held*, that this omission did not extinguish road A and create a consequent stoppage of road B; but, on the contrary, that A remaining open for want of an order of justices, as a consequence, B remained open also.

Quære, if a road long used as a thoroughfare by the public be lawfully stopped at one end, whether the right of way over the remainder be gone. Per *PATTESON, J.*, it is not. *Rex v. Marquis of Downshire*, 698. (See remainder of placitum, *Antd*, VI.)

VIII. Surveyor.

1. Books of, on his quitting office, who entitled to.

A surveyor of the highways, quitting office (before stat. 5 & 6 W. 4, c. 50), claimed a sum as due to him from the parish; and, on the sum being guaranteed to him, agreed to deliver up his books. The sum was afterwards paid. In pursuance of a resolution of vestry, the books were demanded of him for the then churchwardens; and, in a subsequent year, they were also demanded by the churchwardens of the latter year: *Held*, that the churchwardens and overseers of the latter year were not entitled to maintain trover for the books; and, *semble*, that no parish officer of any year was so entitled. *Addison v. Round*, 799.

2. Assessment of, under stat. 13 G. 3, c. 78, how to be pleaded. *Pleading*, IX.

IX. Right of Way. See *Way*.

HIRING.

Settlement by hiring and service. *Poor*, IV.

HOUSE.

Nomination of dwelling-house by party arrested. *Sheriff*, I. 1.

HUNDRED COURT.

Practice in, by uncertificated attorney, its effect. *Attorney*, II. 1.

IDENTITY.

1. Of causes of action in different counts of declaration, how far plea may show. *Pleading*, V. 5.
- II. Of prior and subsequent party to bill, how to be averred in pleading. *Pleading*, XI.

INCLOSURE.

Liability to repair highway, under General Inclosure Act. *Highway*, V. 1.

INDENTURE.

Of Apprenticeship.

1. Execution of. *Poor*, III. 3.
2. What it must state. *Poor*, III. 1.

INDICTMENT.

- I. Venue, how far conclusive as to place of trial. *Venue*.
- II. For nuisance, what a defence to. *Nuisance*.
- III. Removal of, by one of several defendants. *Certiorari*, IV.

INDUCEMENT.

In pleading, when to be proved. *Pleading*, XV. 3.

INFANT.

I. Who are entitled to custody of.

1. Where a person supposed to be improperly in custody is brought up on habeas corpus, the Court, if there appear no ground for restraint, will order that such person be at liberty to go where he pleases, and will, if necessary, give him the protection of an officer in going. But if the party be a legitimate child, too young to exercise a discretion, the legal custody is that of the father; and, if the mother has possessed herself of the child adversely to him, and he claims it, the Court will oblige her to deliver it up.

Nor will this rule be departed from on the ground that the father has formed an adulterous connexion, which still continues, if it appear that he has never brought the adultery to his house or into contact with his children, and does not intend to do so.

Semble, that the child would not be given into the father's custody if it appeared that in his hands it would be exposed to cruelty or to gross corruption. *Rex v. Greenhill*, 624.

2. A father claiming from his wife the custody of their legitimate infant child on habeas corpus, the Court, on a representation by the wife of his profligacy and cruelty, referred it to a barrister to determine as to the proper custody for the child, the wife (who was in contempt for disobeying the writ) and the husband consenting to abide by such determination. *Rex v. Dobbyn*, 644, (n.)

3. Infant child in custody of the mother, brought up by habeas corpus at the father's instance. Ordered that the child remain with the mother; the father's access to be regulated by the Master. *Rex v. Wilson*, 645, n.)

II. How far father liable for necessities found for child.

Quære, whether a father deserting his infant child be liable in assumpsit to a party who supplies the child with necessities, no further proof of contract being given?

No such action can be maintained, if the father had reasonable ground to suppose that the child was provided for.

U. offered to N. to take care of N.'s child, without putting N. to any expense; upon which N. gave up the child to U. Afterwards U. gave up the child to N.'s wife, who was living apart from N., in adultery; and afterwards the child, to escape cruel treatment by N.'s wife and the adulterer, returned to U., who maintained it thenceforward:

Held, that N., who had no notice of the child's quitting U. at all, or of the cruelty, was not liable to U. for the maintenance of the child, inasmuch as the facts did not show any desertion of the child by N., and negatived a contract between N. and U.

And that it made no difference that U., when she made the original undertaking, was a married woman; the ground of the decision being, not that U. had made a valid contract, but that the circumstances negatived desertion; and that, therefore, the question as to the implied liability did not arise. *Urmston v. Newcomen*, 899.

- III. What is proof of desertion of child by father. *Anté*, II.

INFERIOR COURT.

How far stat. 2 W. 4, c. 39, and rules of Court apply to causes removed from inferior courts. *Pleading*, IV. 1.

INFORMATION, CRIMINAL.

- I. During pendency of other proceedings.

The Court refused a rule for a criminal information for an assault, upon its appearing that the applicant had taken out a warrant against the other party, though the applicant offered that it should be part of the rule that he should abandon the proceedings on the warrant. *Ex parte —, Gent., One*, &c., 576, (n). And see *Judgment*, III.

- II. Where there is no intention to provoke breach of the peace.

The Court will not grant a criminal information for calling a magistrate a liar, accusing him of misconduct in reference to his having absented himself from an election of clerk to the magistrates, and threatening a repetition of the same language whenever such magistrate came into the town, unless there appear an intention to provoke a breach of the peace. *Ex parte Chapman*, 773.

INSOLVENT.

General meaning of the term.

Defendant gave a warrant of attorney to plaintiff to secure the payment of a debt by instalments. Shortly before the first instalment was due, defendant told plaintiff that he feared he could not meet it, and that, unless time was given him, he would make over his effects for the benefit of his creditors.

An agreement was then entered into between plaintiff and defendant, that defendant should give his acceptance for a part, and pay the rest by instalments according to his ability, so as to discharge all before April 1st, 1836; and that plaintiff should not enter up judgment unless defendant should dispose of his business or become bankrupt or insolvent.

Defendant paid the acceptance when due. Afterwards, and before April 1st, 1836, defendant asked plaintiff to make him a bankrupt, in order to relieve him from his difficulties, and said that he could not pay 20s. in the pound, and that his assets were 200l., and his debts 300l.

Held, that plaintiff might enter up the judgment and take out execution, defendant appearing to be insolvent in the sense contemplated in the agreement; and that the

facts above stated did not show that plaintiff, at the time of the agreement, knew defendant to be insolvent in that sense.

The expression "becoming insolvent" means a general inability to pay debts, and does not signify taking the benefit of the Insolvent Debtors' Act, unless the context so restrains it. *Biddlecombe v. Bond*, 332.

INSURANCE.

- I. Construction of words "port of lading" in a policy.

Insurance on a ship "at and from her port of lading in North America to Liverpool." She took in part of her cargo at K., in New Brunswick, and then sailed from thence to B., in the same province, seven miles distant, on the same bay of the sea. She there completed her cargo, and then returned to K. to receive provisions, &c., after which she sailed for England, and was lost on the voyage. B. was not in the way from K. to Liverpool. B. and K. were situate on creeks opening into the bay, and were spoken of by some persons as ports, but neither of them had a custom-house. They had custom-house officers, and were under the jurisdiction of the custom-house of St. John, New Brunswick.

Held that, after the ship had begun to load at K., that was her port of lading; that the term "port of lading" in the policy did not allow of her afterwards going to B., and that her doing so was a deviation. *Brown v. Tayleur*, 241.

- II. To what loss underwriters liable.

Insurance on a ship, V., with the usual warranty as to average. The ship having come into collision with another ship, and proceedings being instituted for the damage done to the other ship, the matter was referred to arbitrators, who awarded that each ship should bear half of the aggregate loss. The ship V. on the settlement had to pay a balance to the other ship: *Held*, not to be a loss to which the underwriters were liable.

Held, also, that the expenses of the wages and provisions of the crew of the V., during the time that she was detained in repairing damage done to herself by perils of the sea, were not such a loss. *De Vaux v. Salvador*, 420.

- III. Consolidation rule. *Consolidation*.

INTEREST.

- I. What naval officer has in his half-pay. *Mandamus*, II. 3.

- II. What grantee of allowance by Lords of Treasury has in his allowance. *Mandamus*, II. 2.

INTERPLEADER.

- I. When Court will interfere to protect sheriff. *Sheriff*, VI.

- II. Revival of rule, when it will be made.

A sheriff having taken goods in execution, which were claimed by a third party, obtained an interpleader rule. The parties appeared; and a rule was made that the parties should appear in the next term, and maintain or relinquish their claims, &c., and that, in the mean time, the sheriff should continue in possession till further order of the Court.

and proceedings against him be stayed; and that a feigned issue should be tried between the claimants at the next assizes. The issue was tried, and the third party obtained a verdict against the execution creditor. The latter obtained a rule for a new trial, which rule, after the lapse of five terms, was discharged. The sheriff had, by direction of the execution creditor, quitted possession before the rule for a new trial was discharged. The interpleader rule had never been enlarged, or in any manner formally continued:

Held, that the Court might, nevertheless, set upon the interpleader rule for the purpose of awarding to the successful party his costs of appearing to the sheriff's rules, and costs of keeping possession, if properly incurred by such party. *Levy v. Champneys*, 365.

III. Costs under. *Andé*, II.

IRREGULARITY.

- I. In form of declaration for not complying with rules of Court. *Pleading*, IV. 1.
- II. Setting aside process for; power of judge at chambers. *Judge*, III. 2.

JUDGE.

- I. Certificate of, for costs, under '43 Eliz. c. 6. *Costs*, VI.
- II. Right of, to discharge jury from giving verdict on some of several issues. *Verdict*, II.
- III. When Court will review judge's order.

1. *Attorney*, IV.

2. Whether an application made before a single judge at chambers, to set aside process for irregularity, be made early enough, is a question for his discretion; and the Court will not review his decision.

On such an application, made on the ground that the party's attorney is described as "of 40 Stamford Street," only: *Held*, that the judge at chambers was to exercise his discretion in determining whether the description was sufficient; and the Court refused to entertain the question after he had decided it.

The judge having considered such a description, on the copy of the writ served, insufficient, and having set aside the writ and service for irregularity, the Court amended the order by setting aside only the copy of the writ, and service. *Tadman v. Wood*, 1011.

JUDGMENT.

- I. Amendment of rule for judgment.
1. When it may be made. *Mortgage*, IV.
2. Costs of. *Mortgage*, IV.
- II. Entry of, nunc pro tunc. *Practice*, X. 2.
- III. On criminal conviction, during pendency of action for same offence.

A defendant being brought up for judgment for an assault, and it appearing that the prosecutor had commenced an action, which was still depending, for the same assault, the Court refused to pass any judgment, except that the defendant should give security for his good behavior, he having used violent language towards the prosecutor in addressing the Court.

And this, although, at the time of the defendant being brought up, the prosecutor offered to discontinue the action. *Rex v. Mahon*, 575.

IV. Non obstante veredicto, when it may be. *Pleading*, VIII. 2.

JURY.

- I. What they may determine in action for libel. *Libel*, II.
- II. Right of judge to discharge jury from giving verdict on any issue. *Verdict*, II.
- III. Right of plaintiff to bring another action after withdrawal of a juror at trial. *Practice*, XI.

JUSTICES.

- I. Order of.
1. For stopping up highway, what it must state. *Highway*, VI. and VII. 3.
2. For payment of church-rate, appeal against. *Rate*, I. 6.
3. Objections to, what Court will notice an application for certiorari. *Highway*, VII. 3.
- II. Certificate of, as to repairing and stopping up highway. *Highway*, V. and VII. 3.
- III. Mandamus to. *Mandamus*, I. 2; II. 5.
- IV. Trespass against, for commitment under irregular conviction, when it may be maintained. *Conviction*, I.
- V. Jurisdiction of, within Clifton (*Gloucestershire*). *Statute*, XLI. 2.

KING.

By what statutes bound. *Certiorari*, I.

LANDLORD AND TENANT.

- I. What constitutes a present demise.

By a paper entitled a memorandum of agreement, signed by plaintiff and defendant, it was recited that the defendant and W. had agreed to abandon the annexed contract for taking and letting certain lands; that plaintiff and defendant agreed, the former to take, the latter to let, the lands, upon the conditions contained in the annexed contract; "the said rent to be annually paid by quarterly payments, and to be in amount 220l.; and we further bind ourselves to the other to execute a similar agreement to the one recited and referred to." This agreement had a 3*l.* stamp. The annexed agreement had no stamp, and was, in effect, a lease from the defendant to W., setting out regularly the terms of the tenancy, &c.

Held, that the stamped agreement incorporated the unstamped one, and that the two together might be given in evidence as a lease on the terms contained in the unstamped one. *Pearce v. Cheslyn*, 225.

- II. What tenancy created by payment of rent after void lease. *Post*, V. 1.
- III. Terms of tenancy, arising from old lease, how proved. *Evidence*, XII.
- IV. Lease, granted under a power given by deed, how far binding on parties to deed. *Mortgage*, IV.
- V. Lease of parish property, by whom to be made.

1. In ejectment on the demise of the churchwardens and overseers of a parish, laid after the passing of stat. 59 G. 3, c. 12 (the seventeenth section of which vests all real property belonging to the parish in the churchwardens and overseers in succession, as a corporation), the lessors of the plaintiff

proved that the defendant, ever since the passing of the statute, and for many years before, had paid rent to the churchwardens of the parish for the time being, and that the late churchwardens and overseers (who came into office after the statute passed) had given him notice to quit.

Defendant produced a lease for years to T. K. and J. K., therein described as churchwardens of the parish, to W. E., made before the statute, in consideration of the surrender of a former lease; and also a lease for a term of years, yet unexpired, made before the statute, by J. M. and N. C., described as churchwardens of the parish church, to W. E.'s personal representative, through whom defendant claimed, in consideration of the surrender of the lease first mentioned. In the last-mentioned lease the premises were described as "belonging to the parish church," and the rent was reserved payable to "the said churchwardens and their successors."

On a special case, stating these facts: *Held*,

That the property appeared to be parish property; that the leases passed no legal interest; and that the property, since the statute, was in the churchwardens and overseers in succession, who were entitled to treat the defendant as tenant from year to year, and to recover the premises upon giving notice to quit. *Doe dem. Higgs v. Terry*, 274.

2. In ejectment by churchwardens and overseers, on demises laid after stat. 59 G. 3, c. 12, it appeared that the defendants, before and since the statute, had paid rent to the successive churchwardens, and that the late churchwardens and overseers (appointed since the statute) had given a proper notice to quit. Defendants produced a lease, made before the statute, for fifty-nine years, to parties under whom they claimed, purporting to be made with the consent of the vicar, the majority of the aldermen and burgesses of the borough of E., and of others the inhabitants of the parish, whose names were subscribed to a memorandum on the back of the lease expressing such consent. The churchwardens were the demising parties, and the rent was made payable to them and their successors for the time being. The premises were described as belonging to the parish church.

On a special case stating these facts: *Held* that, notwithstanding the consent expressed as above, the premises must be taken to have been parish property, demised by the churchwardens as such; and consequently that the lease passed no legal interest in the term, and the present churchwardens and overseers might treat the lessees as tenants from year to year:

Held, further, that a parishioner, liable to poor's rate, was, at common law, a competent witness for the plaintiff in such action, no evidence being given that the premises were of any annual value beyond that at which they were demised. *Doe dem. Hobbs v. Cockell*, 478.

VI. Covenant to repair: how far it raises an implied contract on tenant holding over.

A. demised to B., for a term of years, two messuages; the lease contained a covenant by B., that he would, during the term, keep

the premises in repair, and leave them, at the end of the term, in good repair, and in the same state as they were in at the beginning. At the end of the term, the messuages were out of repair, and had been converted into a single house. B. held on without a fresh lease, and C. afterwards purchased the reversion of A., and B. continued to hold on under C.: *Held*,

1. That B. was not liable in assumpsit on an implied contract to put the messuages in such repair, and in the same state as they were in at the commencement of the term.

2. That, supposing B. so liable, C. had no right of action for breaches of the contract committed before he purchased the reversion. *Johnson v. Churchwardens of St. Peter, Hereford*, 520.

VII. Trustees of a term; nature of their reversionary interest. *Mortgage*, IV.

VIII. Relative situation of mortgagee and tenant in possession. *Mortgage*, IV.

IX. What presumption arises from tenant holding over after notice to quit.

In assumpsit for rent of coal, the issue being whether or not the defendants, having given notice to quit, had afterwards waived the notice and continued the tenancy, it was proved that, after the time fixed by the notice had expired, they continued for two months working out certain portions of the coal, which, however, as they contended, it was usual for a tenant to take away on abandoning such a work: *Held*, that it was for the jury to decide on this issue, whether or not the defendants, in remaining for the two months, intended to waive the notice and continue the tenancy.

During all the time above mentioned, the defendants constituted a firm, called the Llangonneck Coal Company. After the expiration of that time, the company appointed an agent. On the trial of the above action the plaintiff offered in evidence a letter of the agent, to show a recognition, by the firm, of a continuing tenancy. Before the letter was written, or the agent appointed, two of the defendants had withdrawn from the firm, but the business was still carried on in the name of the Llangonneck Coal Company, and no notice of the change had been given to the public: *Held*, that the letter was inadmissible. *Jones v. Shears*, 832.

X. For what breaches of contract reversioner may maintain action against tenant. *Ant*, VI.

XI. When use and occupation maintainable.

A. agreed with B. to take a lease of B.'s iron ore at N. for forty years, at a certain rent, engaging to work the several veins of ironstone, limestone, &c., in certain stipulated proportions; and B. agreed to grant such lease.

Held, that by this agreement B. took, not a mere license, but a right constituting an hereditament within stat. 11 G. 2, c. 19, s. 14, in respect of which A. might sue him for use and occupation. *Jones v. Reynolds*, 805.

XII. Fixtures; what constitutes.

A tenant is entitled, at the expiration of his term, to remove a wooden barn which he has erected on a foundation of brick and stone, the foundation being let into the ground, but the barn resting upon it by weight alone.

He may maintain trover for such a barn, against a party converting it.

If the reversioner, having refused, while off the premises, to allow such tenant to take away the barn, afterwards, while a third party is in possession of the land, come on the land and prevent the tenant from entering to take the barn away, this is a conversion by the reversioner. *Wansbrough v. Maton*, 884.

XIII. For what tenant may maintain trover at expiration of his tenancy. *Anté*, XII.

LEASE.

See LANDLORD AND TENANT.

LIBEL.

I. Bona fides, how far a justification.

Declaration complained that defendant published an advertisement in a newspaper, stating that a capias had issued against plaintiff, and that it had been impracticable to take him, and offering a reward for such information to be given to the sheriff's officer as would enable him to take plaintiff; inuendo that plaintiff was in indigent circumstances, incapable of paying the debt, and keeping out of the way to avoid being served with process. Plea, that a capias had been issued, endorsed for bail, and delivered to the sheriff; that defendant had kept out of the way to avoid being taken; that the sheriff's officer had been unable to take him; and that defendant had published the advertisement, at the request of the party suing out the writ, within four calendar months of the date of the writ, to enable the sheriff and his officer to arrest. *Held*, a justification. *Lay v. Lawson*, 795.

II. What put in issue by plea of not guilty.

In an action for libel, the declaration stated that the plaintiff and M. had been duly convicted of conspiring to extort money from C., and received judgment, but that defendant published that the counsel, who moved for judgment, had stated plaintiff to be the writer of a letter which was in fact written by M. Issue was joined on a plea of not guilty. Plaintiff, at the trial, proved the publication and the indictment and sentence, the letter being set out in the indictment as an overt act of the conspiracy, and called the counsel as a witness, who deposed that he had in fact made the statement. *Held*, that on this evidence it was properly left to the jury whether the publication was a libel, and the jury having found a verdict of Not Guilty, that this was not contrary to the evidence. *Stockdale v. Tarte*, 1016.

LICENSE.

To a claim of right of way under prescription act; pleading and evidence relating to. *Pleading*, VI.

LIEN.

Of vendor on goods, when divested. *Vendor and Vendee*, II.

LIGHTS.

See ANCIENT LIGHTS.

LIMITATIONS.

Statute of. See *Statute*, III., XXVIII.

LOCAL ACT.

See *STATUTE*, XLII.—XLVI.

MAGISTRATES.

See *JUSTICES*.

MALA FIDES.

How far it differs from gross negligence. *Bills of Exchange and Promissory Notes*, IV.

MANDAMUS.

I. When it lies.

1. To Lords of Treasury to pay over money received by them for a party under a vote of Parliament.

The Lords of the Treasury agreed to submit a vote to parliament for granting a retired allowance to a public officer, on certificate of ill-health, according to stat. 3 G. 4, c. 113. The vote passed, but the pension was not specifically mentioned in the appropriation act, which, however, directed a gross sum to be applied in discharge of retired allowances. The Lords of the Treasury, on application by the party for payment, informed him that he might receive it from a treasury officer whom they named. The officer declined paying, inasmuch as he had no authority from the Lords of the Treasury, and they, being again applied to, refused to give such authority except on condition that the party would forego certain legal proceedings, which he refused to do.

Held, first, that the party had a legal right to the allowance, the Lords of the Treasury having submitted the grant to parliament, and having afterwards admitted that the money for paying the allowance was in their hands.

Secondly, that a mandamus lay to the Lords of the Treasury to order payment, inasmuch as the claimant had no other remedy; and as the writ was demanded, not against the King, but against officers into whose hands money had been paid under an act of parliament for the use of an individual. *Res v. Lords Commissioners of Treasury*, 286.

2. To Justices in petty sessions to adjudicate on disputed facts.

On complaint against a party as a vagrant, for refusing to maintain his wife, the party charged, being called upon by the justices in petty sessions to show cause for his refusal, denied being married to the woman, and produced some evidence in support of such denial: and he threatened the magistrates with an action if they committed him. The complainants offered evidence of a *Gretna Green* marriage; but the justices refused to hear it, and dismissed the summons, saying that they would not, on this application, try a disputed marriage, alleged to have taken place out of the country, and that the parties ought to try it in the Ecclesiastical Court.

Held, that the justices could not, under these circumstances, refuse to hear the case through; and a mandamus was granted, requiring them to hear the complaint. *Res v. Justices of Cumberland*, 695.

II. When it does not lie.

1. To Lords of Treasury to pay money which has not come to their hands.

Under stats. 50 G. 3, c. 117, and 3 G. 4, c. 113, the Lords of the Treasury were not authorized to grant retired allowances for life. A grant of such allowance made by them in general terms was subject to the discretion of parliament in voting the supplies from year to year, and was revocable by Lords of Treasury.

And, where the Lords, after granting such allowance on the abolition of an office, had revoked the grant, but the allowance had been erroneously inserted in the estimates of the year, voted by parliament, and included in an appropriation act, this Court refused to inquire into the propriety of the revocation, and would not grant a mandamus to the Lords for payment of the arrears, it being proved that the sum so voted had never come to their hands, and had been newly appropriated by a later act of parliament. *Rex v. Lords Commissioners of Treasury; In re Hand*, 984.

2. To Lords of Treasury to apply to Parliament for grant of allowance.

A party to whom a superannuation allowance has been granted in pursuance of a Treasury minute, according to stat. 50 G. 3, c. 117, in respect of an office held during pleasure, has no vested interest in such allowance; but the minute may be revoked at will by the Lords of the Treasury.

Although such party contributed to the superannuation fund under stat. 3 G. 4, c. 113, while the clauses as to such contribution were in force.

Where a Treasury minute had been revoked under the above circumstances, this Court refused a mandamus calling on the Lords of the Treasury to restore such minute to their books, and to submit an application to parliament, in the estimates for the current year, for a grant on account of the allowance sanctioned by such minute. *Rex v. Lords of Treasury; In re Smyth*, 976.

3. To Lords of Admiralty to pay deductions from officer's half-pay.

Deductions having been made from a naval officer's half-pay in pursuance of a general order from the Admiralty, application was made on his behalf to have the amount of such deductions restored, and the Lords of the Admiralty stated, in answer, that they had given directions for restoring it. Afterwards they retracted this consent, giving as a reason that it would subject them to many similar applications. After the officer's death, his administratrix moved for a mandamus to the Lords of the Admiralty to restore the deducted sums, on the ground that they had admitted the right to them and the possession of applicable funds.

Held, that there was no vested right in the half-pay, entitling the administratrix to a mandamus. *Ex parte Ricketts*, 999.

4. To public board to carry into effect a contract. *Patent*, II.

5. To Justices to compel payment of church-rate, when their jurisdiction is doubtful.

On application for a mandamus to a justice to enforce payment of a church-rate, under stat. 53 G. 3, c. 127, s. 7, it appeared that the party assessed had objected to the rate as in-

valid, in the Consistorial Court, but that the rate had there been confirmed; and that the party, being afterwards summoned before a petty session, repeated his former objection: *Held* that, the validity of the rate having been questioned in the Ecclesiastical Court, although it did not appear that such question was any longer depending, the jurisdiction of the justices under s. 7, of the act was so far doubtful that a mandamus could not issue.

The rate was regular on the face of it; but appeared (by affidavit) to have been voted by the parishioners in vestry for the purpose of meeting past disbursements. Semble, that the rate was not therefore bad, whatever objection might be raised to a retrospective application of the money on passing the churchwarden's accounts. *Rex v. Silfcent*, 354.

III. Return to, what it must state.

A mandamus suggested that defendant was surveyor of the highways for a time named, and now expired; and that divers books of accounts, &c., relating to the highways, during his time of office, were now in his possession, and ought to be delivered to the churchwardens, and that he had been often required so to deliver them, and had refused; and the mandamus commanded him to deliver to the churchwardens all books, &c., in his possession, or show cause to the contrary.

Defendant returned that he had not, on the day of the teste of the mandamus, nor since, nor now, nor when he was required on behalf of the churchwardens, any books, &c., in his possession; not stating whether he had them in his possession between the times of the requisition and the teste, nor what he had done with them:

Held, a good return, but the Court gave the defendant no costs of the mandamus. *Rex v. Round*, 139.

IV. Costs of. *Antd*, III.

MANOR.

I. Lord of, whether rateable for payment in lieu of tolls under local act. *Statute*, XLV.

II. In whom bankrupt's estate in customary freehold vested before admittance of assignees.

A., being tenant in fee simple of customary land which passed by bargain and sale with surrender and admittance, became bankrupt, and the commissioners assigned the land to the assignees. Afterwards the bankrupt died; and, after that, the assignees were admitted.

Ejectment being brought, on the demise of the bankrupt's heir-at-law, and of the assignees, both laid between the bankrupt's death and the admission, *Held*, that the plaintiff must recover on one or the other demise; for that the title was not in abeyance; but, if the assignees' title was not perfect, it was in the heir. *Doe dem. Danson v. Parke*, 816.

MARSHAL.

What Court will presume, to sustain allegation on pleadings of defendant being in custody of the Marshal. *Pleading*, IV. 1.

MASTER.

Of K. B. When Court will review his report. *Contempt of Court*.

MEMORANDA.

COTTENHAM, Lord, Chancellor.
LANGDALE, Lord, Master of the Rolls.

MINERALS.

Demise of; what interest the lessee takes.
Landlord and Tenant, XI.

MISDIRECTION.

Of Judge at trial, when ground of new trial.
Pleading, V. 1.

MORTGAGE.

I. What constitutes, under stat. 55 G. 3, c. 184.
Assumpsit, II. 2.

II. When promissory note may be stamped as a mortgage. *Stamp*, II.

III. What mortgagor and person claiming under him, estopped from setting up as against mortgagee.

1. Defect in his own title.

V. mortgaged land in fee to O.; afterwards, and while V. remained in possession, S., claiming by a title anterior to the mortgage, brought ejectment against V., and a verdict was taken against him by consent, subject to arbitration as to what lease S. should grant to V. S. granted a lease to V. in pursuance of the award made: *Held*, that V. could not set up such lease as an answer to an ejectment brought by O. *Doe dem. Ogle v. Vickers*, 782.

2. Prior mortgage.

In ejectment by a mortgagee, a defendant, not being the mortgagor, but in reality defending for his benefit, cannot set up a prior mortgage executed by him. *Doe dem. Hurst v. Clifton*, 813.

IV. Rights of mortgagee with respect to tenant of mortgagor.

A mortgagee, after default in payment by the mortgagor, has (if he think proper to exercise them) the same rights against a tenant by lease granted before the mortgage, as the mortgagor had, and may take his remedy on such lease, as assignee of the reversion. If the lease was made by the mortgagor subsequently to the mortgage, the mortgagee may treat the tenant as a trespasser, but cannot distrain, or sue for rent, unless he has accepted rent from the tenant, or has given him notice to pay rent, and the tenant has acquiesced.

A deed to lead the uses of a recovery, after reciting that the premises were to be conveyed for the purpose, among others, of securing payment of 800*l.* advanced by J. H. to M. R., tenant in tail in remainder, declared the uses as follows:—To H. and L., their executors, &c., for 1000 years, to commence from the day before the date, &c., in trust (subject to the powers, &c., after mentioned), upon non-payment of the 800*l.* and interest, to sell or mortgage, and pay that sum to J. H.: and, from and after the determination of that term, and subject meantime thereto, and to the trusts thereof, to E. R., mother of M. R., for life: remainder to T. L., his executors, &c., for 2000 years, to commence from the day of the decease of E. R., in trust to levy and repay such sums as E. R. should during her life pay to J. H. for interest on the 800*l.*,

and to suffer the person next in remainder or reversion expectant on the first term to receive the residue of rents not applied in executing the trusts of the latter term: remainder, and in the mean time subject thereto, to such uses as M. R. should appoint, and, in default of appointment, to him for life: remainders to his sons and to his daughters in tail: remainders over. A power was then reserved to E. R. to demise the premises for ten years from the date of the deed, or seven years from the day of her decease, reserving the best rent, &c.

E. R. demised the premises to a tenant for seven years from the day of her decease, reserving rent "to M. R., or the person for the time being entitled to the freehold or inheritance of the premises immediately expectant" on the decease of E. R. (She died, and the lessee entered. M. R. died shortly afterwards, and left a daughter. Afterwards the trustees of the terms of 1000 and 2000 years assigned them to J. H., default having been made in the payment of his 800*l.*

Held, that the seven years' lease granted by E. R., being made under a power created by the deed of uses, must be deemed contemporaneous with the term of 1000 years created by the same deed, and binding on the trustees of that term, who were parties to the deed, so that they could not disturb the possession.

That the trustees of that term, though not "entitled to the freehold or inheritance," were the reversioners entitled to the rent reserved by the lease, and consequently, that their assignee might distrain for it.

And this, although an ejectment had been brought against the lessee, on the demises, among others, of the last-mentioned trustees (laid previous to their assignment to J. H.); there having been no judgment, nor any actual eviction of the lessee.

The Court, after giving the above decisions on a special case, ordered judgment to be entered up for the successful party for half a year's rent. On application of that party in the next term, it appearing, on reference to the special case and postea, that the rule for judgment should have been for a year's rent, and no judgment having yet been entered up, the Court, after cause shown, amended the rule on payment of costs. *Rogers v. Humphreys*, 299.

V. When mortgagor entitled to re-conveyance of mortgaged property under stat. 7 G. 2, c. 20, s. 1.

A mortgagor, in order to entitle himself to the benefit, in a court of law, of stat. 7 G. 2, c. 20, s. 1 (directing a reconveyance by the mortgagee, plaintiff in ejectment, upon payment of principal, interest, and costs), must become a defendant in the action of ejectment.

Where he is not such defendant, the Court will not interfere, either under the statute, or in the exercise of its general power over actions in the Court.

Although the ejectment has been brought against the tenant of the mortgagor, and the Judge, at the time of the trial, treated the defendant as such tenant, and decided upon the evidence accordingly. *Doe dem. Hurst v. Clifton*, 814.

VI. Lease granted under a power given by

deed, when it takes effect as against parties to deed. *Anté*, IV.

MUNICIPAL CORPORATION.

See CORPORATION.

NEGLIGENCE.

How far gross negligence differs from mala fides. *Bills of Exchange and Promissory Notes*, IV.

NEW TRIAL.

See TRIAL, NEW.

NISI PRIUS.

Record, what it must contain. *Practice*, XX.

NONSUIT.

For non-production of document; for what cause set aside.

Plaintiff having been nonsuited for not producing a document on the trial, the Court set aside the nonsuit, on payment of costs, upon the affidavit only of the plaintiff's attorney, that he, the attorney, "as soon as he found that the action was likely to come on," had commenced inquiries to ascertain in whose hands the document was, and, upon discovering this, had immediately (through a person who promised to procure it), made efforts to obtain it, but had obtained it too late for the trial, and now had it. *Atkins v. Owen*, 819 (n.)

NOTICE.

I. Of action, who entitled to under stat. 5 & 6 W. 4, c. 59. *Statute*, XL.

II. Of appeal.

1. Against conviction. How far objections, not stated in notice, may be made at trial. *Conviction*, II.

2. Against order of removal. Construction of stat. 4 & 5 W. 4, c. 76, ss. 79 & 81. *Poor*, IX. 1.

3. Against order of Justices for payment of church-rate, to whom to be given. *Rate*, I. 6.

III. Previous to admission of attorney. *Attorney*, I.

IV. To quit; presumption from tenant holding over. *Landlord and Tenant*, IX.

V. Previous to binding of parish apprentice. *Poor*, III. 2.

VI. Of non-payment, to drawer of foreign bill, how to be given. *Bills of Exchange and Promissory Notes*, IV.

VII. Under stat. 6 G. 4, c. 16, s. 82 (Bankrupt Act), what amounts to. *Bankrupt*, I.

VIII. Notice to principal, how far notice to agent. *Bankrupt*, I.

IX. Service of.

1. At house of party in his absence.

(1.) An affidavit of service of notice on a creditor under the compulsory clause of the Lords' Act (32 G. 2, c. 28, s. 16), is not sufficient if it state merely that the notice was left with the landlady of the house where he lodges; or with a person at the house where he resides, who afterwards stated that she acted as his servant, and had

delivered it to him, she herself making no affidavit, and there being no affidavit of belief that the statement of such person was true. *Robinson v. Gompertz*, 82.

(2.) To make a rule absolute, on no cause being shown, it is not sufficient that a deponent should swear to notice of the rule nisi having been left at the dwelling-house of the opposite party, in his absence, with a person who afterwards told the deponent that she had delivered the notice; the deponent must state that he believes this to be true. *Doe dem. Hungate v. Roe*, 83 (n.)

2. On party for performance of a public duty, how far it may be dispensed with by party. *Corporation*, I.

NUISANCE.

In obstructing navigable river, what amounts to.

On the trial of an indictment for a nuisance in a navigable river and common king's highway, called the harbor of C., by erecting an embankment in the waterway, a finding by the jury that the embankment was a nuisance, but that the inconvenience was counterbalanced by the public benefit arising from the alteration, amounts to a verdict of Guilty.

It is no defence to such an indictment, that, although the work be in some degree a hindrance to navigation, it is advantageous, in a greater degree, to other uses of the port. *Rex v. Ward*, 384.

OCCUPATION.

Of tenement, within stat. 1 W. 4, c. 18, s. 1, what constitutes. *Poor*, V. 1 (1.)

OFFICER.

Naval, how far he has a vested interest in his half-pay. *Mandamus*, II. 3.

ORDER.

I. Order and disposition of bankrupt, what is within 6 G. 4, c. 16, s. 72. *Vendor and Vendee*, I.

II. Of Judge, when Court will review. *Attorney*, IV.; *Judge*, III. 2.

III. Of Justices, for stopping up highway; what it must state. *Highway*, VII. 3 (2.)

IV. Of removal, acquiesced in, how far conclusive. *Poor*, VI.

OVERSEERS.

I. Power to lease parish property. *Landlord and Tenant*, V.

II. How far entitled to books of surveyor of highways, on his quitting office. *Highway*, VIII. 1.

III. What inferred from designation on pleadings of party being assistant overseer. *Statute*, X. 1 (1.)

IV. Defence under plea of general issue under stat. 43 Eliz. c. 2. *Pleading*, V. 1.

OYER.

Time for pleading, after praying oyer. *Practice*, XVI.

PARISH.

Property belonging to.

1. What is evidence of. *Landlord and Tenant*, V.
2. Lease of, by whom to be made. *Landlord and Tenant*, V.

PARISHIONERS.

When competent witnesses in action by churchwardens and overseers. *Landlord and Tenant*, V. 2.

PARLIAMENT.

How far Court will interfere by mandamus to Lords of Treasury.

1. To apply to Parliament for grant of Treasury allowance. *Mandamus*, II. 2.
2. To pay over money received for a party under a vote of Parliament. *Mandamus*, I. 1.

PARTICULARS OF DEMAND.

What plaintiff bound to insert. *Costs*, I.

PATENT.

Construction of.

1. In a declaration for infringing a patent which granted that the plaintiff, and no others, should "make, use, exercise, and vend" his invention, and forbade all persons to "make, use, or put in practice" the same, or to counterfeit or imitate it, without the plaintiff's license, the plaintiff alleged that the defendant without his license exposed to sale articles intended to imitate, and which did imitate, his invention.

Held, on general demurrer, that the count was bad, as not stating anything which was necessarily an infringement of the patent. *Minter v. Williams*, 251.

2. A patent for the exclusive use of improvement in the invention of an anchor contained a proviso for avoiding the patent if the patentee should not supply for his Majesty's service all such articles of the invention as should be required, on such reasonable terms as should be settled by the Lords of the Admiralty. The latter used the invention, but did not take the articles from the patentee. The Court refused to issue a mandamus to them to settle the terms according to the patent. *Ex parte Pering*, 949.

PAUPER.

See POOR.

PAYMENT.

- I. How far delivery of cheque amounts to payment. *Cheque*.
- II. Plea of; how far it must allege on what causes of action payment was made. *Pleading*, V. 5.

PENALTY.

How to be awarded in a conviction. *Conviction*, I.

PENSION.

Legal right of party to claim allowance re-

ceived for him by Lords of Treasury under a vote of Parliament. *Mandamus*, I. 1; and *see Mandamus* II. 1-3.

PLEADING.

I. Form of action.

1. Recovery of money extorted under color of legal process.

Plaintiff being a foreigner, ignorant of the English language, was arrested at Falmouth soon after his first arrival there from abroad, by the defendant for 10,000*l*. Defendant and plaintiff then signed an agreement, by which, in consideration of 500*l*. paid by plaintiff to defendant, plaintiff was to be discharged, and not to be again arrested; and plaintiff was to put in bail in twelve days; the 500*l*. was to be "as a payment in part of the writ;" and both parties were to abide the event of the action; the agreement containing no provision for refunding the money if the action should fail. Plaintiff paid the 500*l*. and was released. No bail was put in; and the writ was afterwards set aside for irregularity. Plaintiff then sued defendant for the 500*l*. as money had and received; and the jury found that defendant knew that he had no claim upon plaintiff:

Held, that the action lay, the payment having been made under the compulsion of colorable legal process. *Duke de Cadaval v. Collins*, 858.

2. Against magistrate for commitment under irregular conviction. *Conviction*, I.
3. What averment shows plaintiff entitled to bring action under stat. 17 G. 2, c. 3. *Statute X. 1. (1)*.
4. Bill of exchange in the hands of a tortious holder, how recoverable. *Bills of Exchange and Promissory Notes*, IX.
5. Assumpsit.
 - (1.) What implied contract arises from covenants of lease on tenant holding over. *Landlord and Tenant*, VI.
 - (2.) For what breaches of contract maintainable by reversioner against tenant. *Landlord and Tenant*, VI.
 - (3.) Use and occupation.
 - [1.] Who may maintain. *Post*, II.
 - [2.] In respect of what maintainable by landlord against tenant. *Landlord and Tenant*, XI.
 - (4.) Money had and received.
 - [1.] What constitutes. *Assumpsit*, II. 2.
 - [2.] To recover proceeds of an illegal execution.

An insolvent debtor executed a warrant of attorney, on which judgment was signed, and he afterwards went to prison. Subsequently his goods were seized and sold under a fi. fa. on the judgment, and the proceeds were paid to the judgment creditors. The insolvent petitioned, and his effects were assigned under the Insolvent Debtors' Act, 7 G. 3, c. 57:

Held, that the assignee might recover the proceeds of the sale from the judgment creditors, as money had and received to the use of the assignee after the subscribing of the petition, on section 34 of the act. *Gye v. Hickcock*, 84.

6. Trover.

- (1.) For what maintainable by tenant at expiration of his tenancy. *Landlord and Tenant*, XII.

(2.) To recover bill in hands of tortious holder. *Bills of Exchange and Promissory Notes*, IX.

II. Parties to action.

How far plaintiffs must have community of interest in subject-matter of action.

A., B., and C., being interested in certain lands, but having no common legal interest in any portion of them, agreed together to put them up for sale, according to their respective interests, and the lands were so put up, under the direction of their agent, in lots. Each lot was described in a separate paper, containing the conditions of sale, in which it was stipulated that "the vendors" should deliver an abstract of title; that the conveyances should be executed, and the whole purchase-money paid, on a certain day, from which time the purchaser should have possession; and that, if the purchaser should be let in before payment of the purchase-money, he should be considered tenant at will to the vendors, and pay interest at the rate of 4 per cent. on the amount of purchase-money, as and for rent. Defendant bought four of the lots under the above conditions, two by auction and two by private contract. No abstract of title was delivered; but defendant was let into possession, and held for several years, not paying the purchase-money. He knew of the arrangement entered into by A., B., and C., for the sale of the premises:

Held, that A., B., and C. could not jointly sue upon an implied contract by the defendant to waive the delivery of an abstract, and perform the condition for payment of 4 per cent. interest as rent.

Also, that A., B., and C. could not recover the 4 per cent. in a joint action for use and occupation. *Seaton v. Booth*, 528.

III. Commencement of action.

After delivery of cheque for money sought to be recovered.

(Per LITTLEDALE, J.) a party to whom a cheque is sent may commence an action before he sends it back. *Hough v. May*, 954. (See whole placitum, *Cheque*.)

IV. Declaration.

1. Informal, from not pursuing rules of Court, how to be taken advantage of.

A declaration in K. B. beginning in the old form, "A. complains of B. being in the custody of the Marshal," &c., is not on that account specially demurrable since the act 2 W. 4, c. 39, and the Rules of Mich. 3 W. 4. For the Court will not presume that the action was not commenced in the Palace Court, and the defendant actually in custody of the Marshal, in which case the declaration would be correct, the act and rules not applying to causes removed from inferior courts.

If the defendant wishes to object to such a declaration in a suit commenced in a superior court, he should not demur, but move to set aside the declaration for irregularity. *Dod v. Grant*, 485.

2. Assumpsit.

New assignment: effect of, on the issue.

In assumpsit for money lent, payment was pleaded; the plaintiff new assigned, and non assumpsit was rejoined. The plaintiff, at the trial, claimed 15*l.* for money lent in August, 1833, and proved an acknowledgment by the

defendant after that time, that he owed the plaintiff 15*l.* The defendant gave evidence of his having paid the plaintiff 15*l.* in October, 1833. The under-sheriff, in summing up, stated the question for the jury to be, whether or not the 15*l.* lent in August, 1833, had been so lent. The plaintiff had a verdict. On motion for a new trial, or to enter a verdict for the defendant:

Held, that the proper question for the jury was, whether or not there had been two debts; that the defendant was not precluded from taking this point by the evidence of payment which he had produced at the trial; and that, there having been some evidence of a second debt, a new trial must be had. *Hall v. Middleton*, 107.

3. Debt; for penalty on statute 17 G. 2, c. 3.

What must be stated in declaration. *Statute*, X., 1 (1).

V. Plea.

1. General issue; defence under, when not affected by new rules of pleading.

Under stat. 3 & 4 W. 4, c. 42, s. 1 (which provides that the contemplated rules of pleading shall not disable any person from pleading the general issue and giving the special matter in evidence, where by statute he may now do so), an overseer, sued in trespass for taking A.'s goods, may still prove, on plea of Not Guilty, that he, as overseer, distrained the goods for a poor's rate due from B., and that they were B.'s, not A.'s. The general issue does not, under the rules of Hil. 4 W. 4, confine him to proof of his character of overseer.

The practice of not granting a new trial on the ground that the verdict was against evidence, if the amount claimed fall short of 20*l.*, applies to motions made by plaintiff, as well as motions by defendant.

But where the ground is misdirection, the amount is not regarded. And, where the Judge had misdirected the jury by submitting for their consideration a fact not proved nor deducible from the evidence, the Court granted a new trial, though the amount in question was less than 1*l.* *Haine v. Davey*, 892.

2. Payment.

(1.) How far supported by proof of delivery and acceptance of cheque. *Cheque*.

(2.) How far it must allege on what causes of action payment was made. *Post*, 5.

3. Statute of Limitations; how to be pleaded.

A plea that the "supposed debt, if any such there be," did not accrue within six years, is bad on special demurrer, for not confessing the debt. *Margetts v. Bays*, 489.

4. Set-off.

Amount shown on face of pleadings, how far material. *Post*, 5.

5. How far plea may identify causes of action alleged in different counts of declaration.

Declaration, that defendant was indebted to plaintiff in 20*l.* for work and labor, 200*l.* for money paid, and 200*l.* on an account stated; in consideration whereof defendant promised to pay the said several moneys; breach, non-payment; damages 200*l.*

Plea, as to 20*l.*, parcel of 56*l.* 11*s.* 8*d.*, parcel of the moneys in the first two counts mentioned, and as to 20*l.*, parcel of 56*l.* 11*s.* 8*d.*, parcel of the money in the last count mentioned, that the said 20*l.* so found due

on an account stated was the same sum of 20l., parcel of the moneys in the first two counts mentioned; and that the said two sums of 20l. each were one and the same debt of 20l., and not other and different debts of 20l.; and that defendant paid, and plaintiff accepted, 20l., in satisfaction of the promises, so far as they related to the same debt of 20l., and of all damages sustained by reason of the non-performance: *Held*, on special demurrer.

That the identity might be so averred:

That the plea was bad, for not showing to how much of the sum in the first count, and to how much of the sum in the second, it was pleaded.

Defendant also pleaded, as to certain portions of the sums named in the different counts, amounting in all, on the face of the plea, to 114l. 14s. 8d., a set-off of 57l. 7s. 4d.; and that that sum equalled the damages sustained by the non-performance of the promises, so far as they related to the sums to which that plea was pleaded: *Held*, on special demurrer.

That the plea was bad for pleading a smaller claim as an answer to a larger. *Mee v. Tomlinson*, 262.

6. How insufficiency of averment to be taken advantage of. *Post*, XI.

7. Not guilty, in action of libel, what it puts in issue. *Libel*, II.

8. Bona fides, how far a justification of libel. *Libel*, I.

9. Prohibition: power to plead several pleas. Since the statute 1 W. 4, c. 21, s. 1, several pleas may be pleaded in prohibition, as in common actions between subjects. *Hall v. Mawle*, 283.

10. Scire facias.

Matters which might have been pleaded to original action.

To scire facias upon a judgment in assumption, by the original plaintiff, defendant pleaded plaintiff's bankruptcy, assignment, &c.; and that the causes of action in the original suit accrued before plaintiff became bankrupt. On special demurrer, for that the plea did not show whether the judgment was recovered before or after the bankruptcy: *Held*, that the plea was bad, inasmuch as it did not appear but that the bankruptcy might have been pleaded in bar of the original action. *Baylis v. Hayward*, 256.

VI. Replication.

To a plea of twenty or forty years' enjoyment under stat. 2 & 3 W. 4, c. 71, how license shall be pleaded.

The words "enjoyed by any person claiming right" applied to easements, in stat. 2 & 3 W. 4, c. 71, s. 2, and "enjoyment thereof as of right," in s. 5, mean an enjoyment had, not secretly or by stealth, or by tacit sufferance, or by permission asked from time to time, on each occasion, or on many; but an enjoyment had openly, notoriously, without particular leave at the time, by a person claiming to use without danger of being treated as a trespasser, as a matter of right, whether the right so claimed shall be strictly legal, as by prescription and adverse user, or by deed, or shall have been merely lawful so far as to excuse a trespass.

To a plea of forty or twenty years' enjoyment of a way, a license, if it cover the

whole time, must be pleaded. But a parol or other license, given and acted on during the forty or twenty years, may be proved under a general traverse of the enjoyment as of right: and this, whether such license be granted for a single time of using, or for a definite period.

Semble, that, where issue is joined on the allegation of an interruption acquiesced in, the party alleging the interruption, having proved a non-user during part of the time, may, in order to show that such non-user was not a voluntary forbearance, give evidence that, two years before the non-user commenced, the party claiming the way paid a consideration for being allowed to use it. *Tickle v. Brown*, 369.

VII. Similitur.

Want of, on pleadings, its effect. *Similitur*.

VIII. Judgment.

1. What will be presumed after verdict.

On motion for costs, under 43 G. 3, c. 46, s. 4 (the plaintiff having arrested for 35l. and recovered only 19l.), affidavits were put in for the plaintiff, sworn by himself and others, contradicting the evidence given at the trial for the defendant, and impeaching the credit and competency of his principal witness. No motion had been made by the plaintiff for a new trial or to increase the damages.

Held, that the verdict was *prima facie* evidence of the want of cause for arresting; and that the Court could not try, upon affidavit, whether or not such verdict was well founded. *Tipton v. Gardner*, 317.

2. Non obstante veredicto, when it may be.

Three pleas were pleaded in bar to a declaration in trespass containing one count, and issues joined on them. By order of nisi prius, a verdict was taken for 100l. damages, subject to the award of a barrister, to whom the cause and all matters in difference were referred, with power to direct what should be done by the parties. He directed a verdict for the plaintiff on two issues, and for the defendant on the third, adding that, if there had not been the third issue, he should have awarded 1s. damages to the plaintiff on the other issues:

Held, that it was not competent to the plaintiff to move for judgment non obstante veredicto on the third issue.

And this without reference to any special clause in the order of reference, restraining the parties from bringing a writ of error, &c. *Steeple v. Bonsall*, 950.

IX. Highway assessment, how to be pleaded.

In pleading a surveyor's assessment, made on occupiers of lands, under stat. 13 G. 3, c. 78, sects. 30 and 45, it is necessary to aver that the assessment did not exceed 9d. in the pound on the yearly value of the lands; although the limitation as to value annexed to sects. 30 and 45, is contained in a distinct proviso; and although the form of an order of justices in Schedule No. 15 of the act, adapted to the above sections, makes no mention of yearly value. *Mordell v. Harvey*, 684.

X. Traverse with inducement, what it admits. Evidence, XV. 3.

XI. What averments sufficiently identify parties named on pleadings.

Declaration stated that S. drew a bill payable to his own order, on W.; that "the

lieu of his former tithes, and, in October, 1834, was rated to the poor in respect of such corn rent.

The question for the opinion of the Court was, whether the rector was liable to be rated in respect of such corn rent.

Sir *John Campbell*, Attorney-General, and *Gunning*, in support of the order of sessions. The extinguishment of tithes by means of a commutation for a corn rent may be effected upon either of two principles. First, the tithes may be declared to be worth a certain proportion of the gross value of the land. Then the corn rent, which represents that proportion, ought to be subject to the poor rate; because the rector there receives what the legislature considers an equivalent for the one-tenth of the gross produce to which he was formerly entitled, and for which he was rateable; and the landholder of course retains that which is equivalent to the nine-tenths only of the gross produce, and pays the poor rate on such nine-tenths only. Secondly, the net value of the land, after deducting the poor rates on the whole value of the land, may be ascertained, and the proportion which the rector's corn rent is to bear to such net value declared. In that case the corn rent should not be rated to the poor, because the rector gets an equivalent, not for his share of the gross produce, but for his share in so much of the gross produce as would remain after deducting the whole poor rate due on the whole gross produce. The rate due upon his share of the land has been already deducted from the integer upon which his proportion is estimated; and, if he were to be rated on that proportion, he would be taxed to the poor twice. Now this second principle is the one adopted by the legislature in the present case, the tithes being deemed equal in value to certain proportions of the "annual net value" of the respective sorts of land. The net value must be that which remains after deducting, among other things, the poor-rate. In *Chatfield v. Ruston*, 3 B. & C. 863, a corn rent in lieu of tithes, was made payable "free and clear from all rates, taxes, and deductions whatsoever;" and it was held that such corn rent was not rateable in the hands of the parson. The same decision was come to in *Mitchell v. Fordham*, 6 B. & C. 274, where the words were, "free from all taxes and other deductions whatsoever, except the land tax." Here, in effect, the deduction is to be made, in the first instance, from the gross produce; which is equivalent to directing a payment of the corn rent without deduction. No other meaning can be attached to the word "net." In *Rex v. Adames*, 4 B. & Ad. 61, it was held that, as the poor-rate is to be taken on the net rent which a tenant at rack rent would give for the land, he having to pay all outgoing, a tenant whose lands were liable to a sewer's rate was entitled to be rated lower than the tenant of lands of the same value, not so subject. If a net rent imply the deduction of a sewer's rate, "annual net value" implies the deduction of the poor-rate. This view is fortified by the construction put upon the words "worths and values" in *Rex v. The Hull Dock Company*, 3 B. & C. 516, and by the principle laid down for estimating the annual profits in *Rex v. Lower Mitton*, 9 B. & C. 810. In *Rex v. Lacy*, 5 B. & C. 702, the rent was not estimated on the net value of the lands, and was held liable to a highway rate: that was because the only argument for the exemption was, that the commissioners were to ascertain the net value of the tithes and affix a clear annual rent in lieu of them; and the Court thought that the only deduction contemplated was the expense of collection. Such an interpretation cannot be applied to the words "annual net value of the said lands." Besides, in that case, some allotments of land were made to the parson, and were not exempted from rate; and the Court thought it improbable that he should have been left liable for one species of property, and not for the other: and it is not clear that, if the argument had rested on the word "net," the decision would have been the same. In *Rex v. Boldero*, 4 B. & C. 467, the parson was held rateable for the commutation rent: but there the estimate was made on the full value of the titheable lands; and it was probably with a view to that case that the word "net" was introduced into the act now

payment contemplated or made, except that of 10l.: *Held*, that the indenture was void under stat. 8 Ann. c. 9, s. 39, for not truly stating the sum paid or contracted for with the apprentice. *Rez v. Amersham*, 508.

2. Notice previous to binding parish apprentice.

(1.) How far necessary.

Under stat. 56 G. 3, c. 139, sects. 1, 2, when an apprentice is bound from one parish into another, the indenture is not valid for the purpose of settlement, unless notice has been given to the overseers of the latter parish, pursuant to sect. 2, before the indenture was allowed.

But, on appeal against an order of removal grounded on such indenture, the respondents are not bound in the first instance to prove such notice: if there be no evidence to the contrary, the notice will be presumed. *Rez v. Whiston*, 607.

(2.) When proof of, necessary on appeal.

Anté, (1.)

3. Execution of indenture.

A printed indenture of apprenticeship executed on one day, but bearing date on another, is not void by statutes 8 Ann. c. 9, and 5 G. 3, c. 46; and a settlement may be gained by service under it. *Rez v. Harrington*, 618.

4. Imperfect contract of apprenticeship.

(1.) The sessions quashed an order of removal, which assumed an imperfect contract of apprenticeship; and they stated the following facts for the Court. Pauper's brother worked with W., a carpenter, as apprentice, under a verbal contract; on his leaving W., he applied for pauper to be taken in his place. W. said he would take no more apprentices unless they would agree to work on his land, as well as at the carpentry business, saying, "I will have no more apprentices, unless he is agreeable to do other work as well: I will take him to do work as a servant." W. occupied three or four acres of hop ground. It was agreed that pauper should live with W. three years, to learn the business of a carpenter, and to do any other work W. required; pauper to have 9s. a week the first year, 10s. the second, 11s. the third, and to be paid for overwork at the same rates. He entered into W.'s service in pursuance of the agreement, boarding and lodging at his own expense. The question for the Court was stated to be, whether the pauper acquired a settlement by living with W. under these circumstances; if so, the order of sessions to be confirmed; if not, to be quashed.

This Court quashed the order of sessions. *Rez v. Igham*, 937.

(2.) Pauper's mother applied to W., a carpet-weaver, to take him into his employment. W. agreed with her to take pauper for two years on trial, after which, if W. and pauper agreed, he was to be apprenticed to W. He was to have board, lodging, and washing, but not stated wages, and he was "to draw." Every carpet-weaver is at first taught "drawing." Pauper served above a year under this contract, in the borough of K. These facts being proved on appeal against an order removing pauper to K., the chairman put it to the sessions, whether there had been a hiring and service, or a service under an imperfect contract of appren-

ticeship. They found the latter, but sent a case for the opinion of this Court, stating the facts as above.

Held, that this Court might, under these circumstances, review the judgment of the sessions.

But that the judgment was not to be disturbed, there being grounds for the finding.

And semble, that the finding was right, inasmuch as it might be collected from the case that the object of the parties was learning and teaching. *Rez v. Wishford*, 216.

IV. Settlement by hiring and service.

What constitutes a hiring and service.

By the regulations of a bridewell, the turnkeys were to be appointed by the keeper, but the appointment was subject to the approbation and confirmation of the visiting justices. The keeper might suspend, but not permanently displace them without the authority of the visiting justices. They were to receive their salaries from the county treasurer, but in all other respects to be under the immediate orders and control of the keeper:

Held, that an appointment to the place of turnkey, and discharge of its duties under the above regulations at a yearly salary, did not constitute a hiring and service, by which a settlement could be gained. *Rez v. Sparsholt*, 491.

V. Settlement by renting a tenement.

1. What constitutes occupation and payment of rent.

(1.) Pauper rented a house at 24l. a year, which he paid, and resided in the house with his family. He was in the habit of taking in persons to sleep in some of the rooms, letting sometimes a bed, sometimes half a bed, generally by the night, but occasionally for a week, in which case, however, the bed only was let, and the pauper reserved the right of putting another bed into the room. The lodgers had no right to the rooms by day. The pauper had constant access to, and control over, the whole house, and kept the keys of all the rooms:

Held, an actual occupation of the dwelling-house, within stat. 1 W. 4, c. 18, s. 1. *Rez v. St. Giles-in-the-Fields*, 495.

(2.) Pauper hired a house and lands, from Michaelmas, 1832, to Michaelmas, 1833, for 30l., and entered into occupation at Michaelmas, 1832. In July, 1833, he assigned to W. all his debts, securities, stock, effects, utensils in trade, household goods, furniture, crops growing or severed, implements of husbandry, cattle, live and dead stock, and all other personal estate and effects, to have, hold, and take the said moneys, &c., live and dead stock, and all other the premises assigned, to W., on trust to cultivate the lands as long as the crops then growing should remain, and to sell the stock, crops, &c., and receive the amount of the valuation to be made as between outgoing and incoming tenant at quitting the land; and W. was to be possessed of the moneys on trust, first, to pay the costs and charges, next to pay the rent, taxes, &c., which were or should be due during the continuance of the trusts, and next to pay creditors of the pauper, parties to the deed. In August, 1833, W. sold the stock, effects, and crops, which were cut and carried away by the purchasers; and afterwards W. paid the rent for the year, out

of the produce of the property assigned. Pauper, by himself or family, occupied the house till Michaelmas, 1833.

Held, that there was neither an undivided occupation for the year, nor a payment of rent by the pauper, to satisfy stat. 1 W. 4, c. 18, s. 1; and that no settlement was gained. *Rez v. Pakefield*, 612.

2. Completion of settlement after order of removal.

Pauper hired a house in W. at 17l. per annum, for a year (1832, 1833), and resided in it, and occupied it for a year. After the expiration of the year, while some rent was unpaid, he was removed to B. The order was appealed against. Pending the appeal, the pauper returned to W., resided in the house from the 7th of December, 1833, to the 27th of January, 1834, and paid the arrear of rent due for the expired year. On the 1st of January, the order of removal was, upon the appeal, confirmed on the merits:

Held, that the pauper gained a settlement at the time of the payment of the arrear, and that the confirmation of the order of removal showed only that he had not completed a settlement at the time of the order. *Rez v. Willoughby*, 143.

VI. Effect of division of parish into districts upon settlement.

A pauper was removed by order of justices to the parish of H. (so named in the order), which consisted of several townships, maintaining their poor jointly. The order was acquiesced in. Afterwards one of the townships, O., separated itself from the parish, under stat. 13 & 14 Car. 2, c. 12, s. 21, and from thenceforth maintained its own poor. The pauper was subsequently removed to the township of O. (so named in the order of removal) from the parish of W. On appeal against the order (the respondents having put in the order of removal to H.), O. offered evidence that the pauper was not settled in that particular township, before its separation from H. The sessions rejected the evidence.

Held, PATTESON, J., dubitante, that the former order upon H. was not conclusive against O. on appeal against an order directed to O. as a distinct township; and the case was sent back to be re-heard. *Rez v. Old-bury*, 167.

VII. What constitutes "a coming to inhabit" within stat. 13 & 14 Car. 2.

On a case set up by sessions, it was stated that the pauper, not being resident at the parish of W., was charged by a woman living there with having gotten her with child, and was committed to the county jail at B. for want of sureties; that the woman's father became his surety, and took lodgings for him at W., to which the pauper removed, and after residing there a week, married the woman, became chargeable in about a week after his marriage, and was removed from W. to H. The lodgings were paid for by the woman's father. The case then stated that, on the hearing of the appeal against the order of removal, the respondents offered to prove that the pauper was settled in H., but that "the sessions quashed the order, on the ground that the pauper had not come to inhabit in W. within the meaning of stat. 13 & 14 Car. 2."

Held, by PATTESON and WILLIAMS, Js., that, upon this statement, it sufficiently appeared to this Court that the pauper was removable; and the order of sessions was quashed, and the case sent back to be reheard.

Absente Lord DEXMAN, C. J.; and dissentiente COLERIDGE, J., on the ground that the sessions had negatived the existence of an intention within the statute, and were not necessarily wrong as to the fact. *Rez v. Woolpit*, 205.

VIII. Removal.

Of Irish pauper under stat. 3 & 4 W. 4, c. 40.

A pauper, born in M. in England, not having done any act to gain a settlement in her own right, and being the daughter of Irish parents, who had gained no settlement in England, was, at the age of eighteen, delivered of a bastard, in her father's house in S., in England, where she resided as part of his family. The mother of the pauper having applied to S. for relief for the pauper and her bastard only:

Held that, under stat. 3 & 4 W. 4, c. 40, s. 2, the pauper was removable to Ireland, and not to M.; and that stat. 4 & 5 W. 4, c. 76, (assuming that it defines the age of emancipation to be sixteen, and prevents the head of a family from becoming chargeable by relief given to a child after that age; was not applicable, inasmuch as it extends only to English and Welsh poor. *Rez v. Nile End Old Town*, 196.

IX. Appeal against order of removal.

1. What notice to be given.

The act for the amendment of the Poor Law, 4 & 5 W. 4, c. 76, does not, in sects. 79 and 81, alter the existing practice of sessions as to the time for giving notice of appeal against orders of removal. It is not necessary, by sect. 79, that notice of appeal should be given within twenty-one days after the notice of removal thereby required, nor, by sect. 81, that notice of appeal should be given fourteen days at least before the sessions.

The statement of the grounds of appeal, required by sect. 81, may be delivered before the notice of appeal. And, if delivered with an erroneous notice of appeal, it is nevertheless available, if a good notice of appeal, incorporating such statement by reference, be afterwards served in a proper time. *Rez v. Suffolk*, 319.

2. Grounds of appeal, when to be given.

Anté, I.

X. Effect of order of removal unappealed against. *Anté*, VI.

XI. Overseers.

Power to lease parish property. *Landlord and Tenant*, V.

See further, *Overseers*.

POWER.

I. Execution of; what a sufficient attestation.

Lands were limited to such uses, &c., as L. should appoint by her last will and testament in writing, to be by her signed, sealed, and published, in the presence of, and attested by, three or more credible witnesses. L. signed and sealed an instrument, containing an appointment, commencing thus:—"I, L., do publish and declare this to be my last will

and testament ;" and ending thus :—" I declare this only to be my last will and testament. In witness whereof, I have to this my last will and testament set my hand and seal the 12th day, &c." The attestation was as follows :—" Witness C. B., E. B., A. B.:" *Held*, a good execution of the power, on the face of the instrument.

The will being more than thirty years old : *Held* that, on production of it in the above form, the fact of the attestation was sufficiently proved, though one witness was still alive and was not called.

Quere, Whether in general publication be essential to the validity of a will? *See dem. Spilsbury v. Burdett*, 1.

II. Lease granted under a power given by deed, when it takes effect as against parties to the deed. *Mortgage*, IV.

PRACTICE.

I. Amendment of rule for judgment. *Mortgage*, IV.

II. Bail.

What must be stated in affidavit to hold to bail.

An affidavit to hold to bail, stating the defendant to be indebted to the plaintiff for money had and received by defendant for and on account of plaintiff and at his request, but not adding that it was received to plaintiff's use, is insufficient. *Kelly v. Curzon*, 622.

III. Certiorari.

Recognizances previous to removal of indictment. *Certiorari*, IV.

IV. Consolidation of actions. *Consolidation*.

V. Costs.

1. Of amendment of rule for judgment. *Mortgage*, IV.

2. Defendant's costs in ejectment how enforced. *Ejectment*, IV.

3. Of different issues in a cause. *Costs*, I, 3 (2).

4. Under interpleader rule. *Interpleader*, II.

VI. Criminal information.

On application of person who has taken out warrant against party. *Information*, *Criminal*, I.

VII. Ejectment.

1. Stay of proceedings in second action until payment of costs in a former one. *Ejectment*, IV.

2. Entry of verdict on second demise after execution on first. *Ejectment*, III.

3. Striking out names of lessors of plaintiff at instance of defendant. *Ejectment*, II.

VIII. Execution.

1. Discharge out of custody.

(1.) For debt under 20l., who entitled to. *Execution*, 2.

(2.) For irregularity when it may be.

[1.] A defendant who is arrested on the 10th of June on a ca. sa., which does not comply with the rule of Court, Hil. 2 & 3 G. 4 (requiring the place of defendant's abode, &c., to be endorsed), is too late in applying to the Court in Michaelmas term following, to be discharged on the ground of irregularity; although he swears that he was not aware of the irregularity until the time when he made the application. *Tarber v. French*, 362.

[2.] If a defendant be taken in execution upon a ca. sa., sued out more than a year and

a day after the judgment, without a scire facias, he may be discharged at any distance of time, and does not waive the objection, however long he may remain in custody. *Mortimer v. Piggott*, 363 (n).

2. When execution creditor compelled to indemnify sheriff. *Sheriff*, VI.

IX. Irregularity; in pleadings, by not complying with rules of Court, how to be taken advantage of. *Pleading*, IV.

X. Judgment.

1. Entry of; what will be presumed after verdict. *Statute*, XLII.

2. Entry of, nunc pro tunc.

Under the rules Hil. 4 W. 4 (*General Rules and Regulations*, 3), where plaintiff has obtained a verdict, but defendant has obtained a rule nisi for a new trial, which after the lapse of a year has been discharged, and in the mean time defendant has died, the Court will order judgment to be entered nunc pro tunc, though more than two terms have elapsed since the discharge of the rule, if it appear that the delay was occasioned by taxation of costs, and no fault be specifically imputed to the plaintiff. *Blewitt v. Tregonning*, 1002.

3. Non obstante veredicto, when it may be. *Pleading*, VIII. 2.

4. On criminal conviction, while action pending. *Judgment*, III.

XI. Juror; withdrawal of, on trial.

Right of plaintiff to bring another action.

On a trial in the Exchequer, a juror was withdrawn by consent. Afterwards plaintiff sued defendant in this Court for the same cause of action. This Court stayed the proceedings as being contrary to good faith.

Although the plaintiff who had conducted the first cause for himself, and was not a lawyer, deposed that he did not know that the arrangement would debar him from bringing a second action. *Moscatti v. Lawson*, 331.

XII. New trial.

1. On improper admission of evidence. *Trial*, *New*, I.

2. For misdirection of Judge and verdict against evidence. *Pleading*, V.

XIII. Nonsuit.

Setting aside an affidavit. *Nonsuit*.

XIV. Notice.

Service of, at house of party in his absence, *Notice*, IX.

XV. Particulars of demand.

What plaintiff bound to insert. *Costs*, 1.

XVI. Pleading, time for, after praying over.

If a defendant obtains an order calling on plaintiff to give security for costs, and directing that defendant shall have seven days to plead after such security given, and defendant afterwards, and before security given, craves over, the time for pleading runs from the day when over is granted, if subsequent to the giving of security or rescinding of the order, and not, in that case, from the time when such security is given or order rescinded. *Cahill v. Macdonald*, 1004.

XVII. Process.

Setting aside for irregularity: power of Judge at chambers. *Judge*, III. 2.

XVIII. Prohibition.

To Ecclesiastical Court, when granted. *Prohibition*, I.

XIX. Quo Warranto.

Application for. *Quo Warranto*.

XX. Record.

Of nisi prius, what it must contain.

Since the rule (Hil. 4 W. 4) that the entry of proceedings on the record for trial, or on the judgment roll, shall be taken to be, and shall be, the first entry of the proceedings upon record, it is not necessary to enter upon the nisi prius record a plea in abatement and judgment of respondeat ouster thereupon.

Pepper v. Whalley, 90.

XXI. Sheriff.

When Court will interfere for his protection. *Sheriff*, VI.

XXII. Similitur.

Want of, when cured. *Similitur*.

XXIII. Stay of proceedings.

When Court will interfere to enforce equitable claim.

A. gave a promissory note to B. and C. jointly, for money lent to him, one-half by each. B. died, and A. took out administration, with the will annexed, to her effects. C. sued him on the note. C. was a legatee, and was charged by A. with having goods of the testatrix in her hands. On motion to stay proceedings in the action, upon A. paying half the principal and interest of the note into Court, and giving C. a discharge for the residue:

Held, that the case was not one in which this Court, by virtue of its equitable jurisdiction, could interfere. *Barlow v. Leeds*, 66.

XXIV. Taxation.

1. Of Attorney's bill. *Attorney*, IV.

2. Of costs; power of Court over. *Costs*, I.

XXV. Verdict.

1. In ejectment. See *Ejectment*, III.

2. Discharging jury from giving verdict. *Verdict*, II.

3. What will be presumed after verdict. *Pleading*, VIII. 1. *Statute*, XLII.

PRESCRIPTION.

Enjoyment of right of way for 20 or 40 years under st. 2 & 3 W. 4, c. 71; pleading and evidence relating to. See *Pleading*, VI.; *Evidence*, IX. 2.

PRESUMPTION.

I. Of cause of action, after verdict. *Pleading*, VIII. 1.

II. Of notice previous to binding of parish apprentice, after service under indenture. *Poor*, III. 2.

III. Of proper stamp, on instrument not produced. *Assumpsit*, II. 2.

PRINCIPAL AND AGENT.

I. How far auctioneer agent of vendor and vendee. *Vendor and Vendee*, IV.

II. Notice to principal, how far notice to agent. *Bankrupt*, I.

III. How far Bank of England identified with transactions of branch banks. *Bankrupt*, I.

PRISONER.

in civil execution, discharge of. *Practice*, VIII. 1; *Execution*, II.

PROCESS.

Setting aside for irregularity: power of Judge at chambers. *Judge*, III. 2.

PROHIBITION.

I. To Ecclesiastical Court, to stay proceedings for enforcing church-rate.

Stat. 53 G. 3, c. 127, s. 7, which gives power to a justice to enforce the payment of a sum under 10*l.* due upon a church-rate, where the validity of the rate has not been questioned, nor the liability of the party, takes away the jurisdiction of the Ecclesiastical Court in such cases.

But, if the validity or liability be in question, the Ecclesiastical Courts have jurisdiction, though the party has not been summoned before a justice.

Therefore, where a party, not having been summoned before a justice, was libelled in the Consistory Court for a sum which, on the face of the proceedings, was less than 10*l.*, due upon a church-rate, and sentence was given against him, this Court refused to grant a prohibition, upon the ground that the validity of the rate was questioned in the proceedings in the Ecclesiastical Courts.

And afterwards it appearing, by more particular reference to the pleadings themselves, that they did not disclose whether or not the validity was questioned, this Court held that that circumstance alone did not authorize it to issue a prohibition.

Semble, that the Consistory Court of the Bishop, the Court of Arches, and the Court of Delegates, are superior courts; and that after sentence, unless defect of jurisdiction be apparent on the proceedings therein, it will not be intended.

Semble, that on a motion for prohibition as above, this Court will look only to the proceedings in the Ecclesiastical Court, and not to affidavits, for the purpose of ascertaining whether the validity of the rate was there questioned. *Ricketts v. Bodenham*, 433.

II. Power to plead several pleas. *Pleading*, V. 9.

PROMISSORY NOTE.

See *BILLS OF EXCHANGE AND PROMISSORY NOTES*.

PROSECUTION.

In what cases prosecutor pro rege deprived of certiorari. *Certiorari*, I.

PROTEST.

Of non-payment of foreign bill, how notice to be given. *Bills of Exchange and Promissory Notes*, IV.

PUBLICATION.

Whether necessary to a will. *Power*, I.

PURCHASER.

See *VENDOR AND VENDEE*.

QUO WARRANTO.

Application for: what affidavits receivable.

The Court will receive, in support of an application for a quo warranto, the affidavit of a person who is himself estopped from being a relator, if the motion is made by a re-

litor properly qualified; although the complete ground of the application appears only from the affidavit of the party estopped. *Rex v. Brame*, 664.

RAILWAY.

Compensation under local act. *Statute*, XLVI.

RATE.

I. Church rate.

1. For what purposes it may be made. *Mandamus*, II. 5.

2. Validity of, how Court will judge of. *Prohibition*, I.

3. Liability to.

Held, that the mere fact of a district in a parish having kept up a chapel of its own without coming on the parish rates, did not show a custom in such district to maintain its chapel by rates levied on its own inhabitants. *Craven v. Sanderson*, 666. (See whole placitum, *Evidence*, XV. 3.)

4. Power of Ecclesiastical Court to enforce rate. *Prohibition*, 1.

5. *Mandamus* to Justices to enforce payment. *Mandamus*, II. 5.

6. Appeal against order of Justices for payment: to whom notice to be given.

A party appealing against an order of justices for payment of a church rate, under stat. 53 G. 3, c. 127, s. 7, need not give notice of appeal to the justices making the order; it is sufficient to give it to the churchwardens.

And if such notice to the justices were necessary, service of it upon one of the justices would suffice. *Rex v. Justices of Staffordshire*, 842.

II. Poor rate. See *Poor*, I.

RECOGNIZANCES.

Previous to removal of indictment, when enforced. *Certiorari*, IV.

RECORD.

Of Nisi Prius. Entry of pleadings. *Practice*, XX.

REFUSAL.

By party arrested, to name a dwelling-house, what amounts to. *Sheriff*, I. 1.

RELEASE.

Of witness; what will restore competency. *Evidence*, VII. 2, (1.)

REMOVAL.

Of Poor. See *Poor*, VIII.—X.

REPLEVIN.

I. Duty of Sheriff as to ascertaining sufficiency of sureties in replevin bond. *Sheriff*, I. 2.

II. Costs of different issues. *Costs*, I. 3, (2.)

REVERSION.

I. Nature of reversionary interest of trustees of a term. *Mortgage*, IV.

II. For what breaches of contract reversioner may maintain action against tenant in possession. *Landlord and Tenant*, VI.

RIVER.

Nuisance to navigable river, what amounts to. *Nuisance*.

RULE OF COURT.

I. Hil. 2 & 3 G. 4. Discharge from irregular ca. sa. *Practice*, VIII. 1, (2.) [1.]

II. Mic. 2 W. 4, I. 74. Costs of different issues. *Costs*, I. 3, (2.)

III. Mic. 3 W. 4. Form of declaration. *Pleading*, IV. 1.

IV. Hil. 4 W. 4.

1. Entry of pleadings on Nisi Prius Record. *Practice*, XX.

2. Entry of judgment nunc pro tunc. *Practice*, X. 2.

3. Defence under general issue. *Pleading*, V. 1.

V. Hil. 6 W. 4.

1. Regulating holidays, 743.

2. Examination and admission of attorneys, 744.

3. Readmission of attorney. *Attorney*, II. 2.

VI. East. 6 W. 4. Examination of attorneys, 767, 768.

SALE.

See *VENDOR AND VENDEE*.

SCIRE FACIAS.

Plea to: how far it must show that same defence could not have been pleaded to original action. *Pleading*, V. 10.

SECURITY.

For Costs; time for pleading. *Practice*, XVI.

SEISIN.

Unity of, effect in extinguishing right of way. *Way*, 1.

SESSIONS.

Court of Quarter Sessions.

1. When Court of K. B. will judge as to correctness of inference from facts drawn by Sessions. *Poor*, III. 4, (2.) and VII.

2. Practice of, as to notice of appeals, how far affected by st. 4 & 5 W. 4, c. 76. *Poor*, IX. 1.

SET-OFF.

I. Plea of; how far it must show a larger sum than that against which it professes to be a set-off. *Pleading*, V. 4.

II. Whether Court will order stay of proceedings on statement of equitable set-off. *Practice*, XXIII.

SETTLEMENT.

Of poor. See *Poor*, III.—VI.

SHERIFF.

I. Duty of.

1. Taking party to a dwelling-house on arrest.

In an action against the sheriff, for a penalty under stat. 32 G. 2, c. 28, ss. 12, 1, for taking plaintiff, when arrested, within twenty-four hours, to prison, the plaintiff not having refused to be carried to a safe and convenient dwelling-house of her own nomination, defendant pleaded that he informed plaintiff that she might be carried to a safe, &c.; that plaintiff thereupon consented to be carried to the dwelling-house of L.; that defendant carried her thither accordingly, and offered to permit her to remain there for the rest of the twenty-four hours, but the plaintiff then requested to be taken to prison:

Held, on motion for judgment non obstante veredicto, a good plea, the circumstances being equivalent to a refusal:

Held, also, issue being joined on the allegation of the consent to go to L.'s house, that the consent to be proved was not such consent as a person would give who had the option of being at large; but that the question was, whether plaintiff consented to go to the particular house, as a person would consent, who was obliged to be in confinement somewhere:

Held, also, that the fact of sheriff suggesting L.'s house, did not prevent the consent from being free, within the meaning of the issue.

The sheriff is entitled to exercise a reasonable discretion in determining whether a house, nominated by a prisoner under arrest, as a safe and convenient dwelling-house, be a safe house for the custody of the prisoner.

If a prisoner request to be taken to a house for the purpose only of consulting a person there, that is not a nomination of a house within the statute. *Silk v. Humphery*, 959.

2. Discretion as to sureties in replevin bond.

In taking sureties in a replevin bond, the sheriff is to exercise a reasonable discretion in deciding upon their sufficiency; and, in an action for taking insufficient sureties, it is for the jury to decide whether he has used such discretion or not.

The sheriff or replevin clerk is not bound to go out of the office to make inquiries; but, if the sureties are unknown to him, he ought to require information, beyond their own statement, as to their sufficiency.

Where persons of respectable appearance are brought to the replevin clerk as sureties by the attorney's clerk on behalf of the party replevying, their circumstances being unknown both to the attorney's clerk and to the replevin clerk, and the latter causes the sureties to make affidavit in detail as to their sufficiency, with which he is satisfied, and an action is afterwards brought against the sheriff for taking insufficient sureties, the jury may properly find that the inquiry made does not excuse the sheriff.

On the trial of such an action, the bond, but not its amount, being admitted on the pleadings, evidence was gone into on both sides, upon the question whether or not, under the circumstances above stated, the replevin clerk had used reasonable caution. The replevin bond was referred to by both parties during the trial, and was stated to have been taken in double the value of the goods; and it was in court, ready to be pro-

duced; but, by an oversight the plaintiff did not formally put it in, nor was it expressly noticed as a part of the evidence in the cause, till a verdict had been given for the plaintiff. The Judge stating to the Court that he considered it as in effect put in: *Held*, on motion to enter a verdict for nominal damages for want of proof of the bond, or other evidence of the value of the goods, that the bond must be considered as having been in effect proved at the trial.

In an action against the sheriff for taking insufficient sureties in a replevin bond, the penalty of the bond is the limit of damages. *Jeffrey v. Bastard*, 823.

3. Proceeding to sale under writ of execution. *Post*, VI.

II. When entitled to indemnity from execution creditor. *Post*, VI.

III. What discretion sheriff has as to determining house to which to take party on arrest. *Ante*, I. 1.

IV. What amounts to consent and refusal by party arrested to name a dwelling-house to which to be taken. *Ante*, I. 1.

V. What amounts to a nomination of a dwelling-house by party arrested. *Ante*, I. 1.

VI. When Court will interfere for his protection under Interpleader Act.

Under s. 6 of the Interpleader Act, 1 & 2 W. 4, c. 58, the Court will not make a rule for the protection of sheriff who has levied under a fi. fa., merely because a partner of the debtor has given notice to the sheriff to quit possession on the ground that the goods are partnership property, and that the debtor has no beneficial interest in them, being indebted to the firm beyond the amount of his share in the effects.

The sheriff's duty is to sell the share, though he may not be able to ascertain the amount of actual interest.

But the Court will, in the above case, interfere under the act for the sheriff's protection, if the creditor disputes the partnership.

And where the creditor, having appeared under the interpleader rule and not contested the partnership, whereupon the rule was dismissed, afterwards refused to admit it, and ruled the sheriff to return the writ, the Court enlarged the latter rule till the creditor should indemnify the sheriff. *Holmes v. Mentze*, 127.

VII. Money paid to, on arrest, when recoverable back.

A certificated bankrupt, being arrested on a ca. sa. for a debt provable under the commission, paid the money under a protest, stating his bankruptcy and certificate, and warning the sheriff that he should apply to the Court to have the money paid back:

Held, that this was not such a payment of money under legal process, with knowledge of the facts, as precluded the bankrupt from recovering back the money. *Payne v. Chapman*, 364.

VIII. Damages in action against, for taking insufficient sureties. *Ante*, I. 2.

SIMILITER.

Omission of, in record, effect of.

To an action of trespass for false imprisonment, defendant pleaded leave and license;

to which the plaintiff replied *de injuriâ*, concluding to the country, without an, "&c.;" and no issue was joined on this. There were also pleas of justification, under claims to detain the plaintiff till he made certain payments, which pleas were replied to, and issues joined on the replication: *Held*, that the defendant could not take advantage of the informality, after trial and verdict for the plaintiff. *Spencer v. Hamerton*, 419.

STAMP.

I. Ad valorem stamp, under *stat.* 55 G. 3, c. 184; how value estimated. *Assumpsit*, II. 2.

II. On an instrument already stamped as, and purporting to be, an instrument of a different kind.

An instrument which, in other respects, was a promissory note, and had been properly stamped as such before making, contained in the body of it a memorandum that the maker had deposited certain title deeds with the payee as a collateral security. After it was made, it was stamped with a proper mortgage stamp on payment of the penalty.

Held, that this was an assignable promissory note under *stat.* 3 & 4 Ann. c. 9, s. 1, and that it might be sued on by an endorsee, though the mortgage stamp was put on after the making, and though there was no assignment stamp.

If an instrument containing a mortgage be also a promissory note, it may still be stamped with a mortgage stamp, after the execution, provided it has a promissory note stamp on it at the time it is executed. *Wise v. Charlton*, 786.

III. Evidence relating to.

1. When document not produced will be presumed to be properly stamped. *Assumpsit*, II. 2.

2. How far unstamped instrument may be referred to, and incorporated with stamped one. *Landlord and Tenant*, I.

3. Agreement for what purposes admissible without stamp.

Under Lord Tenterden's act, 9 G. 4, c. 14, s. 8, the following memorandum:—"I acknowledge to owe M. 36*l.*, which I agree to pay him as soon as my circumstances will permit," is exempt from stamp duty, as a writing made necessary by that statute, provided it be put in for the mere purpose of barring the Statute of Limitations, the debt itself being proved by other evidence. *Morris v. Dixon*, 845.

4. Old lease whether admissible to prove terms of subsequent holding without stamp. *Evidence*, XII.

STATUTE.

FIRST: Decisions on particular public and general statutes.

I. 43 Eliz. c. 2 (Poor), s. 19, how far affected by new rules of pleading. *Pleading*, V. 1.

II. 48 Eliz. c. 6. (Costs.) Judge's certificate, how far conclusive. *Costs*, VI.

III. 21 Jac. 1, c. 16. (Limitation of actions.)

1. Unliquidated damages.

Assumpsit for unliquidated damages is within the saving clause in *sect.* 7 of the Statute of Limitations, 21 Jac. 1, c. 16. *Pig-*

gott v. Rush, 912. (See remainder of placitum. *Post*, III. 2.)

2. Imprisonment, what bars operation of statute.

If a party, who is in prison when the cause of action accrues, commences an action after the six years have elapsed, but during the continuance of the imprisonment, the operation of the statute is barred by the saving clause in *sect.* 7. *Piggott v. Rush*, 912. (See remainder of placitum. *Antè*, III. 1.)

3. Plea under, how far it must confess cause of action. *Pleading*, V. 3.

IV. 13 & 14 Car. 2, c. 12. (Poor.) What constitutes a "coming to inhabit" within a parish. *Poor*, VII.

V. 3 & 4 Ann. c. 9. (Promissory notes.) What constitutes a note. *Stamp*, II.

VI. 4 Ann. c. 16. (Pleading several matters.) Costs of issues how affected by Gen. Rule, Hil. 2 W. 4, I. 74. *Costs*, I. 3 (2).

VII. 8 Ann. c. 9. (Indenture of Apprenticeship.)

1. Execution of Indenture. *Poor*, III. 3.

2. What must be stated in Indenture. *Poor*, III. 1.

VIII. 7 G. 2, c. 20. (Redemption of mortgages.) Reconveyance of mortgaged property to mortgagor. *Mortgage*, V.

IX. 11 G. 2, c. 19. (Landlords and Tenants.) What constitutes a hereditament within *sect.* 14. *Landlord and Tenant*, XI.

X. 17 G. 2, c. 3. (Poor-rates.)

1. Inspection of poor-rates.

(1.) Who entitled to.

In debt for a penalty, on *stat.* 17 G. 2, c. 3, s. 3, for not permitting the inspection of a poor-rate, the declaration described the plaintiff as "an inhabitant of the parish."

Held, that this sufficiently showed that he was a party aggrieved.

The declaration described the defendant as "assistant overseer" in the parish, and alleged that he, as such assistant overseer, had the rate in his possession: *Held*, that this sufficiently showed his duty and liability.

Plea, that the plaintiff had no right to inspect the rate, it not being a subsisting rate, or such a rate as he was entitled to inspect:

Held, bad on general demurrer.

Conceded, that no answer was furnished by pleas stating facts, which showed that the time for appealing against the rate had elapsed before the request to inspect was made. *Batchelor v. Hodges*, 592.

(2.) To what rates applicable. *Antè* (1).

2. What sufficient averment on pleadings of party being aggrieved. *Antè*, 1 (1).

XI. 32 G. 2, c. 28. (Lord's Act.)

1. Service of notice under. *Notice*, IX. 1 (1).

2. Taking party arrested to a dwelling-house. *Sheriff*, I. 1.

XII. 5 G. 3, c. 46. (Stamps.) Execution of indenture. *Poor*, III. 3.

XIII. 13 G. 3, c. 78. (Highways.)

1. In what it differs from *stat.* 55 G. 3, c. 68. *Highway*, VII. 3 (2).

2. Order of Justices under *s.* 17, what it must state. *Highway*, VII. 3 (2).

3. Surveyor's assessment, under *ss.* 30 and 45, how to be pleaded. *Pleading*, IX.

XIV. 35 G. 3, c. 101. (Removal of paupers.)

- Expenses of pauper after suspended order of removal. *Poor*, II.
- XV. 41 G. 3, c. 109. (Inclosure.) Liability to repair highway. *Highway*, V. 1.
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- XXI. 55 G. 3, c. 184. (Stamp.) Stamp on assignment. *Assumpsit*, II. 2.
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- XXIII. 59 G. 3, c. 12. (Poor.) Effect of, in vesting parish property. *Landlord and Tenant*, V.
- XXIV. 3 G. 4, c. 113. (Public salaries and pensions.) Superannuation allowance. *Mandamus*, II. 1, II. 2.
- XXV. 6 G. 4, c. 16. (Bankrupts.)
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- XXVI. 7 G. 4, c. 46. (Bank of England.) How far bank identified with transactions of branch banks. *Bankrupt*, I.
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- XXVIII. 9 G. 4, c. 14. (Limitation of Actions.)
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Where it has been agreed between debtor and creditor that the latter shall receive goods in reduction of his demand, the delivery of such goods operates as a payment within stat. 9 G. 4, c. 14, s. 1, to bar the Statute of Limitations. *Hooper v. Stephens*, 71. See also *Evidence*, XV. 2 (2).
2. Memorandum in writing; how far stamp necessary. *Stamp*, III. 3.
- XXIX. 9 G. 4, c. 31. (Offences against the person.) Form of conviction under. *Conviction*, I.
- XXX. 1 W. 4, c. 18. (Settlement by renting tenement.) Occupation and payment of rent. *Poor*, V. 1.
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- XXXII. 1 & 2 W. 4, c. 32. (Game.) Conviction under. *Conviction*, II.
- XXXIII. 1 & 2 W. 4, c. 58. (Interpleader.) See *Sheriff*, VI.; *Interpleader*.
- XXXIV. 2 W. 4, c. 39. (Uniformity of process.) Whether it applies to causes from inferior Courts. *Pleading*, IV. 1.
- XXXV. 2 & 3 W. 4, c. 71. (Prescription.)
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- XXXVI. 3 & 4 W. 4, c. 40. (Irish paupers.) Removal of pauper. *Poor*, VIII.
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- XXXVIII. 4 & 5 W. 4, c. 76. (Poor.)
1. How far applicable to Irish pauper. *Poor*, VIII.
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- XXXIX. 5 & 6 W. 4, c. 33. (Removal of indictments.) Removal by one of several defendants; its effect. *Certiorari*, IV.
- XL. 5 & 6 W. 4, c. 59. (Cruelty to animals.) What is a matter done within.
A hired driver of a cabriolet having brought home the horse, apparently much ill-used by him, the owner's son (in the owner's absence) called in a policeman, and told him that the driver had ill-used the horse. The policeman said that, if the complainant charged the driver with cruelty to the horse, he would take him into custody; the complainant said, "I do;" and the policeman apprehended the driver, under stat. 5 & 6 W. 4, c. 59, s. 9.
Held, that the complainant must be considered, not as a party giving information to the officer, in consequence of which he was arrested, but as a principal causing the arrest to be made; and that he was not entitled to notice of action, which the statute requires to be given to persons sued for anything done in pursuance of it. *Hopkins v. Crowe*, 774.
- XLI. 5 & 6 W. 4, c. 76. (Municipal Corporations.)
1. Right of burgesses to inspect voting papers. *Corporation*, III.
2. Effect of, on jurisdiction of Justices.
By stat. 2 & 3 W. 4, c. 64, s. 36, sched. (O.) 30, Clifton is made a part of the parliamentary borough of Bristol, which is a county of itself. Except so far as that act operated, it was in the county of Gloucester: *Held*, that after the passing of the Corporation Act, 5 & 6 W. 4, c. 76, ss. 7, 8, the Gloucestershire Justices had no longer the power to make an order for diverting a footway in Clifton, their jurisdiction, in such cases, being transferred to the Justices of Bristol. *Res v. Justices of Gloucestershire*, 689.
- SECONDLY: Decisions on local acts.
XLII. River Nene navigation.
By one section of an act of parliament, it was enacted, that money allowed by commissioners of a navigation to their clerk, appointed by them, should be paid by the proprietors of the tolls on the navigation, in certain proportions. A

subsequent section enacted that, if any proprietor should neglect or refuse to pay on demand made either of him or his agent, the money might be recovered by action of debt, &c., with double costs, in the clerk's name, against such proprietor, or, if he could not be found, against his agent; or otherwise the sum might be levied by distress upon the goods of the proprietor, or if no such goods could be found, on the goods of his agent.

The clerk obtained a verdict in debt against a proprietor, on an issue of nil debet, but had averred no demand in the declaration:

Held, that the right of action was given by the two sections conjointly: that the demand, if necessary to the action, must be presumed after verdict; and therefore, that the declaration must be considered as framed, and the verdict recovered, under both sections, and that the plaintiff was entitled to double costs. *Tabbis v. Yorke*, 134.

XLIII. Hatfield Inclosure Act, construction of as to highways. *Highway*, V. 1.

XLIV. Stopping up roads under Easthampstead Inclosure Act. *Highway*, VII. 4.

XLV. Whitechapel paving: rating of tolls.

The lord of a manor, as owner of a market in the parish of W., was entitled to a part of certain market tolls in W. By an act for better paying part of W., authority was given to levy rates for the purposes of the act; and by the same act the market tolls were made payable to commissioners, who were to collect them and to pay over to the lord a part equivalent to his former dues. There was no clause in the statute making the lord rateable in respect of these payments.

By a subsequent local public act, for the relief of the poor in W., for cleansing, lighting, and watching, and for repair of highways, in W., and for repairing the parish church, it was enacted (sect. 53) that certain rates should be laid "upon all and every the person and persons who do and shall inhabit, hold, occupy, possess, or enjoy any land, house, shop, warehouse, or other building, tenement, or hereditament; that is to say, one rate for the relief of the poor, one for repair of the church, and a third for cleansing and lighting streets, and watching and repairing highways within such parts of the said parish as are not within certain liberties; such last-mentioned rate to be a pound rate (not exceeding a certain proportion) "upon or according to the annual rent or value of all messuages, lands, tenements, and hereditaments as shall be held or occupied within such parts of the said parish as are not within the said liberties." By a subsequent section, the rates for the poor were to be levied and recovered in the same manner as poor rates are directed to be levied and recovered by stat. 43 Eliz. c. 2.

In several subsequent clauses of this act, and in the rating clause and a previous one of the paving act, the words "tenement" and "hereditament" were used with reference to corporeal hereditaments solely.

Held, that, in sect. 53 of the more recent act, "hereditaments," in the clause fixing the pound rate, meant such as were local and corporeal only; and that "hereditament" in the prior clause of the same section must be construed in the same sense; and therefore that the payments to the lord in

lieu of toll were not rateable under this act. *Colebrooke v. Tickell*, 916.

XLVI. Compensation under railway act.

By the Liverpool and Manchester Railway Act it was provided that the purchase-money to be given by the Railway Company for lands, &c., taken, and the compensation they were to make for damage to lands, &c., and for detriment, injury, damage, loss, inconvenience, or prejudice, sustained by owners and occupiers, should be ascertained, in case of disagreement, by a jury, who should assess compensation for the damages to be sustained by any person being owner or occupier of or interested in such lands, &c., for the detriment, &c., which should accrue to him by reason of the making of the railway, or of the execution of the company's power; such damages to be settled distinctly from the value of the lands. And every tenant at will, lessee for a year, and other person in possession of lands, &c., through which the railway was intended to pass, not having any greater interest than as tenant at will or lessee for a year, was to give up possession at six months' notice; but, where such tenant was required to give up possession before the expiration of his term or interest, the company were to make compensation for the value of the unexpired term or interest, to be settled, if necessary, by a jury.

The company gave notice as above, to a party whose lease had been several times renewed for terms of seven years, and whose landlord, at the time of the last renewal, had declined to renew for fourteen years, but assured the tenant that he would not be turned out at the end of the seven. The tenant afterwards laid out money in improvements. During the seven years the landlord sold his reversion to the company, and died.

Held, that the tenant had no interest for which the company were bound to make compensation under the act. *Rex v. Liverpool and Manchester Railway Company*, 650.

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- I. On improper admission of evidence.
Where improper evidence is received, and a verdict given for the party adducing it, the Court will grant a new trial, although there be other evidence to the same point in favor of the same party; unless they see clearly that the improper evidence could not have weighed with the jury, or that the verdict, if given the other way, would have been set aside as against evidence. *Baron de Rutzon v. Farr*, 53. (See remainder of placitum, *Evidence*, III.)
- II. Misdirection of Judge at trial. *Pleading*, V. 1.
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VENDOR AND VENDEE.

I. When property in goods passes to Vendee.

P. contracted with a ship-builder to build him a ship for a certain sum, to be paid by instalments as the work proceeded; the first instalment when the vessel was rammed, the second when she was timbered, &c. An agent for P. was to superintend the building. The vessel was built under such superintendence, all the materials being approved by the agent before they were used. The builder became bankrupt before the ship was completed. Afterwards the assignees completed the ship. All the instalments were paid or tendered. In an action of trover by P. against the assignees for the ship: *Held*, that, on the first instalment being paid, the property in the portion then finished became, by virtue of the above contract, vested in P., subject to the right of the builder to retain such portion for the purpose of completing the work and earning the rest of the price; and that each material subsequently added became, as it was added, the property of P. as the general owner.

Held, further, that under the above circumstances the ship did not pass to the assignees as having been in the possession, order, or disposition of the bankrupt by consent of the true owner, within stat. 6 G. 4, c. 16, s. 72. *Clarke v. Spence*, 448; *Pest*, II.

II. Lien of Vendor.

A party having goods in his own warehouse at Liverpool sold them, and gave the following delivery order to the vendee:—"We hold to your order 39 pipes," &c., "rent free to 29th November next." The goods remained in the same warehouse unpaid for till the vendee became bankrupt. In an action of trover for the goods by the assignee, evidence was given that, by the usage of Liverpool, goods sold while in warehouse are delivered by the vendor handing to the vendee a delivery order; and that the holder of such order may obtain credit with a purchaser as having possession of the goods.

Held that, as between the original vendor and vendee, the right of lien was not divested by giving such delivery order.

Also, that the bankrupt had not possession of the goods as reputed owner, with the consent of the true owner, within the meaning of stat. 6 G. 4, c. 16, s. 72. *Townley v. Crump*, 58.

III. Bill of parcels, how far a warranty. *Warranty*.

IV. How far auctioneer agent of Vendor and Vendee.

Whether an auctioneer be the agent of both purchaser and seller depends upon the facts of the particular case.

Therefore, where a party, to whom money was due from the owner of goods sold by auction, agreed with the owner, before the auction, that the goods which he might purchase should be set against the debt, and became the purchaser of goods, and was entered as such by the auctioneer, it was held that he was not bound by the printed conditions of sale, which specified that purchasers should pay a part of the price at the time of the sale, and the rest on delivery. *Bartlett v. Purnell*, 792.

V. What relation between vendor and vendee arises on non-fulfilment of conditions of sale. *Pleading*, II.

VENUE.

How far conclusive as to place of trial.

An indictment for misdemeanor was preferred at the Central Criminal Court; the marginal venue was "Central Criminal Court;" in the body of the indictment the facts were stated to have taken place "at the parish of St. Mary Lambeth, Surrey, within the jurisdiction of the said Court." The indictment was removed by certiorari.

Held, that the trial must be at the assizes for Surrey. *Rez v. Connop*, 942.

VERDICT.

I. What amounts to a verdict of guilty, on indictment for nuisance. *Nuisance*.

II. Right of Judge to discharge Jury from giving verdict.

In trespass quare clausum fregit, issues were joined on three pleas: 1st, of a public carriage way, 2dly, of a public bridle way; 3dly, of a public footway. The jury found a verdict for the plaintiff on the first issue, and for the defendant on the third; and the Judge, without the consent of the plaintiff, discharged the jury from giving a verdict on the second issue.

The Court granted a new trial, although the plaintiff, at the beginning of the trial, had agreed that the damages, if any, should be merely nominal. *Tinkler v. Rowland*, 868.

III. Entry of, on second demise in ejectment after execution on first. *Ejectment*, III.

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WARRANTY.

What amounts to.

In assumpsit for breach of a warranty of pictures, it was proved, among other things, that the defendant, at the time of the sale, gave the following bill of parcels:—"Four pictures, Views in Venice, Canaletto, 1601." The Judge left it to the jury upon this and the rest of the evidence, whether the defendant had contracted that the pictures were those of the artist named, or whether his name had been used merely as matter of description, or intimation of opinion.

The jury found for the plaintiff, saying that the bill of parcels amounted to a warranty:

Held, that the question had been rightly left to the jury, and that the verdict must not be disturbed. *Power v. Barkam*, 473.

WAY.

Right of.

1. By what words in a conveyance it will pass.

Estates A. and B., formerly distinct, became vested in co-parceners. Before that time, a right of way had been enjoyed from A. over B., and, after the unity of seisin, the way always continued to be used. The parceners, for the purpose of making partition, conveyed to a releasee to uses the messuages, tenements, lands, &c. (of which the estates consisted), and all houses, out-houses, ways, easements, &c., to the said several messuages or tenements, lands, &c., belonging or appertaining, or *therewith usually held, used, occupied, or enjoyed*: to have and to hold the messuages, &c., called A., with the buildings, lands, &c., thereunto belonging, and their appurtenances, to the releasee to the use of S. in fee; habendum, as to estate B., in similar terms with respect to the parcels, to the releasee to his own use in fee, in order that he might become tenant to the præcipe in a recovery.

Held, that the deed sufficiently showed an intention that a right of way (which way was admitted to have been used up to the time of the deed), from the high road over B. to A. and back, for the convenient use of A., by the occupiers of A., should pass to the uses limited as to A.

That by the word "appurtenances," in the habendum as to A., interpreting that clause with reference to the other parts of the deed, the way in question did pass.

And that the releasee to uses, having no estate in A., had not such a seisin of the soil as would extinguish the right of way by unity of seisin. *James v. Plant*, 749.

2. By enjoyment under stat. 2 & 3 W. 4, c. 71; pleading and evidence relating to. See *Pleading*, VI.

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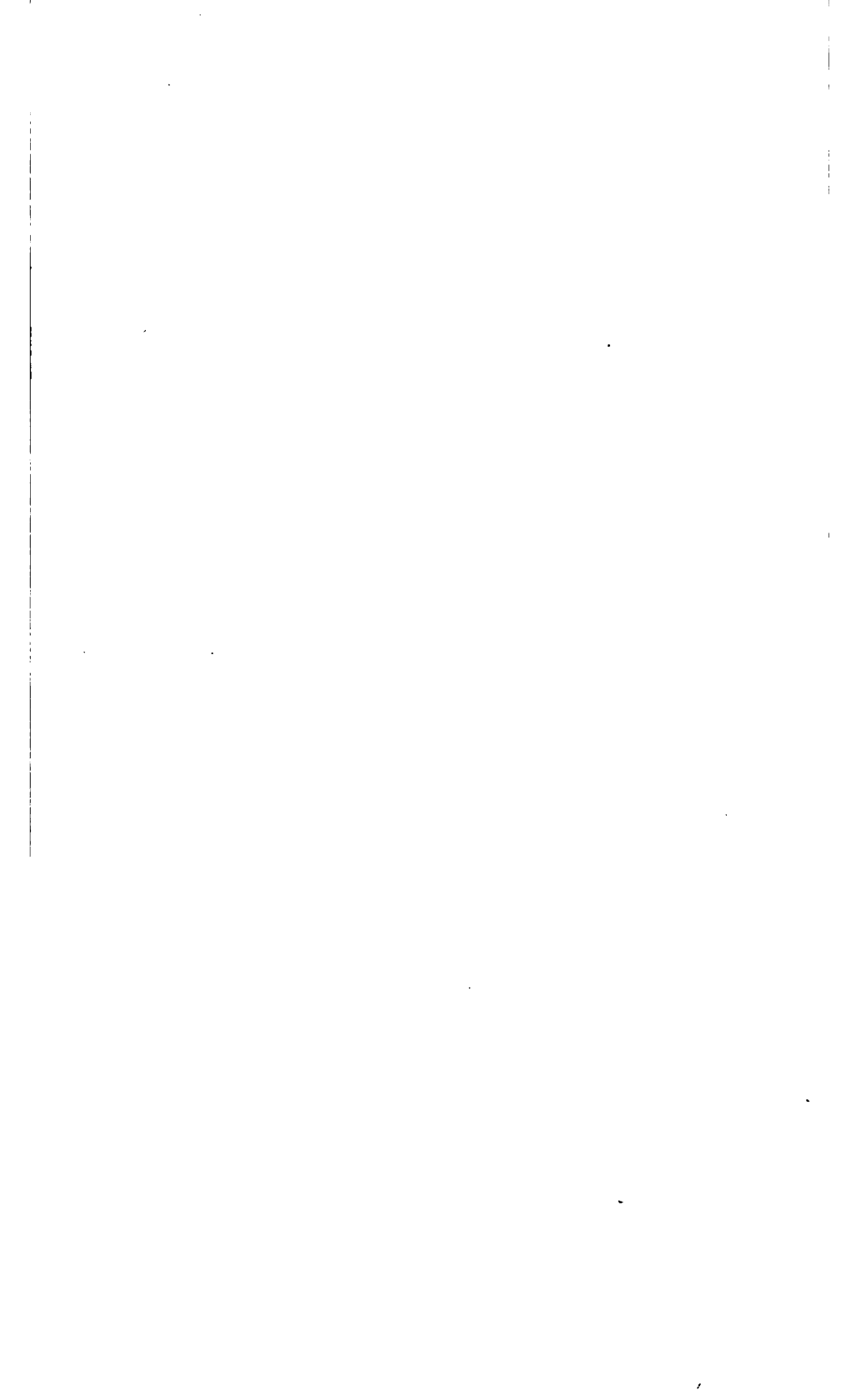
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REPORTS OF CASES

ARGUED AND DETERMINED

IN

The Court of King's Bench,

WITH

TABLES OF THE NAMES OF THE CASES ARGUED AND CITED,
AND THE PRINCIPAL MATTERS.

BY

JOHN LEYCESTER ADOLPHUS,

OF THE INNER TEMPLE,

AND

THOMAS FLOWER ELLIS,

OF THE MIDDLE TEMPLE,

ESQRS., BARRISTERS AT LAW.

VOL. V.

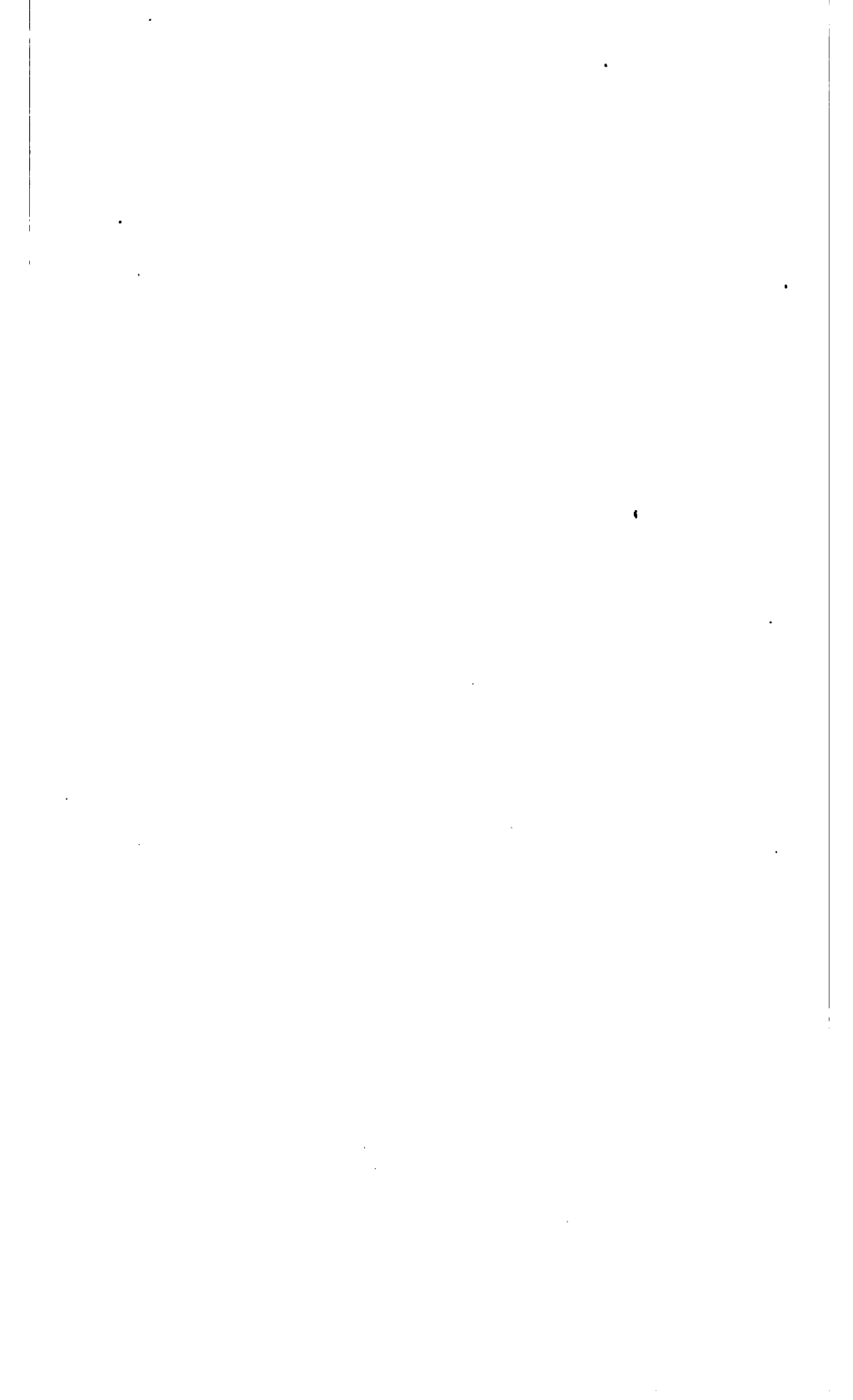
CONTAINING THE CASES OF TRINITY TERM IN THE SIXTH, AND MICHAEL-
MAS TERM IN THE SEVENTH YEAR OF WILLIAM IV. 1836.

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1853.



J U D G E S
OF THE
COURT OF KING'S BENCH,
DURING THE PERIOD OF THESE REPORTS.

The Right Hon. THOMAS LORD DENMAN, C.J.
Sir JOSEPH LITTLEDALE, Knt.
Sir JOHN PATTESON, Knt.
Sir JOHN WILLIAMS, Knt.
Sir JOHN TAYLOR COLERIDGE, Knt.

ATTORNEY-GENERAL.
Sir JOHN CAMPBELL, Knt.

SOLICITOR-GENERAL.
Sir ROBERT MOUNSEY ROLFE, Knt.

OT

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C A S E S
ARGUED AND DETERMINED
IN THE
COURT OF KING'S BENCH,

AND
ON WRITS OF ERROR FROM THAT COURT TO THE EXCHEQUER
CHAMBER,

IN
Easter Term,

IN THE SIXTH YEAR OF THE REIGN OF WILLIAM IV.

(Continued from Vol. IV.)

The Governor, Deputy Governor, Assistants, and Guardians of the Poor of the City of BRISTOL *v.* WAIT, GARDENER, and BARNETT. *May 9.*

Governors of the poor, hiring a house without their district, for the purpose of setting their own paupers to work there, and using it for that purpose only, are rateable in the parish in which the house is, as occupiers, whether the employment of the paupers there be profitable or not.

REPLEVIN. The defendants avowed, as overseers of the poor of the parish of St. Philip and St. Jacob, in Gloucestershire, for distresses under justices' warrants, for poor rates stated to be made on the plaintiffs, as occupiers of certain premises in that parish, for which they were rateable to the poor. There were [*2] *several avowries for different rates; and one of the avowries set forth part of a statute (1 W. 4, c. iv., local and personal, public), whereby it was enacted that the plaintiffs might contract for the purchase of certain premises for an asylum for pauper lunatics, and that the same, when so purchased and appropriated, should be subject and liable to such rates as they were then subject and liable to, but should not be assessed to any rates at a higher rate or value than that at which they were at the time of such purchase rated or assessed; that the plaintiffs did purchase and appropriate the premises, and became and were, and from thence hitherto had been, and still were, the occupiers of the same; that the premises were, before the act, liable to rates; and that the plaintiffs were also occupiers of other premises in the parish: allegation, that certain rates were made on the plaintiffs in respect of their occupation, which, so far as related to the premises purchased under the statute, were not higher than the same were rated at before the purchase: allegation of warrant of distress, &c. Pleas, to each avowry, *de injuriâ*.¹ Issue thereon.

On the trial before ALDERSON, B., at the Gloucestershire Summer assizes, 1834,

¹ There were other pleas on each avowry which led to issues in law, all of which were decided in favor of the defendants; see *The Governor, &c., of the Bristol Poor v. Wait*, 1 A. & E. 264.

the facts (as stated by the Lord Chief Justice in delivering judgment) appeared to be these:—

The plaintiffs, being governors of the poor of the city of Bristol, had taken certain property, out of the limits of the city, and within the parish of St. Philip and St. Jacob, for the purpose of putting out their poor, either simply to lodge them, or to employ them at their *discretion. It further appeared that, in some [*3] part of the property (houses and buildings), the poor had been employed in a manufacture, which was stated to have been a losing concern, and, in other parts, had been merely lodged. It further appeared that such property would have been rateable towards the relief of the poor of St. Philip and St. Jacob, unless the kind of occupation in this particular case exempted it.

The counsel for the plaintiffs contended that, this property being rated in each rate, all the rates were bad, inasmuch as under these circumstances, the defendants were not such occupiers of it as to be rateable to the poor.¹ The learned Judge directed a verdict *for the plaintiffs reserving leave to move to enter a verdict for the defendants. In Michaelmas term, 1834, *Ludlow*, Serjt., ob- [*4] tained a rule accordingly.

Maule and *J. W. Alexander* showed cause in Hilary term last.² The plaintiffs had no beneficial occupation. The premises are occupied for the purposes of charity. It has been held, that a party is not an "inhabitant" or "occupier," under stat. 43 Eliz. c. 2, s. 1, who occupies solely for public purposes. It cannot be said that the plaintiffs inhabit here: the claim upon them must, therefore, be simply by virtue of their occupation. If the owner of the lands choose to leave them quite barren and unoccupied, he cannot be rated for them; per Lord MANSFIELD, in *Rex v. Occupiers of St. Luke's Hospital*. 2 Burr. 1064. In *Lord Amherst v. Lord Sommers*, 2 T. R. 372, the colonel of a cavalry regiment had hired stables for the use solely of the regiment, under a warrant from the Crown; and it was held that he was not rateable in respect of them. In *Rex v. Occupiers of St. Luke's Hospital*, 2 Burr. 1053, see *Rex v. St Giles*, York, 3 B. & Ad. 573, it was held that no one was rateable in respect of a lunatic hospital. In *Holford v. Copeland*, 3 B. & P. 129, it was held that the masters in chancery are not rateable for their chambers in Southampton Buildings, under an act (11 G. 3, c. 22, ss. 24, 38), giving power to rate persons "who do or shall inhabit, hold, use, occupy, possess, or enjoy" lands, houses, &c., and that "schools, inns of court and chancery, halls, societies," "and all other public buildings" *shall be rated, and the rate "be paid by the owner or [*5] owners, proprietor or proprietors." In *Rex v. Terott*, 3 East, 506, it was held

¹ Several other points were discussed, both at Nisi Prius and in Banc. Among these were, whether the objection to the rates could be taken otherwise than by appeal; whether the rates were formally made, and consistent with the distress warrant; and whether the overseers were properly appointed. Also, it appeared that, until the purchase, under the local act, part of the premises had been in the occupation of officers of the ordnance, for the service of the Crown; and it was contended that these premises were, therefore, not rateable at the time of the purchase, and consequently, under the terms of the local act, not afterwards. The parties, on learning the opinion of the Court as to the point mentioned in the text, came to a compromise on the other points. Besides the authorities mentioned above, the following were cited. *Marshall v. Pittman*, 9 Bing. 596; the previous case between the present parties, 1 A. & E. 264; Stat. 38 G. 3, c. 69, (local and personal, public); *Rex v. Stubbs*, 2 T. R. 896, and note (*) at p. 896; *Weaver v. Price*, 3 B. & Ad. 409; 1 Nol. P. L. 54, 59 (ed. 4th); *Nichols v. Carter*, Cro. Car. 394; *Groenvelt v. Burwell*, 1 Ld. Raym. 454; *Milward v. Caffin*, 2 W. Bl. 1330; *Durrant v. Boys*, 6 T. R. 580; *Hutchins v. Chambers*, 1 Burr. 579; *Rex v. Sutton*, 4 M. & S. 582; Stat. 17 G. 2, c. 38, ss. 4, 7; *Rex v. The Hull Dock Company*, 8 B. & C. 516; *Rex v. Newbury*, 4 T. R. 475; forms in *Burn's Justice, Poor* (see ed. D'Oyl. & Wil. vol. ix. p. 223, forms (A), (C), (E)); *Rex v. Benn*, 6 T. R. 198; *Fawcitt v. Fowlis*, 7 B. & C. 394; *Bonnell v. Beighton*, 5 T. R. 182; *Rex v. Morgan*, 2 A. & E. 618, note (a) (S.C., as *Rex v. The Justices of Buckinghamshire*, 3 N. & M. 68); *Rex v. Trecothick*, 2 A. & E. 405; *Rex v. Gream*, 2 A. & E. 616.

² The case was argued on January 19th and 20th, before Lord DENMAN, C. J., LITTLEDALE, WILLIAMS, and COLBRIDGE, Js.

that an officer, who, by himself and his family, occupied apartments in barracks, not necessary to him for the purpose of the public service, was rateable in respect of such occupation. In that case, all the authorities were collected; and the principles laid down in the judgment, show that the plaintiffs here have not such an occupation as makes them rateable. It is there said (p. 514) that, "if the party rated have the use of the building or other subject of the rate as a mere servant of the Crown, or of any public body, or in any other respect for the mere exercise of public duty therein, and have no beneficial occupation or emolument resulting from it in any personal and private respect, then he is not rateable."

Ludlow, Serjt., *Sir W. W. Follett*, *Macleay*, and *Greaves*, contra. It is true that public property has been held not rateable: but the decisions on this point have been founded upon the impossibility of finding an occupier. That is, in effect, the explanation given by Lord KENYON in *Rex v. Hurdiss*, 3 T. R. 497; and it is the principle upon which Lord Amherst v. Lord Sommers, 2 T. R. 372, was decided. [Lord DENMAN, C. J., referred to *Ayr v. Smallpeace*, 1 Bott, 125, pl. 154 (ed. 6th).] This, however, is not only an occupation, but a beneficial one. The plaintiffs relieve themselves of the expense of supporting their own paupers by making them work in another parish. An occupation by putting in paupers is not an occupation for a public purpose. If, as [*6] sometimes happens, all the rateable property in one parish belongs to a single person, can he exonerate himself by hiring a building for the paupers to work in, in another parish, and claim an exemption for such building? As for the suggestion, that the concern is not on the whole balance profitable, that is not a material circumstance. The test is, not the actual profit made, but the capability of yielding profit; *Rex v. Agar*, 14 East, 256; *Rex v. Parrot*, 5 T. R. 593. To interpret the word "occupier" in this restricted sense would be in contradiction to the sense in which it must be understood in other acts, as, for instance, in the Municipal Corporation Act, stat. 5 & 6 W. 4, c. 76, s. 9.

Lord DENMAN, C. J., now delivered the judgment of the Court.

This was an action of replevin, tried before my brother ALDERSON, at the Summer assizes for the county of Gloucester, 1834, when a verdict was found for the plaintiffs, damages 4*l.* 4*s.*, with liberty for the defendants to move to enter a verdict for them, no fact (as is added in the report) having been in dispute.

The motion was made accordingly; and several points of inferior importance were raised before us upon the discussion; but the most material question was, whether the goods, the subject of the action, had been properly levied under a warrant of distress for a poor rate, or, in other words, whether the plaintiffs were the occupiers of rateable property in the parish of St. Philip and St. Jacob in the county of Gloucester, of which the defendants were overseers. (His [*7] Lordship then stated the facts.) It, therefore, became a question, whether the managers of the poor (whether governors, as in this instance, or overseers generally), renting rateable property out of the limits of their district, city, parish, township, or place, are exempt from rateability, because such property is applied solely to the purpose of disposing of their own poor, with which, upon the statement already made, the place in which the property is situated has no concern.

Upon this question we were referred to, and pressed by, the cases well known, and so often referred to, of property held merely for public purposes, as stables taken by the colonel of a regiment merely for the use of that regiment (*Lord Amherst v. Lord Sommers*, 2 T. R. 372), of property devoted to charitable purposes, as apartments held by the matron of the Philanthropic Society, merely to superintend the children (*Rex v. Field*, 5 T. R. 587), or the like in the case of the superintendent of St. Luke's (*Rex v. Occupiers of St. Luke's Hospital*, 2 Burr. 1053); in each of which instances there was no occupation, beyond the public purpose in the former, and the charitable in the latter. With respect to which cases, it is enough to say that we accede fully and without reserve to

the principle and authority of them all; observing, at the same time, that, so soon as any independent occupation for private advantage is discoverable, rateability immediately attaches. The case of the commanding officer of barracks (*Rex v. Terrott*, 3 East, 506), furnishes a full illustration and confirmation of the latter remark. The absence of "beneficial occupation" was also much insisted upon; and it was contended that *that* is the true criterion to ascertain whether property be rateable *or not. It is not to be denied but that this phrase, "beneficial occupation," has been in frequent use; and, [*8] generally speaking, it serves tolerably well to convey rather a popular notion, than to give a certain rule for deciding the question of rateability in every instance. Because, if by beneficial be meant *profitable*, or anything like it, the expression is obviously fallacious: and upon this point all discussion is superfluous, because the case of an unprofitable and losing occupation (expressly so found) of a coal-mine, has been held no exemption from rateability (*Rex v. Parrot*, 5 T. R. 593), a coal-mine, by the words of stat. 43 Eliz. c. 2, s. 1, being subject to a rate. Without affecting the precision of an exact definition, it would probably be nearer the truth to say, that the *presumptive* liability arising from occupation is to be explained away in each case. Why is the coachman living in apartments, by permission of his master, not rateable, according to Lord KENYON, in the case of *Rex v. Field*, 5 T. R. 592? It is his master's occupation. Why were not the matron and the superintendent, in the cases above referred to, rateable for the apartments they occupied? Because, as they had no more than was necessary to carry into effect the object of the establishment, in each instance, to rate them would, in reality, be to rate the charity children in the one case, and the lunatics in the other. It cannot be said that *no benefit* is derived. By the occupation of the portion of the building in each of the cases alluded to, the expense of a house, or lodging, elsewhere, is saved.

But, moreover, the question here does not arise upon a rate imposed by the managers of the poor of Bristol *upon premises occupied by their own [*9] poor, within their own city. On the contrary, the rate in question was imposed by foreign overseers upon property situated in their own parish, and which, in the hands of an ordinary individual, would clearly be rateable to the relief of their poor. How does it concern the overseers and lay payers of the parish of St. Philip and St. Jacob, in what manner any person or persons manage the property taken and held in that parish? Suppose the governors of Bristol to have taken 100 acres of land only, and to have brought such of their paupers as were capable of labor from a poor-house in Bristol, to employ them upon the land, as a beneficial mode, according to their opinion, of disposing of the poor. Suppose, also, that the return, whatever it might be, was applied solely towards the maintenance of the poor who had labored upon the farm, or of those who were unfit for labor, and had been left behind: how can this constitute a better claim to exemption from rateability in the parish where the property lies than a *losing* occupation, which, it is quite certain, does not affect the question of liability at all? The same rule must, of course, apply to every species of property.

We are, therefore, upon the whole, of opinion that the buildings so held by the plaintiffs in the parish of St. Philip and St. Jacob were rateable to the relief of the poor of that parish; and that a verdict, according to the leave reserved, should be entered for the defendants. Verdict to be entered for the Defendants.

*The KING v. The Churchwardens of DURSLEY.

[*10]

Under statute 59 G. 3, c. 184, s. 14, churchwardens cannot raise a loan on the credit of the church-rates to pay a debt for repairs, incurred in a past year. The loan ought to be raised at the time when the repairs are done, and the laying of rates for the repayment should commence immediately, and be continued so as to pay off the debt by ten annual instalments.

IN Michaelmas term, 1835, *R. V. Richards* obtained a rule nisi for a mandamus to the churchwardens of Dursley, Gloucestershire, to pay Charles Bruce Warner, Esq., the instalments which had become due and were unpaid, of the sum of 350*l.* borrowed under the provisions of stat. 59 G. 3, c. 134, and of the subsequent acts in furtherance of the same object, and the arrear of interest due on 300*l.*, part of the said sum; or to raise by rate, pursuant to the said statute, a sum sufficient for that purpose, and pay the same to the said C. B. Warner. The affidavits in support of the rule contained the following statements:—

In 1832, Mr. Warner was applied to by Bloxsome and Hickes, the then churchwardens, to lend them 350*l.* towards defraying the expense of repairing the parish church; the money to be borrowed and raised on the credit of the church-rates according to the above statute; and he lent the sum, having first ascertained that the proper consents would be given. Bloxsome and Hickes gave him a deed of charge, dated February 27th, 1832, the recitals of which he believed to be true. It recited that the vestrymen of Dursley, deeming it necessary, in the years 1824, 5, 6, that certain repairs should be done to the church, they were effected at the expense of 1585*l.*; that, in November, 1831, there being 413*l.* of that sum unpaid, a vestry was held, at which it was unanimously resolved that 63*l.* should be *raised and paid in part of that [*11] sum, and that 350*l.* should be borrowed and raised on the credit of the church-rates, under stat. 59 G. 3, c. 134; and the churchwardens were directed to apply to the bishop and incumbent for their consents: and that the consents were afterwards given, and the money lent by Warner on condition that it should be repaid by annual instalments of 50*l.* on the 27th of February, and five per cent. interest be paid half-yearly on August 27th, and February 27th. Bloxsome and Hickes did then, by that deed, as churchwardens, charge the parish of Dursley with the said 350*l.*, and with the repayment thereof, with interest, according to the above terms; and did thereby, in pursuance of the above act, and of any other act or acts, &c., declare, “that the said sum of 350*l.*, with interest thereon, is, and shall continue to be, chargeable and charged upon the church-rates now raised or hereafter to be raised in the said parish, until the said sum of 350*l.*, together with the interest, is fully repaid according to the terms and conditions above set forth.” Nine of the parishioners (among whom were the two churchwardens) also gave a bond as a collateral security, and thereby severally bound themselves to make good each a ninth part of the 350*l.*, if not paid out of the rates, or of such parts of it as should not be paid. The instalment of 1833 was paid, and interest down to August, 1834; but no further payment was made, though the churchwardens were applied to at various times down to July, 1835.

In opposition to the rule, Bishop, one of the churchwardens for the current year, deposed that many of the rate-payers had determined to resist payment of [*12] any rate made for paying off the sums claimed by Warner, *alleging that the churchwardens of 1832 had no right to raise money in that year for discharging a debt incurred by new pewing, ornamenting, and beautifying the church in 1824 and 1825, before they became holders of property in the parish; and likewise that the expense was objectionable as not having been incurred for necessary repairs. Bishop stated that the parish had no funds in hand; and that the debt was incurred long before he himself was a resident in the parish. In February, 1833, and February, 1834, Bloxsome and Hickes were still churchwardens: Bishop and one West were sworn in churchwardens in May, 1834.

Thesiger and *Busby* showed cause in Easter term, 1836.¹ Any point that might arise from the change of churchwardens since 1832, is waived for the purpose of this argument. By stat. 59 G. 3, c. 134, s. 14, it is enacted, that it shall be lawful for the churchwardens of any parish, with the consent of the

¹ April 23d. Before Lord DENMAN, C. J., LITLEDAL, PATTESON, and COLERIDGE, Js.

vestry, and of the Bishop and incumbent, "to borrow and raise upon the credit of the church-rates, or of any rates made under the said recited act or this act, of any such parish, such sum or sums of money as shall be necessary for defraying the expense of repairing any churches or chapels; and they are hereby empowered and required, in any case in which such money shall have been borrowed, to raise by rate a sum sufficient from time to time to pay the interest of the money so borrowed, and not less than ten per cent. of the principal sum borrowed, out of the produce of such rates, until the whole of the money so borrowed shall be repaid." The question here is, whether churchwardens, *having ordered repairs, and that without ascertaining the cost at the [*13] time, may borrow money on the credit of the rates, to pay for such repairs, six years after they have been done? The effect of that proceeding is to make persons liable for the expense, who were not inhabitants when it was incurred. The words of stat. 59 G. 3, c. 134, s. 14, are prospective, enabling the churchwardens to borrow such moneys as "shall be necessary" for defraying the expense of repairs. The proper course is, that they should first ascertain the amount which will be necessary, then borrow the money. It is to secure the proper performance of this, that the statute requires the consent of the bishop and incumbent to the borrowing: when that has been properly done, the rate may be imposed and levied without any further consent. This view of the statute is consistent with the decision in *Rex v. The Churchwardens of St. Mary, Lambeth*, 3 B. & Ad. 651, on stat. 58 G. 3, c. 45. [COLERIDGE, J. It may be very necessary to ascertain the amount which will be wanted, in order to obtain the requisite consents.] Besides, it is a rule that a mandamus does not lie where parties have another remedy; the only exception is, where that remedy would not be equally efficacious, *Rex v. The Severn and Wye Railway Company*, 2 B. & Ald. 646. Here the remedy upon the bond given as a collateral security would be as effectual as the proceeding by mandamus. [COLERIDGE, J. It is not a remedy available against the rates.] After the objection made by many of the inhabitants, the churchwardens, if they complied with such a mandamus as is here suggested, might reasonably fear that they would be liable to an action; and therefore the mandamus ought not to go; *Rex v. Dyer*, 2 A. & E. 606.

**R. V. Richards*, contra. The bond gives no remedy except in the event of the rates failing. The fear of an action is no answer to such an appli- [*14] cation as this, unless the Court see that it is a well-grounded fear. The real question is, whether the inhabitants may be bound by a deed of charge for a loan raised to pay for repairs appearing by such deed to have been done in a past year. Inconveniences may be suggested, whether the mandamus be held to lie or not. But the object of stat. 59 G. 3, c. 134 (which, for the present purpose, operates in extension of stat. 58 G. 3, c. 45), is to make the parish a quasi corporation with reference to debts of this kind. By the later act the consents of the bishop and incumbent are required, in addition to that of the vestry, for borrowing money on the credit of the church-rates for the purpose of repairs. If the consenting parties, in their discretion, allow the loan, as requisite for the purpose of repairs, the rate may be made to meet such loan; and it cannot be maintained that the lender is bound at his peril to see that the rates are from time to time properly appropriated. The fourteenth section of the latter statute is very strongly expressed; the words "such sum or sums of money as shall be necessary for defraying the expense of repairing any churches or chapels" may refer either to bygone or to future expenses. At least the application is so far reasonable, that a mandamus ought to go, in order that the point may be discussed on the return. No case appears to touch upon the subject, except *Rex v. The Churchwardens of St. Mary, Lambeth*, 3 B. & Ad. 651, which, as far as it applies, is in favor of this rule. *Cur. adv. vult.*

*Lord DENMAN, C. J. in the same term, May 6th, delivered the judg- [*15] ment of the Court.

After stating the nature of the application, his Lordship said: It appeared,

among other facts, that the repairs in question had been done in the years 1824, 1825, and 1826, at an expense of 1585*l.*; that in 1832, the sum of 350*l.* remaining unpaid, the applicant had been asked to lend that sum, and had done so, receiving a deed of charge, regular in form, and with the necessary consent of the bishop, incumbent, and vestry. One instalment of the principal and interest had been paid in 1833, and the interest to August, 1834.

It was objected, on showing cause, that the section in question (59 G. 3, c. 134, s. 14) does not authorize the borrowing money and charging the rates retrospectively. We have considered this objection; and although the words of the statute are in this respect general, we are of opinion that it must prevail.

It is a general rule with respect to parish rates, founded on obvious principles of policy and justice, that they are not to be made retrospectively. The payers being a fluctuating body, nothing, generally speaking, is more just, or more likely to conduce to economy, than to hold that they who create a charge shall themselves bear it. The statute has, to a certain extent, modified this general rule; and the churchwardens are authorized, with the sanction of the vestry, bishop, and incumbent, to borrow on the credit of the rates, such sum of money as shall be necessary for defraying the expense of repairing the church: and they are then empowered *and required* to raise, by rate, a sum [*16] sufficient from time to time to pay the interest, and not less *than 10 per cent. of the principal, until the whole of the money so borrowed shall be repaid.

It appears to us that all these provisions point clearly to the limits of departure from the general principle above stated. The consent of the incumbent and bishop appear to have been thought necessary, in order to see that the repairs should be of that onerous and yet permanent nature which might properly be thrown in part on the payers of succeeding years. Their consent, and that of the vestry have the effect also of securing the parish from an improvident outlay: and, finally, the provision that the principal and interest shall be paid in ten instalments, which ought in our opinion to be annual, secures the participation of the existing rate-payers in the discharge of the loan, and prevents it from becoming a burden at any indefinite period on their successors.

These obvious purposes of the act, so necessary to prevent abuses of the power given by it, can only be secured by an adherence to the general rule stated above, in all particulars not specially provided for by the clause. We are therefore of opinion that the rate now sought to be imposed would not be authorized by the statute, and of course that the present rule must be discharged.

Rule discharged.

[*17] *The KING v. The Principal and Antients of BARNARD'S INN.

Rule for a mandamus to the Principal and Antients of Barnard's Inn to admit an attorney into the society, discharged, it not appearing that this Court had the requisite authority over the Inn.

A RULE was obtained in Trinity term, 1835, calling upon the Principal and Antients of the Society of Barnard's Inn, in the city of London, to show cause why a mandamus should not issue, commanding them to admit William Gresham, gentleman, a member of that society.

The affidavit of Mr. Gresham, on which the rule was obtained, stated that he was an attorney of this Court, and of the Court of Common Pleas, and a solicitor in Chancery, and had been some years resident in Barnard's Inn. That, "by an order made in the reign of the late Queen Elizabeth, entitled, Orders necessary for the government of the Inns of Court, established by commandment of the Queen's Majesty, with the advice of her Privy Council, and the Justices of her Bench, and the Common Pleas, in Easter term, in the sixteenth year of the reign of the said Queen, the reformation and order for the Inns of Chancery is

referred to the consideration of the Benchers of the Houses of Court, whereto they are belonging; wherein they are to use the advice and assistance of the Justices of the Courts at Westminster, and thereof to make a certificate to the Privy Council at the second sitting the next term in the Star Chamber; and which said order is signed by the then members of the Privy Council," Dugd. Orig. 312, 3d ed. That in 36 & 38 Eliz. and 12 Ja. 1, (see Dugd. Orig. 313, 314, 316, 317, 3d ed.), *orders were made by the Crown with the advice and assistance of the Privy Council and all the Judges, for the regulation [*18] and ordering of the said Inns of Court and Chancery; and that particularly, "by an order, Dugd. Orig. 317, 3d ed., made" 12 Ja. 1, "reciting, For that there may be great abuse in the lodging and harboring of ill subjects, or dangerous persons in the said Inns of Court and Chancery, being privileged and exempted places: it is therefore ordered, that there be general searches in every house of Court and Chancery twice every Michaelmas term."

And that, "by an order made" 15 April, 6 Car. 1, Dugd. Orig. 320, 3d ed., "by the Lord Keeper of the Great Seal of England, and all the Judges of both Benches, and Barons of the Exchequer, by command of the King's Majesty's most honorable Privy Council, for the government of the Inns of Court and Chancery, it is ordered that the Inns of Chancery shall hold their government subordinate to the Benchers of the Inns of Court unto which they belong: and in case any attorney, clerk, or officer of any Court of Justice, being of any of the Inns of Chancery, shall withstand the direction given by the Benchers of Court, upon complaint thereof to the Judges of the Court in which he shall serve, he shall be severely punished; either by forejudging from the Court, or otherwise, as the case shall deserve." And it is further ordered, "that the Benchers of every Inn of Court cause the Inns of Chancery to be surveyed; that there may be a competent number of chambers for students; and that once a year an exact survey be taken, that the chambers allotted for that purpose be accordingly employed."

*It was further stated, that John Baines, principal of Barnard's Inn, and a clerk in the Six Clerks' Office, in Hilary term, 1828, in a [*19] cause in this Court between one Baker, plaintiff, and the said John Baines, defendant,¹ "did, as defendant in the said cause, allege and plead that Barnard's Inn was inhabited by a society known by the name of the Society of Barnard's Inn, theretofore lawfully constituted as one of the Inns of Court of Chancery, and had from time immemorial had certain rights and privileges which he, the said John Baines, then claimed on behalf of such society."

Also that, by several orders of this Court, and particularly by certain rules of Court made in Michaelmas term, 1654, and Michaelmas term, 1704,² it was

¹ Baker v. Baines. See 5 B. & C. 24, note (a).

² Rules and Orders of the Court of King's Bench, pp. 19, 97: ed. by Peacock, 1811. The rule of Mich. 1664 is, "That all officers and attorneys of this Court be admitted of some Inn of Court or Chancery, by the beginning of Hilary term next, or in the same term wherein they shall be admitted officers or attorneys, and be in Commons one week in every term, and take chambers there; or in case that cannot be conveniently done, yet to take chambers or dwellings in some convenient places, and leave notice with the butler where their chambers or habitations are, under pain of being put out of the roll of attorneys." The rule of 1704 has the following preamble:—"Whereas divers complaints have been made to us, that many attorneys and clerks of the several Courts at Westminster are not admitted in any of the Inns of Court or Chancery, according to ancient course and usage, by which they might be resorted to, and business of law better managed, to the greater ease of the Queen's subjects; the neglect whereof is to the great detriment and decay of the societies of the law, and divers inconveniences do thereupon daily happen; for the prevention whereof, and to establish a remedy for the same, It is ordered," that all attorneys, &c., shall procure themselves to be admitted, &c. (as in the text, p. 20), "before the end of Trinity term now next ensuing, and take chambers there (if conveniently they may be had), else that they take lodgings in some convenient place near the said Inns, and leave notice in writing with the butler or porter of such Inn whereof they are admitted, where their lodgings or habitations are, except such persons as are, or shall be hereafter, inhabitants or housekeepers in Lon-

[*20] *ordered by the Judges of the several courts of Queen's Bench and Common Pleas, and the Barons of the Exchequer at Westminster, That all attorneys and clerks of the said courts, not already admitted into one of the Inns of Court or Chancery, shall procure themselves to be admitted into one of the said Inns of Court (if those honorable societies will admit them), or into one of the Inns of Chancery." And that the deponent was informed and believed that, "by the recent orders of some or all of the Inns of Court, an attorney or solicitor, while he is on the Rolls of any of the Courts at Westminster, is not admissible of such Inns of Court; but such orders do not extend to the Inns of Chancery.

It was then stated that, on March 13, 1832, Mr. Gresham wrote to Mr. Baines, the principal, expressing his desire to become a member, and offering to give the customary bond, and in other respects conform to the regulations of the society. The society refused compliance. In August, 1832, Mr. Gresham, being then resident in the Inn, renewed the application, presenting testimonials of his fitness. Compliance was refused. In January, 1834, he again applied, requiring that, in the event of non-compliance, the society would certify the refusal, and the grounds of it, in order that he might appeal to the visitors of

[*21] the Inn or proceed otherwise, *as advised. Admission was not granted, nor any statement furnished. The principal and secretary informed Mr. Gresham that there was no objection to his character or fitness; but (according to Gresham's affidavit) Mr. Baines, the principal, stated to him that the society was full, and no other members could be admitted.

The affidavit went into further statements as to the admission of another person subsequently to Gresham's application; the funds of the society, and the disposal of them; the persons who were members, and the manner in which the chambers were occupied. And it then stated, that Mr. Gresham, conceiving that the society of Gray's Inn might, as visitors of Barnard's Inn, exercise their visitatorial power as to his admission, lately presented to the members of the Bench of Gray's Inn a memorial, praying that they would undertake such inquiry as should seem meet, or would take such other steps as should seem best calculated to promote the ends of justice, so that deponent might be admitted a member of Barnard's Inn. The Benchers of Gray's Inn appointed a day for hearing, and caused a copy of the memorial to be served on the Principal and Antients of Barnard's Inn. No one attended on their behalf. Mr. Gresham was heard, and the Benchers afterwards informed him, by their treasurer, that they had "caused search to be made for precedents, but none had been found which, in the opinion of the said Benchers, sufficiently bore upon the case of deponent; and that, in consideration of all the circumstances, they, the said Benchers, declined interfering in the matter of the said memorial."

The affidavit finally stated that the said John Baines now was and acted as principal of Barnard's Inn, and that *certain other persons named were [*22] antients: and that, unless this Court would interfere, the deponent had no means of procuring the observance of the said rules of Court by the society, nor any mode of obtaining admission.

In opposition to the rule, affidavits were put in, sworn by the present principal, Mr. Baines, and the late principal, stating: "That the said society" (of Barnard's Inn) "is a voluntary society, and has, as deponents believe, existed for several centuries." That the said society is composed of a principal, antients, and companions; and that the number of such antients and companions

don, Westminster, Southwark, or the suburbs thereof, and liberty of the tower of London, and St. Catharine's there, and such who are sworn attorneys of Courts within the said cities, towns, and liberties."

See also the Rules (and introductory recitals) C. B. Mich. 29 Car. 2, and Mich. 86 Car. 2, Rules and Orders of the Court of Common Pleas, ed. by Peacock, pp. 53, 69.

And the Rule, Hil. 8 G. 3, K. B.; Rules and Orders of K. B., ed. by Short, 1822, p. 23: 1 Tidd, 72, 9th ed.

has from time to time varied according to the will and discretion of the said principal and antients. That the principal and antients of the said society, or the majority thereof, have alone the conduct, management, and control thereof, and alone make, and have, as the deponents believe, since the existence of the same made, all the rules, orders, and regulations relating to the said society, the election of the antients and companions or members, and all other matters connected therewith. "That no person is nor ever has, as deponents believe, been admitted a member or companion of the said society, without having been first proposed by an antient, and seconded by another antient, and elected by the majority of the said antients. And these deponents have never heard, nor do they believe, that any person or persons has or have been elected a member of the said society in any other manner." And they added that Gresham never had been so proposed, seconded, or elected. That the property of the society (with a trifling exception) consists of premises, holden under a lease for forty years, granted by the dean and chapter of Lincoln to the principal for the time being, *in trust for himself and the antients, such lease being [*23] renewable every fourteen years on payment of a fine varying from time to time in amount; and which fine had, sometimes, when the society's funds were insufficient, been provided for by loans from the antients' private funds. That it was at this time necessary to renew the lease: that (from circumstances which were stated) it was doubtful whether the lease would be renewed, and that, if it were, there were not sufficient funds of the society to pay the fine. Mr. Baines denied having stated to Mr. Gresham that the society was full.

Another affidavit was put in, in opposition to the rule, stating that William Gresham, who was believed to be the party now applying, was admitted a member of Gray's Inn on the 26th of January, 1835, and was still a member.¹

Sir W. W. Follett showed cause in the present term.² There is no instance of an application like this, except *Rex v. The Benchers of Gray's Inn*, 1 Doug. 353, and *Rex v. The Benchers of Lincoln's Inn*, 4 B. & C. 855. In the first of those cases a mandamus to call to the bar was refused, on the ground that the Inns of Court were voluntary societies, governed by their own rules, and subject only to the control of the Judges as visitors. In the second, this Court refused a mandamus to admit into the society, holding that there was not an inchoate right in the king's subjects generally to be admitted into such bodies. So the Court has refused a mandamus to a corporation to admit an inhabitant of the borough to be a free *burgess, where the claimant did not show [*24] an inchoate right.³ The rules of 1654 and 1704, supposing that they had not fallen into disuse, only require attorneys to be admitted into one of the Inns of Court or Inns of Chancery. They furnish no ground for coming to this Inn in particular. [COLERIDGE, J. That would be an argument for every Inn in turn.] It shows that a party, to make this claim, ought to have an inchoate right of admission at some particular Inn. Barnard's Inn is a voluntary society, governed by its own rules as to the admission of members; and Mr. Gresham has not brought himself within those rules: there is nothing to show that this Court can interpose. The case of a party wishing to enter himself of an Inn for the purpose of being called to the bar is much stronger than the present. There the admission is clearly necessary to the call; yet, if it be refused, the Court will not interfere. [COLERIDGE, J. Do you admit that there is a control anywhere, over the Inn?] This Court has none; and perhaps it could not be ascertained that there is any. *Rex v. Allen*, 5 B. & Ad. 984, shows the difficulty of proving the existence of such a control; and by the judgments delivered in *Rex v. The Benchers of Lincoln's Inn*, 4 B. & C.

¹ A formal objection was taken to this affidavit when it was first adverted to in showing cause, viz., that the deponent gave no address or addition, but that of "Steward of the Society of Gray's Inn." No further allusion was made to the affidavit.

² April 22. Before LORE DENMAN, C. J., LITLEDALE, PATTERSON, and COLERIDGE, Js.

³ See *Rex v. Mayor of West Looe*, 3 B. & C. 677.

855, it appears that there is none for the present purpose. [LITTLEDALE, J. In the rule of 4 Ann., antè, p. 20, the words "if those honorable societies will admit them," are introduced after mentioning the Inns of Court, but not after the mention of the Inns of Chancery.] It does not appear that the Judges had a right to make rules which should oblige any of the Inns to receive members. These rules have not been formally rescinded; but they refer [*25] to a state of things quite different from that which *has existed since the admission of attorneys has been regulated by statute. The rules are not evidence that the Courts had the power of compelling the Inns to receive; nor even that they assumed such a power. It has long been an established rule of the Courts that no person shall be admitted to the bar who is not a member of an Inn; yet the Courts will not compel the Inn to call a person who is a member: the only resort is to the twelve Judges. Here, if there is any resort, by appeal, to the twelve Judges, or to any particular Inn, that is the course to be adopted. In *Rex v. The Benchers of Lincoln's Inn*, 4 B. & C. 858, Lord TENTERDEN says, "It is true, that the twelve Judges are the visitors of the Inns of Court, but in that character they have jurisdiction only over actually admitted members." "It has been argued, that every individual has *prima facie* an inchoate right to be a member of one of these societies, for the purpose of qualifying himself to practise as a barrister." "It might as well be said that every individual had an inchoate right to be admitted a member of a college, in either of the universities, or of the College of Physicians, or any other establishment of that nature." It has been suggested here, from the Bench, that to ask what right the party had to be admitted of the particular Inn would furnish an answer for every Inn in turn. But the same observation might be made if the question were asked as to admission into a college in one of the universities. And a person must have a degree from one of the universities, to practise in the Ecclesiastical Courts, or to be a member of the College of Physicians. There is nothing to distinguish this case from that of other Inns which are voluntary societies. The question is, *whether [*26] the party has any inchoate right to be a member of the particular society.

Kelly and Kennedy, contrà. The Court will at all events not decide so important question as this on affidavits. The origin of these bodies, and the system upon which they were at first regulated, is at present obscure. Some historical illustration of them is found in *Fortescue de Laudibus Legum Angliæ*, c. 49, and in Mr. Amos's notes; and in the introduction to 3 Rep. p. xxxvi. Ed. Thom. and Fr. 1826. It is contended on the other side that the Inns are voluntary societies, bound by no rules but of their own making. If so, the interference of the King, Lord Keeper, Privy Council, and Judges, by the rules which have been cited, was illegal. But those rules must be considered as evidence that the Inns were once subject to the jurisdiction of the superior Courts and the orders of the Judges, and that there must have been a control to which the societies were subject if they departed from those rules. The order of 12 Ja. 1 directs a general search in the Inns every Michaelmas term. Would that search have been a trespass? And can it be supposed that, by the rules of 1654 and 1704, attorneys were called upon to perform that which did not lie in their power? It is true that, in the rule of 1704, the order for obtaining admission into the Inns of Court is qualified by the words "if those honorable societies will admit them"; but there is no such qualification as to the Inns of Chancery in this rule; and perhaps, when the rules were made, a distinction may have been intentionally drawn between the Inns of Court and those of Chancery. [COLERIDGE, J. In the rules of *1654, antè, p. 19, note (b), there is no [*27] qualification as to either class of Inns. LITTLEDALE, J. If the rules were strictly binding, attorneys in all parts of the kingdom would be obliged to procure admission, and take chambers in the Inns.] It is true that the rules have fallen into disuse, and that many attorneys are not members of the Inns, probably from the great increase of attorneys without a corresponding increase

in the number of Inns: still the rules are not repealed by the statutes passed since they were framed; and they are evidence, at least, of the constitution and duties of the several societies. And there are regulations affecting attorneys, contemporaneous with that of 1704 now in question, which are not interfered with by the statutes. It is asked, why a mandamus should be directed to Barnard's Inn in particular? But it is sufficient if a party, having right, makes his claim as to any Inn. [Lord DENMAN, C. J. In *Rex v. The Bishop of London*, 13 East, 419, a rule nisi for a mandamus to the Bishop to license a lecturer was refused because, the Archbishop of Canterbury had authority to license as well as the Bishop, and application had been made to the Bishop only.] The plea put in by Mr. Baines, in *Baker v. Baines*, ante, page 19, is inconsistent with the assertion that this is a mere voluntary society. [Lord DENMAN, C. J. The plea is only that Barnard's Inn is lawfully constituted as one of the Inns of Chancery, and having certain immemorial rights. There is no denial of its being a voluntary association.] *Our. adv. vult.*

Lord DENMAN, C. J. on the following day (April 28d) delivered judgment as follows:—We have looked into the authorities, but find nothing upon which this *case can be decided. We are therefore confined to the matter appearing on the affidavits; and in them we see nothing that gives us authority to interfere. The rule must, therefore, be discharged. [*28]

Rule discharged.

OWEN and WISH v. BODY and GRIFFITHS.

An assignment to trustees for the benefit of all creditors who may execute the deed, is not valid as against creditors who do not execute, if it authorize the trustees to carry on the debtor's trade, and contain such terms that the creditors subscribing would become partners in the business.

The trade in question being that of an hotel keeper, it is no objection to such an assignment that the debtor, when it was executed, had not a license for retailing excisable liquors; there being no evidence that the trustees contemplated selling, or in fact sold, any liquors without such license, and a license having been procured two days after the execution of the deed.

THIS was a feigned issue directed by the Court under the Interpleader Act, 1 and 2 W. 4, c. 58. The question stated in the pleadings as having arisen between the parties was, whether the defendants or either of them were hindered or precluded by the indenture after mentioned, and by the circumstances of the case, which were stated in the declaration (but which it is unnecessary to detail here), from levying execution upon certain goods in that indenture mentioned. The plaintiffs alleged that the defendants were hindered and precluded, &c.; which the defendants traversed.

On the trial before PATTESON, J., at the Exeter Spring assizes, 1835, it appeared that, on the 6th of November, 1834, Joseph Marchetti, being indebted to the defendants and other persons, executed an assignment for the benefit of his creditors.

The assignment was by indenture of the above date, between Marchetti of the first part, the plaintiffs of the second part, and the several other persons whose hands and seals were thereunto subscribed, being creditors of Marchetti, of the third part. It recited that Marchetti had for several years carried on the business of an inn-keeper and lodging-house keeper, at Torquay; that several *judgments had been obtained against him, and writs of fi. fa., thereupon issued, were then depending, at the suit of the several persons, [*29] and for the several sums after mentioned (four of the debts, with the names of the creditors, not including any of the present plaintiffs or defendants, were then mentioned); and that the said writs of fi. fa. were then in process and execution: That Marchetti, being unable to pay the said debts, had requested the plaintiffs to pay off the same, and had proposed and agreed to assign over

to them all his estate and effects upon the trusts after mentioned, to secure repayment to them of the said debts, and for the purpose of paying all his creditors: And that the plaintiffs had examined the affairs, and agreed to undertake the trust, and had accordingly paid certain sums, amounting together to 155*l.*, in satisfaction of the above four debts, and costs. Then followed an assignment by Marchetti to the plaintiffs, their executors, &c., for the purposes of the deed, and of all his leasehold estate, household goods, stock in trade, debts, &c., estate and effects whatsoever, with power to enter into his dwelling-houses and premises, and to use and take possession of the goods, &c.: Habendum to the plaintiffs, their executors, &c., upon trust that they should, with all convenient speed, in such manner, at such time or times, and on such terms, as they should think most advantageous, sell the goods and chattels, and get in the debts: And further that the plaintiffs, or the survivor of them, his executors, &c., "shall and do, so long as they or he shall think it most desirable and advantageous so to do, continue and carry on the business of the said Joseph Marchetti, in and upon the dwelling-house and premises of the said J. M.,

[*30] in their or his names or name or *otherwise; and shall and do pay and means aforesaid, in the first place in and towards" (paying the costs of these presents, and carrying the trusts thereof into execution); "and in the next place shall and do retain and pay unto themselves, their executors," &c., "the said sum of 155*l.* so paid by them, the said William Purchase Owen and William Wish, as aforesaid, with interest," &c.; "and in the next place shall and do pay and satisfy all such sums of money as, in their or his judgment, shall be necessary to be paid, laid out, or expended, for rent, taxes, wages, insurance, or otherwise, in the continuing and carrying on the business of the said J. M., and in maintaining and keeping up the stock in trade by purchasing horses, carriages, and other articles and things, and shall and do pay the surplus of such money so to arise and be received as aforesaid, unto and amongst themselves the said W. P. O. and W. W., and all other creditors of the said J. M. who shall have executed these presents, within three calendar months from the date hereof, rateably and proportionably, according to the amount of their respective debts, when and so often as there shall be sufficient money in the hands of the said W. P. O. and W. W., their executors," &c., "to pay two shillings in the pound upon or in respect of their said debts, or as often as thereunto requested in writing by the major part in value of the said creditors, parties hereto, and, after the several payments aforesaid, shall and do pay the surplus of such money so to be received unto the said J. M., his executors, administrators, or assigns."

Then followed a power of attorney to the trustees, to *get in debts, &c.; [*31] a covenant by Marchetti for better granting and assigning, &c.; a power to the trustees to compound with debtors; clauses for the security of the trustees; a covenant by each of the creditors, parties to the indenture, with Marchetti, "to accept and take the dividend or dividends to arise and be produced out of and from the said goods and chattels and effects, in full satisfaction and discharge of his debt," and not from henceforth to sue or molest Marchetti, on account of any debt now due; and a covenant by the trustees for the faithful execution of the trusts; and that they "shall and will from time to time keep, or cause to be kept, proper books of account relating to the estate and effects of the said J. M., and the management and disposal thereof, for the examination and inspection of the said other parties hereto, or any or either of them, at all times; and therein make, or cause to be made, true and proper entries of all receipts, payments, and disbursements, and of all other transactions, matters, and things requisite and necessary to show the true state and condition of the said estate and effects; and shall and will, at the request of the said other parties hereto, or any or either of them, render a just and true account of all matters and things relating to the said trust, and make a just and faithful distribution of all such sum or sums of money as shall come to their or his hands

by virtue hereof, according to the true intent and meaning of these presents." There was added a proviso, that the trustees should, and they were thereby directed to, "sell, dispose, and convert into money the whole of the said household goods and furniture, stock in trade, goods, chattels, and effects, immediately or as soon as occasion may be, at any time hereafter, on being thereunto requested in writing by the major part in value of *the said creditors, instead of continuing on the said trade or business of the said J. M. as [32] aforesaid." And, lastly, a proviso that creditors holding securities, and becoming parties to the indenture, should not be prejudiced as to such securities.

The deed was executed by the plaintiffs (a wine-merchant and a builder) and by two other creditors; not by the defendants. The plaintiffs immediately afterwards took possession, and began carrying on the business; Marchetti continuing on the premises, but acting only in subordination to the trustees, and accounting to them if he received money. At the time of the assignment, Marchetti had no license for retailing exciseable liquors, having omitted to take it out in the preceding month. On the 8th of November, the trustees obtained a license. See stat. 9 G. 4, c. 61, s. 14. The defendants, when the assignment was executed, had brought actions against Marchetti for their respective demands; and, after the execution of the assignment (November and December, 1834), they obtained judgment and issued writs of *fi. fa.*, which the sheriff executed by seizing goods mentioned in the indenture, and which were the goods in question in this cause. The executions were subsequent to the obtaining of the license. Under the learned Judge's direction, a verdict was found for the plaintiffs, subject to the opinion of this Court upon certain objections to the assignment.

Erle, in Easter term, 1835, moved for a rule to show cause why the verdict should not be set aside, and a verdict entered for the defendants, on the grounds, first, that the deed was not a valid conveyance of the property, as against creditors not executing, being not only a transfer *of it to the intent that the parties executing might carry on the business as partners; and, secondly, [33] that, at the time of the assignment, the business was illegal for want of a license, under stat. 9 G. 4, c. 61. A rule nisi was granted. In this term, April 30,

Crowder showed cause. There was nothing in the conduct of the plaintiffs, after the execution of the deed, inconsistent with a desire to act openly and beneficially to the creditors. Then as to the deed itself. First, setting aside the objection as to the license, this deed shows, in its provisions, a *bonâ fide* intention that the creditors shall have the benefit of the sale of Marchetti's effects, according to the best judgment of the trustees, and receive the advantages of the business, so long as it can be carried on: and it is calculated to carry that intention into effect. (He then recapitulated the clauses of the deed.) *Holbird v. Anderson*, 5 T. R. 235, shows that a transaction of this kind is not invalid merely because its effect may be to give particular creditors a preference: and in *Pickstock v. Lyster*, 3 M. & S. 371, it was decided that a deed, by which a debtor assigned all his effects to trustees for the benefit of his creditors, was good, though executed with intent to defeat the execution of an individual creditor, no purpose of fraud being proved, but the object being an equal distribution. In the present deed there is no ground for a suggestion of fraud; all appears to be done with the view of producing the greatest benefit to the creditors, any one of whom was at liberty to come in; and no benefit would accrue to Marchetti individually, except in the ultimate result, if the purposes of the assignment *should be [34] fully answered. It is contended, on the other side, that the clause enabling the trustees to carry on the business, would make those creditors who joined in the deed partners, and that they cannot be called upon to undertake such a responsibility. But this was the best mode of winding up the business, and the most advantageous to the creditors that could be suggested under the circumstances, and considering the nature of the trade. The intention of the clause was not fraudulent, nor was there anything illegal in the course proposed; and it does not appear that the objection now made was taken by the creditors. No

instance has been given in which a clause of this kind, which might or might not be beneficial to the creditors, has been held to invalidate an assignment. Then it is urged that the business was illegal, because no license had been taken out for retailing liquors, and the parties carrying on the trade would have been liable to penalties under stat 9 G. 4, c. 61, s. 18. It does not appear that the trustees knew this fact at the time of the assignment; but they repaired the defect as soon as it could be done. [LITTLEDALE, J. The license wanted, was only for selling excoiseable liquors, not for carrying on the general business.] It cannot be said that, if a penalty was incurred for want of this license, the rest of the business was prohibited, and could not be a subject of legal transfer. It is true that Marchetti, in assigning his goods, sold and disposed of all the wines and liquors on the premises; but such a disposal of them, with all the rest of his effects, is not a selling within the terms of the statute; nor can the Court infer from such a sale, an intention that the trustees, who are to carry on the business, should carry it on unlawfully, by selling in *opposition to the statute. [*35] The clause for carrying on the business, is subsequent to and distinct from the clause for selling the goods and chattels. Suppose they had sold the goods by auction, can it be said that, on account of the stipulation for carrying on the business, they could not have made a good title?

Erie, contra. First, this is not a bonâ fide assignment within the authority of *Pickstock v. Lyster*, 3 M. & S. 371, because the goods are not conveyed for the direct object of their being converted into money, and applied in satisfaction of the debts, but to be traded with, and payments made from time to time out of the receipts, subject only to a power vested in the major part in value of the creditors to compel a sale if they think fit. It is an assignment on speculation, and upon such terms that the creditors in general may or may not think it prudent to come in. Such a deed is clearly within stat. 13 Eliz. c. 5. In the case of a regular assignment, the creditor coming in entitles himself to a dividend, and runs no risk. But here, such a creditor would be a partner with the trustees, taking the profits of the hotel, liable for the debts incurred in carrying it on, and perhaps even subject to the bankrupt laws. No case can be cited in which a deed like this has been held valid. *Jezeeph v. Ingram*, 8 Taunt. 838, was the case of a mortgage to an individual creditor, and was discussed upon the question, whether there had been a sufficiently notorious transfer of possession. This is the gift accompanied with a trust, of which an instance is given in [*36] *Twyne's case*, second resolution, 3 Rep. 81 a. and which is said *there not to be a bonâ fide conveyance within the proviso of stat. 13 Eliz. c. 5, s. 6. The trustees here might lawfully have sold, but they have elected to carry on the business, which they are not warranted in doing. The deed was one by which the creditors not coming in, were delayed and hindered of their just actions and debts within the meaning of the statute, since they might justly object to subscribing a deed which would make them partners with the trustees.

This view of the case is strengthened by the remaining objection, as to the want of a license. The business was illegal on this account when the deed was executed; and the carrying on of such illegal business was a material part of the transaction which was concluded by that deed on the 6th of November. The contract was of the class prohibited by law, according to the distinction stated in *Forster v. Taylor*, 5 B. & Ad. 887. [LITTLEDALE, J. The only ground of illegality that can be stated is, that the trustees might have sold excoiseable liquors. Unless they did so, I do not see how the transaction was unlawful.] The contract is made in contemplation of an illegal act. [LITTLEDALE, J. Is it so, if, as soon as the trustees come in, they do all in their power to render the business legal? The license was actually obtained on the 8th of November. Lord DENMAN, C. J. There was no covenant for beginning the business immediately. COLERIDGE, J. Was there any evidence of liquors having been in fact sold before the 8th?] None. [COLERIDGE, J. You are not entitled to assume

the fact.] It is not necessary to contend that the trustees had actually become liable to penalties. [*Crowder* mentioned *Brown v. Duncan*, 10 B. & C. 93.]

*Lord DENMAN, C. J. If either of the points now urged on behalf of the defendants be maintainable, the assignment is invalid. One point [*37] is, that this was a contract for carrying on an illegal trade, because Marchetti had not a license for retailing exciseable liquors when the trustees took the property. But I think that objection comes to nothing, because no one was bound to do an illegal act: the parties might have proceeded upon the contract so as not to incur any penalty or violate any law. The other question is a very doubtful one, upon which we must take time to consider.

LITLEDAL, PATTESON, and COLERIDGE, Js., concurred. *Cur. adv. vult.*

Lord DENMAN, C. J., on a subsequent day of the term (May 5th) said:—On consideration, we think that, upon the second ground of objection, this assignment was not good. The deed imposed such terms as might have constituted a partnership among the persons executing it; and those were terms to which creditors were not bound to submit. The assignment, therefore, was invalid.

Rule absolute.

*JOHN GRAVES v. SUSANNA JEMIMA HICKS.

[*38]

Testator devised lands to trustees to raise an annuity for his widow, and, subject thereto, to the use of testator's son William, for life; remainder to trustees to preserve, &c.; remainders to the use of William's first, second, and every other son successively in tail male; and, on failure of such issue, then (subject to a further annuity for the widow,) to the use of his grandson J. G., the son of his late daughter Sophia G., for life; remainder to the use of trustees to preserve, &c.; remainders to the use of the first, second, and every other son of J. G. successively in tail male; and, on failure of such issue, to the use of trustees, in trust for the first, second, and every other son of testator's daughter Anna Maria successively in remainder (as in the two preceding devises) in tail male; and, on failure of such issue, in trust for testator's right heirs. Powers were given to William, and to J. G., when in possession, to charge the estates with portions for younger children. There were further bequests to the testator's widow, and his said daughter A. M.

By a codicil, reciting that, since the date of the will, testator's son William had died without issue, the testator altered his will as to certain lands not now in question, and charged the lands devised as above with further annuities to his wife and to A. M. By a second and third codicil he made his wife his executrix and residuary legatee, and gave a further legacy to A. M.

By a fourth codicil (made sixteen months after the date of the will) the testator recited that he thereby revoked "several of the dispositions" by him theretofore made, and instead thereof he devised all his estates to his daughter A. M.; and, from and after the determination of that estate, he devised the same to J. G. "and his heirs in strict entail, as in my said will directed," with the additional clause, that, if J. G. should not be thirty-one years old when the estate should devolve on him by the death of A. M., he should not take possession till he attained that age, but the rents should accumulate and be in the hands of trustees for the benefit of J. G. "and his heirs;" "and in failure of issue of the said J. G." the testator ordered that his estates should go over as was by the will directed. At the date of the codicil J. G. was eleven years old.

Held that, under the will and fourth codicil, J. G. took a life estate only.

THE Vice-Chancellor sent the following case for the opinion of this Court:—

John Hicks, of Plomer Hill House, in the parish of West Wycombe, was, at the time of his making the will and codicils now in question, and until his death, seised in fee of the estates after-mentioned. He made his will, duly executed and attested, bearing date May 4th, 1821.

He thereby devised his copyhold messuage or mansion-house, lands, and hereditaments, called Plomer Hill House, in the parish of West Wycombe, to four trustees in fee for his wife Susanna Jemima Hicks during her life or widowhood, or until she should cease to reside at the premises, or let the same, &c.; and, from and after her death, or other events referred to, the trustees were *to stand seised on such trusts, &c., as might best correspond with the uses, trusts, &c., declared as to the residue of the testator's real estates. [*39]

And he devised his freehold estate in Cornwall, called Treravel, to the trustees in fee, to the use of the trustees, their heirs, &c., during the respective lives of testator's niece Frances, the wife of William Mountstevens, and of testator's daughter Anna Maria, the wife of Francis Hearle, and the life of the survivor of them, in trust to raise out of the rent, &c., an annuity of 20*l*., and pay the same to such person as Frances Mountstevens should appoint, and to herself for her own use, in default of appointment: and to pay the residue of the rents, &c., to such person as Anna Maria should appoint, or to herself in default of appointment; but, in case Frances should die in the lifetime of Anna Maria, the whole rents, &c., to be paid to the latter, as was above directed with respect to the residue: and, from and after the decease of Anna Maria, then, subject to the above annuity, to the use of her child, or of her children, as tenants in common, in tail: and, for default of such issue, to the uses declared as to the residue of the testator's real estates. And he devised his manor of Bradenham, in the county of Buckingham, and the advowson of the living of Bradenham, and certain freehold farms in the same county, and all the rest and residue of his real estates whatsoever and wheresoever (subject to such incumbrances as might exist at the time of his death under any marriage settlement or otherwise), to the trustees in fee, to the following uses; viz. that his wife might, during her widowhood, receive thereout an annuity or rent-charge of 300*l*., with power of distress, &c.:

[*40] and, subject thereto, to the use of testator's son William *Thomas Horatio Nile Nelson Hicks, and his assigns, during his life (with a devise to the trustees to support contingent uses and estates); and, immediately after the decease of William, to the use of the first, second, and every other son of the said William, severally and successively in remainder one after another, according to the priority of their respective births, and the heirs male of the body of each such son, so that every elder of the same sons, and the heirs male of his body, should always be preferred to every younger of the same sons, and the heirs male of his body: and, on failure of such issue, to the use that Susanna should take a further annuity or rent-charge of 100*l*. during her life or widowhood, with power of distress, &c.; and the trustees take a further annuity or rent-charge of 100*l*. for Anna Maria's sole use, during a term of 99 years if she should so long live. The will then proceeded as follows:—

“And as to the said manor and other hereditaments and premises lastly hereinbefore devised, the same shall (subject to the uses, estates, and charges hereinbefore mentioned) remain and be to the use of my grandson John Graves, the only son of my late daughter Sophia Elizabeth Graves, deceased, by Charles Gray Graves, and his assigns, during the term of his natural life, without impeachment of waste; and, immediately after the decease of the said John Graves, to the use of the said Joseph Holden Strutt and George Farr” (two of the before-mentioned trustees) “and their heirs, during the natural life of the said John Graves, upon trust to support the contingent uses and estates hereinafter limited; nevertheless to permit and suffer the said John Graves, and his assigns, during his natural life, to receive the rents, issues, and profits of the same

[*41] manor, *and other hereditaments and premises; and, immediately after his decease, to the use of the first, second, and every other son of the said John Graves, severally and successively in remainder one after another, according to the priority of their respective births, and the heirs male of the body of each such son, so that every elder of the same sons, and the heirs male of his body, shall always be preferred to every younger of the same sons, and the heirs male of his body; and, on failure of such issue, to the use of the said Joseph Holden Strutt and George Farr, their heirs and assigns, in trust for the first, second, and every other son of my daughter the said Anna Maria Hearle, severally and successively in remainder one after another, according to the priority of their respective births, and for the heirs male of the body of each such son, so that every elder of the same sons, and the heirs male of his body, shall always be preferred to every younger of the same sons and the heirs male of his body; and, on failure of such issue, in trust for my own right heirs for ever.”

Proviso, that, if any son or sons of Anna Maria should be born in the testator's lifetime, the estate in tail male thereby devised unto or in trust for him should cease, and the manor, &c., lastly devised vest in the two trustees, in trust for each such son and his assigns during his life; and, after his decease, in trust for his respective first and every other son, severally and successively, according to his respective seniority in tail male.

After some other clauses (giving powers to the son to charge the manor and hereditaments last devised with jointure, and with portions for younger children, to a certain amount, and like powers to the son and grandson as to the residuary estates, when they should be in possession of, or entitled to, the rents and profits of the residuary *estates; and giving also certain powers of leasing), the [*42] testator bequeathed all his money in the funds to the first-mentioned trustees, their executors, &c., in trust to pay the interest and dividends to, or permit them to be received by, his wife Susanna, during her life or widowhood, and, after her death or second marriage, to stand possessed of the stocks, dividends, &c., in trust for the person who, under this will, should, "either as tenant for life or in tail male, be in the actual possession of" the testator's "residuary real estate hereinbefore devised, or entitled to the rents and profits thereof." A power was given to Susanna to appoint out of the trust money, stocks, &c., any sum not exceeding 500*l.*, to be raised and applied for the benefit of testator's son William, and his daughter Anna Maria, or either of them. He bequeathed to his wife all his ready money which should be in Plomer Hill House at the time of his death, certain articles of plate, his family carriage, and the wines, &c., live and dead stock, which, at his decease, should be on the Plomer Hill premises, for her own absolute use. And he bequeathed all the household goods, furniture, books, pictures, plate, &c., not before bequeathed, which should belong to him at his death, to the first-mentioned trustees, their executors, &c., in trust for his wife, so long as she should be entitled to the premises first devised; and, immediately after the determination of her estate therein, then in trust, absolutely, for the person who, under the will, should then, either as tenant for life or in tail male, be in the actual possession of his residuary real estate before devised, or entitled to the rents and profits thereof. The testator then, after legacies to servants, bequeathed all the residue of his personal estate, not before specified, to his son *William, charged with payment of debts, [*43] funeral expenses, and legacies, which, if the residue of personalty should be insufficient, were charged on the funded property before bequeathed; and, if that should be insufficient, the deficiency was charged upon the residue of realty. And it was declared that the devises and bequests to Susanna were in addition to the annuity or rent-charge of 200*l.* settled upon her on her marriage with the testator, but in lieu of all dower and thirds out of his real estates; and that the provisions for his daughter Anna Maria were in addition to what she and her husband had received before or since their marriage, but in bar and satisfaction of all claims to any real or personal estate which she might make under the last-mentioned settlement. The testator appointed his son William and the first-mentioned trustees his executors.

By a codicil, dated May 10th, 1822, reciting that, since the execution of the will (viz., on the 5th of February last), the testator's only surviving son William, had died unmarried and without issue, and that, in consequence thereof and for other reasons, the testator was desirous of making such additions to and alterations in his will as were after mentioned; the said testator devised his estate of Treravel, from and immediately after the decease of Anna Maria Hearle, to the use of Francis Hearle, her husband, if he should survive her, and his assigns, for his life (subject to the annuity of 20*l.*, thereon charged); and, from and immediately after his decease, to the uses, &c., directed by the will to take place from the decease of Anna Maria. And he charged the manor and advowson of Bradenham, and the other residuary real estates, with the payment of a further annuity or rent-charge to his wife Susanna of 100*l.*; and a further

[*44] *annuity of 200*l.*, to the before-mentioned trustees for Anna Maria, during the term of 99 years, if she and her husband, or either of them, should so long live, upon the same trusts as the former annuity; and an annuity or rent-charge of 100*l.*, to Francis, during his life. And he revoked the former bequests of plate, &c., and of his carriage, and of the wines, &c., at Plomer Hall, and of household goods, furniture, books, &c.; and, in lieu thereof, bequeathed all his effects at Plomer Hill, including the articles of plate first mentioned in the will, and his carriages there, &c., to his wife absolutely. He also charged the residue of his personalty (if sufficient) with an annuity of 30*l.* for a certain time, towards the education of his great nephew, John Mountstevens, son of William Mountstevens, if (as the testator expressed his wish to be) the said J. M. should be educated for holy orders; and he bequeathed to him, if he should qualify himself for the church, the next presentation of the living of Bradenham. And the testator bequeathed the residue of his personalty, formerly left to his son William (subject, &c.), to his said wife Susanna; and, in case of her death in the testator's lifetime, then to his nephew, — Mountstevens, the eldest son living of the said William Mountstevens.

By a second codicil, July 15th, 1822, the testator appointed his said wife Susanna sole executrix and residuary legatee.

By a third codicil, July 18th, 1822, he gave the proceeds of five shares in the County Fire-office to his wife, for her life; and after her death to Anna Maria Hearle and her husband, and the survivor of them, for their lives; and, after their decease, to the testator's "heir" in possession of his Bradenham and other estates.

[*45] *A fourth codicil was added, as follows, dated September 14th, 1822:—"And I do make and add this further codicil to my will, hereby revoking and making null and void several of the dispositions heretofore made by me in my said will and codicils of all my freehold, copyhold, and personal estate and effects of all and every kind and description; and, instead and in the place of such devise, disposition, and bequest thereof, I do give, devise, and bequeath all and every my freehold and copyhold, and personal estate and effects of every kind and description whatsoever and wheresoever situated, unto my daughter Anna Maria Hearle; and, from and after the determination of that estate, I give, devise, and bequeath the same unto my grandson John Graves and his heirs in strict entail, as in my said will directed, with this additional clause, especial and positive orders, that, in case the said John Graves should not be thirty-one years of age at the time my said estates shall devolve upon him by the death of my daughter, he shall not take or be put in possession of the same until he shall have attained such age of thirty-one years, but that the rents and profits thereof shall accumulate and be in the hands of my trustees for the use and benefit of my said grandson and his heirs; and, in failure of issue of the said John Graves, I order that my said estates and effects shall go and descend as is by my said will directed. And I do hereby ratify and confirm the several annuities and donations by me in my said will and former codicils given and bequeathed. And I do further give and bequeath unto my dear wife Jemima one other annuity of 100*l.*, to be paid her in like manner and with the like restrictions as the former ones given by my will and codicils, hereby in all other respects *but what is above-mentioned confirming

[*46] my said will and codicils."

By a fifth codicil, dated July 3d, 1823, the testator, expressing his will that what he had left his daughter should be independent of her husband, ordered and directed that her lease or appointment of or on the said estates should be valid, and that her receipt should be a discharge for any rents or other moneys paid to her, notwithstanding her coverture: but he left to her husband the rents and profits of Treravel during his life (subject to an annuity of 20*l.* to his niece Mrs. Mountstevens for her life only), and also a further annuity of 100*l.* during his life out of the Bradenham estates. And he gave and confirmed to his wife,

N. S. 287. See p. 50, *antè*. The words of devise there were, I give, &c., to William Fetherston, "and to his heirs male according to their seniority in age, on their respectively attaining the age of twenty-one years, all my estates real and personal in lands, houses and tenements not hereinbefore disposed of, the elder son surviving of the said William Fetherston and the heirs male of his body lawfully begotten always to be preferred to the second or younger son: and in case of the failure of issue male in the said William surviving him, or their dying unmarried and without lawful issue male attaining the age of twenty-one years, then to Theobald Fetherston, brother of the said William, and his heirs male lawfully begotten, on attaining the age of twenty-one years, the elder to be preferred to the younger; and in case of the death or failure of the issue male of the said Theobald lawfully begotten, and their not attaining the age of twenty-one years, then to my right heirs for ever." *There it was held that the words of devise gave an estate tail, and not a life estate only, to the first devisee; the expressions, "the elder son surviving of the said William Fetherston, and the heirs male of his body," had a very strong tendency to show that the eldest son was intended to be the stirps from which the estate of inheritance should commence; but the subsequent words rendered that questionable; and therefore the House of Lords would not say that the estate tail, clearly given to William Fetherston by the first words of devise, was cut down by the subsequent clauses. In the present case, to cut down the estate tail given in the beginning of the codicil, the subsequent words "in failure of issue of the said John Graves" must be qualified in a manner not warranted by any principle or authority, namely by reading them as "in failure of issue male of John Graves's first and other sons."

It has been held that a clause giving an estate tail ought not to be cut down by inference from subsequent words, where the effect of such a construction would be to exclude children of the first taker who were apparently not meant to be excluded. Thus in *Langley v. Baldwin*, 1 Eq. Ca. Abr. 185, cited in *Attorney-General v. Sutton*, 1 P. Wms. 759; see *Allanson v. Clitherow*, 1 Ves. sen. 26; *Vaughan v. Farrer*, 2 Ves. sen. 186, where the devise was to A. for life, remainder to his first, second, and so to his sixth son, and, if A. should die without issue male of his body, then to B. in fee; it was decided that, as there was no limitation beyond the sixth son, and as A. might have a seventh and other sons, who were not meant to be excluded, therefore, to let in those sons, A. must be held to take an estate tail. Here, by the limited construction insisted upon for the defendant, the daughters of John Graves would be excluded. The principle of the last cited case was acted upon by Lord Chancellor Hardwicke in *Allanson v. Clitherow*, 1 Ves. sen. 24. In *Banks v. Holmes*, cited in *Morse v. Lord Ormonde*, 1 Russ. 394, and note (a) *ibid.*, where the words "without issue" were used in a devise, the House of Lords refused to construe them as "without such issue as aforesaid;" though the case was one in which, if possible, such a construction would have been favored.

It may, perhaps, be contended that John Graves was intended to take an estate in tail general after the determination of the estates given to his first and other sons, and *Doe dem. Bean v. Halley*, 8 T. R. 5, may be cited. But in that case there was a clearly expressed intention to prefer all the issue male of the person first named to the family afterwards named to take in remainder: in the present codicil no intention is shown to exclude daughters of John Graves, or of any of his sons.

Cowling, *contrà*. The fourth codicil, when taken in connexion with the will and other codicils, shows the testator's intention to have been that the plaintiff should still take in the manner originally pointed out in the will. Three properties are devised by the will. (He then read the respective limitations as to Plomer Hill, Treravel, and Bradenham with the residuary estates.) The plaintiff, by the original devise, took a remainder for life only, expectant on the determination of the estates limited to William, the testator's son, and William's first and her sons, with remainder over to the plaintiff's first and other sons in tail male. William died unmarried, and without issue; and in conse-

quence the first two codicils were made, adding some new devises and bequests, and making the testator's wife sole executrix and residuary legatee. The fourth codicil also was framed to provide for the consequences of William's death. John Graves, the grandson, being then only eleven years old, the testator did not wish, in case of his own decease, that Bradenham and the residuary estates should vest in so young a person : he therefore interposed a life estate in Mrs. Hearle (whom, in the preceding codicil, he had shown an increased disposition to favor), with a direction that, in case of her death, the rents and profits should be received by the trustees till John Graves attained the age of thirty-one. These, and the addition of a new bequest to the testator's wife, are all the purposes of the fourth codicil ; for it has been decided that the words of revocation with which it begins apply to the residuary property only : *Doe dem. Hearle v. Hicks*, 8 Bing. 475. [PATTERSON, J. The codicil says, that the rents and profits shall accumulate in the hands of the trustees for the use of John Graves and his "heirs." That shows that the testator uses the word "heirs" very loosely.] "Heir" is used perhaps as inaccurately in the third codicil.

The words of the codicil, then, being "unto my grandson John Graves, and his heirs in strict entail as in my will directed," if it is held that an estate tail is given, the words "as in my will," &c., become inconsistent. And it would be in the power of the devisee to cut off the entail, in direct contradiction to the [55] will. *[PATTERSON, J. That argument would apply to the will itself. The first or other son of John Graves taking under the will might have cut off the entail.] According to the plaintiff's construction, Mrs. Hearle's family were disinherited by the codicil, though it appears that, down to the time of making it, the testator's favor towards her had increased. By the will, the funded property is left, ultimately, in trust for the person who shall, "as tenant for life or in tail male," be in possession of the residuary real estate, or entitled to the rents and profits. Under the fourth codicil, according to the argument for the plaintiff, the destination of the residuary real estates is changed, without any corresponding change as to the personality ; yet no reason appears for a distinction between them. If, notwithstanding these objections, a paramount intent be relied upon, it lies on the plaintiff to show such an intent. The words "as in my said will directed" have the same effect as if the devise in the will were repeated in the codicil. And, in *Doe dem. Hearle v. Hicks*, 8 Bing. 488, TINDAL, C. J. (after referring to the clause in which the words occur) says, "the only alteration effected by the codicil is, the substitution of a devise to the daughter for life, instead of that given to the son, to take place immediately next before the estate given to John Graves." As to the words "in failure of issue of the said John Graves," the rule is that, where a particular class of issue has been mentioned, the words "in failure of issue" shall be construed to mean "such issue." Thus in *Blackborn v. Edgley*, 1 P. Wms. 600, the testator devised his freehold estate to certain persons in trust to convey the [56] same to Hower Edgley for life, remainder to trustees during H. E.'s life, to preserve contingent remainders ; remainder to his first, &c., son in tail male ; remainder to his daughters in tail general, as tenants in common ; remainders over in fee, "if H. E. should die without issue." It was contended that by these last words H. E. took an estate tail ; and the rather, because "otherwise the daughters of his son could never take, which would be against the testator's intention : " but Lord Chancellor PARKER said, "If I devise an estate to A. for life, and after his death without issue, then to B., this will give an estate tail to A." "But here being a limitation upon H. E.'s death to his sons, and after to his daughters, the following words [*if Hower Edgley should die without issue*] must be intended, if he should die without such issue : " and it was held that no estate tail passed. That decision is in point. In *Langley v. Baldwin*, cited 1 P. Wms. 759, see p. 52, *antè*, there was not a class of issue mentioned ; the limitations were to the first, second, and soon to the sixth son, of the first devisee ; and that was relied upon in the decision. In *Doe dem. Bean v. Halley*,

8 T. R. 5, the devise was to M. H., remainder to his eldest son lawfully to be begotten, and the heirs of such eldest son; and, in default of issue male of M. H., then over. There the words "issue male" could not be taken to mean "such issue." The objection made in the present case, that, upon the defendant's construction of the codicil, daughters would be excluded, was also taken, but did not prevail, in *Blackborn v. Edgley*, 1 P. Wms. 605. And it is observable, that, in the present case, powers are given by the will to the testator's son and grandson to charge *the estates with portions for younger children. In *Morse v. Marquis of Ormonde*, 5 Madd. 99, the testatrix devised estates [*57] in trust for her daughter for life; remainder to the use of the first and other son and sons of her daughter successively in tail male; remainder, in default of such issue, to the daughter and daughters of her said daughter, if more than one, as tenants in common in tail; cross remainders between them in tail; remainder to an only or only surviving daughter in tail; remainder, in default of *all such issue* of her said daughter, to trustees for a term, to raise and pay such legacies as were in that will after bequeathed. And she afterwards, by that will, bequeathed certain legacies, from and immediately after the decease and *failure of issue* of her said daughter. It was contended that the legacies were too remote, because they were made to depend on a failure of issue generally; and that the term vested at one time and the legacies became payable at another: but Leach, V. C., held that, having regard to the whole context, the words "failure of issue" might be construed as meaning failure of "issue of my said daughter as aforesaid:" and, on appeal, this judgment was affirmed, *Morse v. Lord Ormonde*, 1 Russ. 382. So here, "on failure of issue," in the codicil, is in effect only a repetition of the words "on failure of such issue" in the will.

The cases, including *Robinson v. Robinson*, 1 Burr. 38, and *Coulson v. Coulson*, 2 Stra. 1125, 2 Atk. 246, 247, where the construction has been governed by the paramount intention of the testator, cannot assist the plaintiff here, because the construction insisted upon by him is against the paramount intent. **Jack v. Fetherston*, 9 Bligh. N. S. 237; is no authority for the plaintiff. The devise there was to William Fetherston and his heirs [*58] male according to seniority, on their respectively attaining twenty-one. There was no prior devise inconsistent with this. Looking at the words "heirs male" as they were there used, there could be no doubt that those "heirs" were intended to take by descent; and the rule in *Shelley's case*, 1 Rep. 104 a, of course applied to the estate of the first devisee. *Doe dem. Bosnall v. Harvey*, 4 B. & C. 610, is a case of the same class. In *Bennett v. Lowe*, 7 Bing. 535, where the devise was to and equally amongst A., B., and C., and, if any of them should happen to depart this life leaving a daughter or daughters, then the share of her so dying to go to such daughters according to seniority, and, in case A., B., or C., should die "without issue" in the lifetime of certain other parties, her share was devised over, it was held (the case being argued with reference to the context, and to intention) that the words "without issue" did not enlarge the estates of A., B., and C., to estates tail. In the present case, looking to all the provisions of the fourth codicil, there appears an intention rather to restrict than extend the interest to be taken by John Graves. At all events, the plaintiff's construction of the codicil ought to be clearly made out, as it operates in revocation of the estate formerly given to Mrs. Hearle's family. A reasonable doubt whether or not such revocation was intended will not suffice. This is laid down by TINDAL, C. J. (as to another devise in this will) in *Doe dem. Hearle v. Hicks*, 8 Bing. 480. It is also suggested [*59] *there by the Lord Chief Justice that the testator appears to have framed the fourth codicil without legal assistance: no stress, therefore, ought to be laid upon particular expressions in that codicil, varying from those used in other parts of the will.

Sir John Campbell, Attorney-General, in reply. The question in *Doe dem. Hearle v. Hicks*, 8 Bing. 479, as stated by TINDAL, C. J., has no bearing on

that now before the Court, which is as to the operation of the fourth codicil, reference being had to the death of the testator's son, which took place before that codicil was executed. The argument, that to give an estate tail to the first devisee would enable him to defeat the testator's intention by cutting off the entail, may be used in every case where the question is whether a first devisee takes in tail or for life.¹ Supposing the rule to be correctly laid down, that where an estate is limited to a class of issue, a devise over "in failure of issue" must be construed as if it were "in failure of *such* issue," that does not apply to a case where the words "in failure of issue" are added in a codicil, after a change in the state of the family. But no authority has been cited, establishing the supposed rule as a general proposition. *Blackborn v. Edgley*, 1 P. Wms. 600, shows only that, under certain circumstances, the words "without issue," may mean "without such issue." In *Morse v. Marquis of Ormonde*, 5 Madd. 99, 1 Russ. 382; the words upon which the question arose were "failure of issue;" but the words of limitation in a prior part of the will, having reference to the same event, were, "in default of all such [*60] *issue." The word "such" might reasonably be carried on from one clause to the other. In *Bennet v. Lowe*, 7 Bing. 535, the reasons of the judgment do not appear; but, in the argument which prevailed, the particular circumstances of the devise were insisted upon; as that the testatrix knew how to employ proper words of inheritance where such words were requisite; that, if the first class of devisees took more than life estates, the property might descend to males, whom the testatrix evidently meant to exclude; and that the words "without issue" were clearly explained by the preceding clause, which provided that if any of the devisees should die, "leaving a daughter or daughters," the share of her so dying should go "to such daughters," as they should be in seniority. Regard was had both to the general and to the particular intent, in the construction there adopted. *Cur. adv. vult.*

The following certificate (dated February 2d, 1836) was sent in the ensuing vacation :—

This case has been argued before us in counsel, and we are of opinion that the plaintiff, John Graves, takes an estate for life in each of the estates in Buckinghamshire and Cornwall, under the will and codicils mentioned therein.

J. PATTESON,
J. WILLIAMS,
JOHN TAYLOR COLERIDGE.

¹ See judgment in *The Earl of Scarborough v. Doe dem. Savile*, 3 A. & E. 963, 964.

ticular actions, I. Assumpsit 1, 5 B. & Ad. vii., it is said that the plea of non assumpsit shall operate only as a denial in fact of the express contract or promise alleged, or of the matters of fact from which the contract or promise alleged may be implied in law. And that, in actions against carriers and other bailees, for not delivering or not keeping goods safe, &c., this plea "will operate as a denial of any express contract to the effect alleged in the declaration, and of such bailment or employment as would raise a promise in law to the effect alleged, but not of the breach." And other instances are given, bearing in like manner on the present question. Here no express promise is relied upon: the plaintiff's qualification as an apothecary is one of the "facts" from which the alleged contract is to be "implied in law." *Edmunds v. Harris*, 2 A. & E. 414, may seem to contradict this reasoning; but the authority of that case has been much questioned.¹ A great hardship would be thrown upon defendants in cases like this, if the new rules obliged them to prove, and to plead, the want of qualification, which qualification ought to be part of the plaintiff's case. In *Moore v. Boulcott*, 1 New Ca. 323, the non-delivery of a bill by an attorney was pleaded in answer to an action for his work and labor; but there no question arose as to the effect of the new rules upon stat. 2 G. 2, c. 23, s. 23; and the words of that section are, *that no attorney "shall com- [386] mence or maintain any action" for his fees, &c., till one month after delivery of his bill; not, as in the Apothecaries' Act, that he shall be precluded from recovering unless he give certain proof on the trial.

Humfrey, contra. The new rules, when once in force, have the authority of an act of parliament, by stat. 3 & 4 W. 4, c. 42, s. 1. In *Graham v. Partridge*, 1 M. & W. 395, S. C. Tyr. & G. 754, the Court of Exchequer held the statute of set-off, 2 G. 2, c. 22, s. 13, to be in effect repealed by the rule which requires a set-off to be specially pleaded. [*Whitehurst*. That was on the ground that the statute 2 G. 2, c. 22, s. 13, was not a statute introducing a "power of pleading the general issue," within the meaning of stat. 3 & 4 W. 4, c. 42, s. 1, and therefore that the rule had not "the effect of depriving any person" of that power.] The only effect of the Apothecaries' Act, 55 G. 3, c. 194, s. 21, is, that the plaintiff shall be called upon to prove his qualification, provided there be anything in the cause that raises the question; but not where, by the state of the record, that fact is not material to the issue. Where, for instance, a tender is pleaded, that is equivalent to an admission that the plaintiff was qualified as an apothecary. Suppose it could be shown that the defendant had expressly admitted the qualification. [*PATTESON, J.* That, as against him would (if available) be evidence on the trial to satisfy the statute.]

Humfrey then showed cause in *Wills v. Langridge*, relying on the same arguments as in the former case.

* *Waddington*, contra. A defendant pleading the general issue as to [387] part of the demand, and a tender as to the residue, admits only that the sum tendered is due. That was laid down in *Simpson v. Routh*, 2 B. & C. 682, where, in an action for money had and received, for the overplus of a sum levied by distress, this Court held that the plaintiff was properly nonsuited for want of a demand, though part of the sum claimed had been tendered. In *Seaton v. Benedict*, 5 Bing. 28, which was an action of assumpsit for goods sold and delivered, it was held that a tender or payment into Court recognised the defendant's liability only to the extent of the sum tendered or paid in, and that he might dispute it as to items not covered by that sum. A similar rule is laid down in *Long v. Greville*, 3 B. & C. 10; see *Meager v. Smith*, 4 B. & Ad. 673; *Harrison v. Douglass*, 3 A. & E. 396, as to payment of money into Court, with the exception that, if money is paid in upon a special contract, that contract is admitted as alleged. In the present case it might be that the money was paid

¹ See *Hayselden v. Staff*, ante, 159, where *Edmunds v. Harris* is decided not to be a binding authority. See also the cases cited, ante, 158-162; some of which were mentioned in the present argument.

in for goods furnished after the plaintiff had become qualified. [PATTESON, J. In *Lipscombe v. Holmes*, 2 Camp. 441, which was an action for work and labor as a surgeon, Lord ELLENBOROUGH held that a payment into Court admitted the plaintiff's right to sue in that character.] The cases in Banc contradict that decision. Then, supposing the tender not to weigh on behalf of the defendant, the case is clearly distinguishable from that of an action by an attorney who has not delivered his bill. A defendant sued by an apothecary cannot know whether he is qualified or not: a client must know whether or not he has received a bill. And the positive enactment of stat. *55 G. 3, c. 194, [*388] s. 21, makes the proof of qualification at the trial a condition precedent to the apothecary's recovery of his charges.

Lord DENMAN, C. J. (after reading the clause last referred to). The statute requires that, before any person shall be allowed to recover charges made by him as an apothecary, he shall prove that he was duly qualified. The undersheriff, in the first of the cases before us, held that the qualification was a part of the plaintiff's title to recover, which the statute made it imperative upon him to prove, and that, in the absence of such proof, he must be nonsuited. I think that the ruling was right. There is a difference between cases in which proof is made necessary by a statute on principles of public policy, and where it is required merely for the security of individuals in transactions between themselves. And a defendant cannot know that a plaintiff is not qualified as an apothecary; it would be great injustice to call upon him to plead and prove the want of qualification, especially where he is told by a statute that, unless the plaintiff proves himself qualified, he cannot succeed. The case, therefore, is quite different from that of an attorney suing without having delivered a bill. There the fact is within the knowledge of the defendant; and he ought, if he has no other defence, to give notice of the defect insisted upon to the plaintiff, who may then deliver his bill and bring another action. And the enactment which governs that case is differently framed from sect. 21 of stat. 55 G. 3, c. 194, which makes proof of qualification on the trial a condition precedent to the plaintiff's recovery. The tender in the second case has not the effect supposed by the plaintiff. *It [*389] is too much to say that an offer of payment, so generally made, admits the plaintiff to be an apothecary entitled under the act to recover charges in that character. The defendant may have been willing to get rid of the action by a tender without knowing whether the plaintiff was a qualified apothecary or not. The new rules do not apply. The contract is not avoided here; but the statute gives a protection to the defendant, and prevents the plaintiff from recovering, if he fail, on the trial, to invest himself with a certain character. The rules, therefore, must be, in the first case, discharged; in the second, absolute.

LITTLEDALE, J. By the rules, Hil. 4 W. 4, Pleadings in particular actions, tit. Assumpsit, I. 3, 5 B. & Ad. viii., matters "which show the transaction to be either void or voidable in point of law" must be specially pleaded. If, for example, such a case as *Forster v. Taylor*, 5 B. & Ad. 887, were to occur again, there is no doubt that the defence must be pleaded. Here, the contract is not avoided by the general policy of the law, or defeated with reference to the particular dealing between the parties; but there is an enactment which affects the character of one of the parties personally, and excludes him from suing. This is not matter to be pleaded; for, in the nature of things, the defendant cannot be expected to know whether the plaintiff fills the character in question or not. The matters of defence arising upon statute, which are noticed in the clause of the new rules just cited, and in which special pleas are required, all refer to something which affects the nature of the contract itself. As to the *tender, [*390] I am of opinion that that does not admit the character in which the plaintiff sues, but that, upon the plea of non-assumpsit, he may dispute the character as if no tender had taken place.

PATTESON, J. These motions bring under review an opinion which I delivered, after much consideration, in *Morgan v. Ruddock*, Harr. & W. 505; S. C.

4 Dowl. P. C. 311. I still adhere to that opinion. The words of stat. 55 G. 3, c. 194, s. 21, "unless such apothecary shall prove on the trial, that he was in practice," &c., cannot be got over. As to the second of the present cases, *Reid v. Dickons*, 5 B. & Ad. 499, is a material authority; because there it was admitted that there was only one contract, under which the plaintiff claimed; and the action was for a residue of money owing on that one contract. In that case 110*l.* was paid into Court; and the defendant pleaded the general issue and the statute of limitations. PARKE, J., says there, "The payment of money into Court admits the contract as alleged, and a right to recover 110*l.*; but beyond that sum, every defence is open."

WILLIAMS, J. I am of opinion that the first rule must be discharged, and the second made absolute; and I found myself on the 21st section of stat. 55 G. 3, c. 194. It would require something that should exclude all doubt, to satisfy me that the new rules of Court did away with that enactment.

First rule discharged.
Second rule absolute.

*The KING v. The Churchwardens of ST. JAMES, WESTMINSTER. [*391]
June 10.

By statute 1 Jac. 2, c. 22 (1685), the parish of St. James, Westminster, was created, by dividing a district from the parish of St. Martin; and it was enacted, that the inhabitants of St. James's "shall be from time to time subject to the laws and statutes now in force, or hereafter to be made for the choice of churchwardens," &c., "and such other like parish officers, and other parochial duties within the said parish, in like manner as the inhabitants of the said parish of St. Martin's are or might be subject and liable unto." St. Martin's had been governed by a select vestry: and provision was made for continuing such a vestry in St. James's.

Before 1685 the practice in St. Martin's on the election of the two churchwardens had been, that the vestry chose them by scoring certain prepared lists (the greatest number of scores carrying the election); but, by usage, the junior churchwarden of the preceding year was re-elected of course. It did not appear how or when this practice originated. The power of the select vestry to choose the churchwardens was often disputed in St. Martin's after 1685; and, for the last two years, the elections by them were discontinued, and the officers chosen according to stat. 58 G. 3, c. 69. No alteration was made in St. James's.

Held, that the mode of election practised in 1685, was one of the laws then in force, by which, under stat. 1 Jac. 2, c. 22, the parish of St. James was to be governed. And that the abandonment of the custom by St. Martin's did not oblige St. James's to discontinue it also.

St. James's had adopted Sir John Hobhouse's act. Agreed, that this made no difference.

A RULE nisi was obtained in this term (May 24th), for a mandamus, calling upon the then churchwardens of St. James, Westminster, "to cause a notice to be given in the parish church and chapels of the parish of St. James, Westminster, for convening a meeting of the inhabitants of the said parish for the purpose of electing churchwardens and sidesmen for the said parish for the year ensuing, in like manner as, and according to the laws and statutes under which, the churchwardens and sidesmen for the parish of St. Martin in the Fields, in the said county, are now chosen." The material statements in support of the rule were as follows.

Henry Rice, formerly vestry-clerk of St. James, deposed, on information and belief, "That the churchwardens and sidesmen of the said parish of St. James *were always chosen, after the year 1685, by the select vestrymen appointed for the said parish of St. James, under and pursuant to the [*392] statute of 1 James 2, c. 22; and that the mode of proceeding, on the part of

¹ The churchwardens having gone out of office before cause was shown, it was ordered, on the motion of the Attorney-General, that the succeeding churchwardens should be at liberty to show cause.

² "For erecting a new parish, to be called the parish of St. James, within the liberty of Westminster." The act, sect. 1, marks out a precinct by certain bounds and limits,

the said select vestrymen, after the said year 1685, was to meet together in the vestry-room of the said parish church, on the Thursday before Easter in every year, and 'score,' as it was called, first for churchwardens, and next for four sidesmen, which was done by a paper, with the names of eligible persons for each office written thereon, being passed round by the select vestrymen present, each in their turn making a mark; and the names which were afterwards found to have most scores or marks against them were chosen churchwardens; and the four names with most scores or marks against them were chosen sidesmen; and the junior or last named churchwarden of the first and of every succeeding year it was always the custom to continue the senior churchwarden of the next year; and such continuing churchwarden, with the person so scored for to be associated with him as aforesaid, was afterwards, at another meeting of the select vestrymen, holden on the Tuesday in Easter week, confirmed by the select vestrymen there present, as the churchwardens and sidesmen of the parish for the year ensuing."¹ That, as the *deponent was informed, &c., such mode of proceeding was adopted in the parish of St. James in conformity with the mode of proceeding adopted and used for the choice of churchwardens and sidesmen by the select vestry which, in 1685, regulated the affairs of St. Martin in the Fields, the last-mentioned vestry being at that time a select vestry granted, at the instance of certain *of the inhabitants of St. Martin's, by an instrument under the hand of the diocesan or ordinary, dated June 28th, 1662.

That the inhabitants of St. Martin's have often, since 1685, resisted and disputed the power of the select vestry to regulate its affairs or appoint churchwardens, and such power has been the subject of much litigation; and that, for the last two years, in consequence of the result of a late litigation, which was determined against the vestry, they have ceased to claim or exercise such power; and the choice of churchwardens and sidesmen for St. Martin's has been by the inhabitants at large; and the course has been that, upon notices given (as described in the affidavit), the inhabitants of St. Martin's, being rate-payers, have, and enacts that it shall be a distinct parish, divided and exempt from the parish of St. Martin.

¹ The sections of stat. 1 Jac. 2, c. 22, chiefly bearing upon the present case were,—

Sect. 9, which enacts, "That the inhabitants of the said parish of St. James shall be from time to time subject to the laws and statutes now in force, or hereafter to be made, for the choice of churchwardens, overseers of the poor, scavengers, surveyors of the highways, constables, and such other like parish officers, and other parochial duties within the said parish, in like manner as the inhabitants of the said parish of St. Martin's are or might be subject and liable unto (except where it shall be otherwise hereby appointed)."

Sect. 10 appointed the first churchwardens by name, to hold office till Easter, 1686, and enacted, that "they and their successors, churchwardens of the said parish of St. James, shall have and receive such and the like church duties and perquisites as the churchwardens of the said parish of St. Martin do, may, might, or ought to receive, and shall be accountable for the same, and all other money that shall come to them as churchwardens, in such manner as churchwardens of other parishes within the city and liberties of Westminster are or ought to be."

Sect. 11 provides and enacts, "That all such vestrymen of the said parish of St. Martin as are inhabitants within the precincts aforesaid, and all such others as are now constituted to be supervisors and commissioners for the said church of St. James by the said Lord Bishop of London, shall be vestrymen of the said parish of St. James; and they, together with the said rector of the said parish, or any six or more of them, shall and are hereby authorized, at their first or second meeting after the end of this present session of parliament, to elect so many additional vestrymen, inhabitants and householders within the said parish, as shall make the number of the whole, with the rector and churchwardens for the time being, to be four-and-thirty persons; and the said vestrymen, or any six or more of them (whereof the rector for the time being, or his assistant or clerk, by his appointment, and one of the churchwardens to be two), shall and may have and exercise the like power and authority for ordering and regulating the affairs of the said parish of St. James, as the vestrymen of the said parish of St. Martin now have and exercise in reference to the said parish of St. Martin; and upon the death or other voidance of any such vestryman, they, or any six or more of them, shall and may elect a fit person, inhabitant and householder in the said parish, to supply the same."

at meetings holden pursuant to such notices, elected churchwardens and sidesmen by voting in the manner prescribed by stat. 58 G. 3, c. 69, "for the regulation of parish vestries."

That, in June, 1832, the churchwardens of St. James, Westminster, after the requisite proceedings, gave notice in the London Gazette, that that parish had adopted Sir John Hobhouse's act, 1 & 2 W. 4, c. 60, whereupon the select vestry appointed under 1 Jac. 2, c. 22, ceased to regulate the parish affairs. The churchwardens named in the rule were applied to by the vestry-clerk to give notice, in the parish church, of a meeting of the inhabitants of the parish, to elect churchwardens for the year ensuing, but refused to give such notice, unless ordered by this Court to do so.

The affidavits in opposition to the rule set out a minute of vestry, dated April 1st, 1686, showing the mode in which the first election of churchwardens took place after the passing of stat. 1 Jac. 2, c. 22, namely, by *scoring. The minute referred, in several parts, to "the custom of the parish" relative [*395] to the proceedings described.¹ Copies were added of the vestry minutes of April 20th, 1835, when the late churchwardens were chosen by scoring, which choice was confirmed in vestry, 21st April, 1835; also the minutes of March 31st, 1836, when the present churchwardens were chosen by scoring, which choice was confirmed in vestry on the 5th of April following, and the churchwardens sworn in on the 26th of May. And it was stated by the vestry-clerk of St. James's, "That, although, by several acts of parliament relating to this parish, passed subsequently to the said act, 1 Jac. 2, the appointment of overseers of the poor and other officers has been fixed to be made at a certain time and in a particular manner, *such appointments have always been expressly declared, by the several acts relating thereto, to be vested in the [*396] select vestry of the said parish, and that no public meeting of the inhabitants of the said parish has ever, to the best of deponent's knowledge and belief, been called for the election of churchwardens, overseers, or any other officers, excepting that the said parish having adopted an act," &c. (Sir John Hobhouse's act), "a public meeting of the parishioners is always called in the month of May in every year, to elect vestrymen and auditors of accounts, according to the provisions of the said act."

Sir J. Campbell, Attorney-General, and J. Jervis, now showed cause.* The question is, whether the churchwardens of St. James's parish are to be elected by the rate-payers at large, or by those who now constitute the vestry under Sir John Hobhouse's act.* The ninth section of stat. 1 Jac. 2, c. 22, might leave

¹ The minute was as follows:—"At a vestry the 1st day of April, 1686. Present, Dr. Thomas Tennison, rector, eleven other members, and Mr. John Haines, and Mr. William Nott, churchwardens. On this day, according to the custom of the parish of St. Martin's, churchwardens and sidesmen were nominated for this parish for the year ensuing, and notice was sent to have them attend at the vestry on Tuesday, in Easter week, to be then confirmed in their places; and at the same time the like notice was sent to several persons, out of which overseers of the poor were to be elected also for the year ensuing. The proceeding therein was as followeth: that is to say—The names of four persons were written in a paper, out of which two were by strokes of the gentlemen of the vestry noted to be churchwardens; and the first of those four written in the said paper was, according to the custom of St. Martin's, the junior churchwarden of the last year; and the greater number of strokes were for Mr. William Nott and Mr. William Hargrove, who were the two first in the said paper named to be churchwardens. There was also in the like manner the names of six persons written in a paper, out of which four sidesmen were to be nominated, whereof the two first named were the two juniors of the last year, who were chosen of course, according to the custom aforesaid; and the two eldest next them were also nominated, which were Mr. James Fearn and Mr. Joseph Parsons; and the rule in this case is, that the sidesmen are supplied out of those that have been overseers or fined for that office, to be named according to their seniorities." Nott was the second of the two persons named in stat. 1 Jac. 2, c. 22, s. 10, as churchwardens up to Easter, 1686.

² Before Lord DENMAN, C. J., LITLEDAL, PATTESON, and WILLIAMS, Js.

³ Stat. 1 & 2 W. 4, c. 60, s. 27, enacts, "That from and after the adoption of this act

some doubt on the subject; but sect. 11 explains the former clause, and is decisive. It enacts that the vestrymen of St. James's shall have and exercise "the like power and authority" for regulating the affairs of that *parish, "as [*397] the vestrymen of the said parish of St. Martin," now have and exercise in reference to the said parish of St. Martin, that is, according to the custom at that time established in both parishes. If it be clear that the usage in question, as to the choice of churchwardens, existed, *de facto*, when the act of 1 Jac. 2, c. 22, passed, the act must be taken as adopting that usage, although it may not be conformable to the common law course of election. This was the mode in which the Covent Garden Market Act, 53 G. 3, c. lxxi. (local and personal, public), was construed in *The Duke of Bedford v. Emmett*, 3 B. & Ald. 366. It does not appear that, when the statute of James passed, any one supposed the then existing mode of election to be illegal. Whatever construction may be given to sect. 9, it cannot be supposed that every statute which might affect the parochial affairs of St. Martin's was to have a similar operation in St. James's. The adoption of Sir John Hobhouse's act by the parish of St. James does not alter the present question, there being, in sect. 27, a saving of local vestry acts, except as to elections.

Sir W. W. Follett, *contra*. The affidavits state that the power assumed by the select vestry in St. Martin's had been a matter of much contest before the alteration in the mode of electing officers there. The language of stat. 1 Jac. 2, c. 22, shows that changes in the government of the parishes were contemplated. Sect. 9 enacts, that the parish of St. James shall be "from time to time" subject to the laws and statutes "now in force, or hereafter to be made," for the choice of [*398] officers, in like manner as the inhabitants of St. *Martin's "are or might be subject and liable unto." Sect. 11 does not apply to the election of parish officers, which is already disposed of by sect. 9. The enactment in sect. 9, referring to the "laws" in force for the choice of officers, cannot contemplate a mode of election which the Court, if it came before them, would not hold legal. In the absence of any regulation by statute or established custom, the churchwardens ought to be elected by the inhabitants; and nothing has been pointed out here, which, at the time when stat. 1 Jac. 2, c. 22, passed, could have legally taken away the common law right of election from the inhabitants of St. Martin's, and vested it in a select body. [Lord DENMAN, C. J. There may be some little fallacy in the use of the words "legal" and "illegal," as applied to the custom in question. You mean to speak of it, not as against morals or policy, but as not entirely warranted by law.] That is so. Either the words "laws and statutes," in the statute of James, contemplate local laws and usages, and then they can only refer to legal ones; or they allude to the general law of the land, and then the common law mode of election must be meant. It may be admitted that the adoption of Sir John Hobhouse's act does not affect the question.

Cur. adv. vult.

Lord DENMAN, C. J., on a subsequent day of the term (June 13), delivered the judgment of the Court.

We are clearly of opinion that the act of parliament intended to direct the election of churchwardens to take place in the new parish of St. James, carved out of St. Martin's, according to the prevailing course of proceeding in the last-named parish. The language is not *entirely free from doubt; but, con- [*399] sidering that a certain custom had long prevailed without question, the

in any parish, the vestry shall exercise the powers and privileges held by any vestry now existing in such parish, and the authority of such vestry may be pleaded before any justice or justices of the peace, or in any court of law," &c., "and all parish officers or boards shall account to them in like manner as they have accounted to the said vestry: provided always, that nothing in this act shall be deemed, construed, or taken to repeal, alter, or invalidate any local act for the government of any parish by vestries, or for the management of the poor by any board of directors and guardians, or for the due provision for divine worship within the parish, and the maintenance of the clergy officiating therein, otherwise than is by this act expressly enacted regarding the election of vestrymen and auditors of accounts."

phrase, "subject to the laws and statutes now in force," must be taken as a description of the existing practice. If the intention had been that, in case of any change in the constitution of St. Martin's vestry, a similar change should immediately take place in St. James's, some reference must have been had to the mode in which the law was to undergo alteration. Such an enactment would have been superfluous, if the change were effected by act of parliament, by which the effect of it on St. James's parish might have been the subject of express regulation; and, if a new state of things in St. James's had been intended to follow every new state of things in St. Martin's, produced by an opinion that the ancient vestry had not a legal origin, it cannot be doubted that the act would have prescribed some means of determining upon its legality, as the verdict of a jury, or the sentence of a Court. The answer may be that no such doubt ever crossed the mind of the legislature in James the Second's time; but, if that be correct, it seems to follow that the custom, as it existed in the old parish, was established in the new, without any reference to its origin.

The rule must therefore be discharged.

Rule discharged.

*CLAY *v.* BOWLER. June 10.

[*400]

A person, having been in prison twelve months in execution on a judgment for a debt not exceeding 20*l.*, exclusive of costs, was disordered in mind, and unable to transact business. His wife gave notice to the plaintiff that she should apply to the Court for his discharge under stat. 48 G. 3, c. 123; and she applied accordingly.

Notices had been given by the plaintiff for the purpose of bringing up the defendant under the compulsory clause, 32 G. 2, c. 28, s. 16: but no account had been obtained from him.

Held, that the Court might act upon the wife's application, and discharge the prisoner.

THE defendant having been in prison more than twelve successive calendar months in execution on a judgment obtained against him in the King's Court of Record of his Honor of Peverel, holden at Lenton, Nottinghamshire, for a debt not exceeding 20*l.*, exclusive of costs, his wife gave notice to the plaintiff that she should apply to this Court for his discharge, pursuant to stat. 48 G. 3, c. 123, and the rule, Hil. 2 W. 4, I. s. 90; 3 B. & Ad. 388.

E. V. Williams, in this term (May 25th), moved accordingly, and stated that the material question would be, whether the wife's application could be treated as that of the husband for the purpose of the act. On this point he relied upon the affidavit of a surgeon, who deposed that he had attended the defendant for upwards of twelve months last past; that from repeated attacks of paralysis, the defendant then was, and had been for eight months last past, of unsound mind, totally incapable of making an affidavit, or of understanding the nature thereof, and incapacitated from doing any kind of business, or expressing himself in any way to be understood. A rule nisi was granted.

Whitehurst now showed cause. Notices were given on behalf of the plaintiff, after the defendant had been *three months in custody, for the purpose of bringing him up under the compulsory clause (s. 16) of stat. 32 G. 2, c. 28;¹ but no discovery of his estate and effects could be obtained. The merits, therefore, are against the application; though it cannot be contended, after some late decisions, that the proceeding referred to is any bar to the discharge under stat. 48 G. 3, c. 123. But that statute, sect. 1, entitles the person or persons in execution to be discharged, "upon his, her, or their applications" to one of the superior Courts. This cannot be called the defendant's application. He is of unsound mind, and the notice is not given in his name, nor does it even profess to be given by the wife on his behalf. This application is not necessary to prevent his lying in prison, for he might be relieved under sect. 73

¹ The notice appeared to have been given about seven months before the present application.

of the Insolvent Debtors' Act, 7 G. 4, c. 57, which provides for the discharge of prisoners unsound in mind. And, where a party is discharged under that clause, the creditors have remedies against his property, which cannot be enforced where the discharge is under stat. 48 G. 3, c. 123; as against copyhold, which is not liable to an elegit, but may be conveyed for the benefit of creditors under stat. 7 G. 4, c. 57. There is no reason, therefore, for giving an extended construction to stat. 48 G. 3, c. 123.

E. V. Williams, contra. If the prisoner is brought within the conditions of stat. 48 G. 3, c. 123, the Court cannot look to the circumstances, for there is no discretionary power; *Wood v. Kelmerdine*, 2 Y. & J. 10; *Stacey v. Field* [*402] send, 1 Dowl. P. C. 700. The unsuccessful proceeding under the compulsory clause, 32 G. 2, c. 28, s. 16, is admitted to be no bar to an application under the subsequent act, and was held to be none in *Ex parte Rossiter*, 13 Price, 186, and *Ex parte White*, 1 Dowl. P. C. 66. The question, therefore, is simply whether a person of unsound mind may take advantage of stat. 48 G. 3, c. 123. It would be strange if such a person were placed in a worse situation than a sane person who obstinately remains in prison twelve months. The Court will construe the act liberally, and consider this application by the wife as the party's own. A lunatic must of necessity appear before the Court by some other person. An action brought by an attorney for him would be considered as his action.

Lord DENMAN, C. J. This is an application on behalf of a lunatic prisoner by the party most nearly connected with him. Under the circumstances, and in a case affecting liberty, it would be violent to say that the application is not his act. The rule may, therefore, be made absolute.

LITLEDALE, J. The object of this statute is that, for a debt within a certain amount, a party shall not be kept in prison more than twelve months, though he may have chosen to lie in prison during that time. Here the party cannot, himself, apply for his discharge. Perhaps, in strictness, there should be a committee, and he should make the application; but we cannot suppose that, to discharge the prisoner from a debt of this amount, such a process should be gone through; *and, the application here being made by a person so [*403] near as the wife, I think the rule may be granted.

PATTESON and WILLIAMS, Js., concurred.

Rule absolute.¹

¹ If a feoffment be made in mortgage upon condition that the feoffor shall pay such a sum at such a day, if the feoffor die before the day, the heir may pay or tender it at the day; but if a stranger who hath not any interest will tender it, the feoffee is not bound to receive it. Litt. s. 834. "But if the heir be an idiot, of what age soever, any man may make the tender for him in respect of his absolute disability, and the law in this case is grounded upon charity, and so in like cases." Co. Litt. 206 b.

GAMBRELL v. Earl FALMOUTH and HOUGHTON. June 10.

Same v. Earl FALMOUTH and AUSTIN.

Where two defendants in trespass sever in pleading, but plead the same pleas, all going to the whole action, and one succeeds upon all the issues, the other upon one only, each defendant is entitled to his separate costs of the issues on which he has succeeded, and an aliquot part of the joint costs, unless the Master is satisfied that, by reason of special circumstances, less ought to be allowed to either.

The defendants in such a case having appeared by separate attorneys and counsel, but the attorneys being members of the same firm, and the briefs and evidence substantially the same, the Master taxed the costs as if the parties had appeared by the same attorney. Admitted, that the taxation, in that respect, could not be disturbed.

A landlord sued in trespass for an irregular distress, and obtaining judgment against the plaintiff, may recover double costs under stat. 11 G. 2, c. 19, s. 21, though he has pleaded specially.

Talfourd, Serjt., had obtained a rule to show cause why the Master should not review his taxation in both the above actions, and why the costs of the defendant, the Earl of Falmouth, in both actions, should not be set off against the

plaintiff's damages and costs in the first. The circumstances were reported by the Master (Goodrich) for the information of the Court, and were, in substance, these.

The plaintiff Gambrell had been tenant of Lord Falmouth of a house, &c. Two distresses for rent were at *different periods made on the plaintiff's effects, the first by the defendant Houghton, the Earl's agent, the other by [*104] the defendant Austin, his lordship's bailiff; and for those distresses the above two actions were brought, the Earl, as landlord, being made a defendant in each.

The declaration and other pleadings were in substance the same in each action. The declaration contained three counts: 1. For distraining for more than was due; 2. For taking plaintiff's tools whilst in actual use; 3. For distraining the tools when there were other goods sufficient to satisfy the rent.

Pleas (the same by each defendant): 1. Not guilty to the whole; 2. To the first count, that the whole sum distrained for was in arrear; 3. To the second count, that plaintiff was not using the tools; 4. To the last count, that there were not other goods of sufficient value. Whereupon issues were joined.

Both causes were tried before Lord DENMAN, C. J., at the Berkshire Summer assizes, 1835, when verdicts were found thus. In the first action, for the Earl on the general issue, but for the plaintiff on the special pleas; and for the plaintiff with 10*l.* damages and 40*s.* costs, against the defendant Houghton upon the whole of the record. In the second action a verdict for both defendants on all the pleas.¹

The defence in each action was conducted by Messrs. *Adlington, Gregory, Faulkner, and Follett*, the attorneys for Lord Falmouth. In the first action the Earl appeared and pleaded by *George Faulkner*, his attorney, and the defendant Houghton by *Robert Bayley Follett*, his attorney.

On the taxation it appeared that separate briefs had been prepared and separate counsel employed by the *defendants in each case; and the reason assigned by the Earl's attorney was, that his Lordship knew nothing of [*405] the acts of the other defendants until the actions were about to be brought, and that therefore it was deemed advisable to keep his defence distinct from that of his agents; and upon this ground it was contended that the Earl was entitled to the whole costs of his defence in the first action, as having defended by a separate attorney; a point which the Master overruled, the attorneys for the respective defendants being partners, and the briefs and evidence for each defendant being substantially the same. It was next insisted, on the part of the Earl, that he was at all events entitled to an aliquot portion of the costs of the whole defence; and *Griffith v. Jones (Exchequer)*, 4 Dowl. P. C. 159, was cited as an express authority; but the Master overruled this suggestion also. 1. Because the principle contended for had never been acted upon in the King's Bench. 2. Because, if such principle had been acted upon, yet it would not apply to this case, the Earl having failed on his special pleas.

The Master, therefore, allowed the Earl in the first action his reasonable costs with reference to the merits of his own defence only, according to the practice hitherto observed in the King's Bench, where acquitted defendants sever in pleading; which practice was recognised in *Holroyd v. Breare*, 4 B. & Ald. 43, 700. And in the second action, in which both defendants were successful, he apportioned the costs of each defendant according to the same practice, allowing for separate pleas, briefs, counsel, &c., but adhering as far as circumstances would permit to the case of *Nanny v. Kenrick*, 2 Dowl. P. C. 334, in [*406] *which it was holden that, where several defendants defend separately, and apparently by different attorneys, but all the business is virtually done by one, they are not entitled to charge by separate bills of costs, but must make a joint charge.

Double costs were also claimed for the Earl in the first action, and for the Earl and the defendant Austin in the second action, under stat. 11 G. 2, c. 19, s.

¹ See *Gambrell v. Earl of Falmouth and Austin*, 4 A. & E. 78.

21: but the Master refused to allow them, thinking that, as the defendants, instead of confining themselves to the general issue, as they were empowered to do by the statute, had thought fit to plead specially as well, they were not entitled to such double costs.

And, with regard to setting off the Earl's costs in both actions against the plaintiff's damages and costs in the first action, the Master expressed his opinion that the Earl was not entitled to do so, the actions being not between the same parties; observing at the same time that the plaintiff's attorney's lien would in that case be effected,¹ and consequently that the Earl, if he persisted in claiming such set off, must apply to the Court.

The Master added the following explanation of the mode of allowing costs in K. B., in cases like the present.

By stat. 8 & 9 W. 3, c. 11, s. 1, it is enacted that, in all actions of trespass against several defendants, one or more of whom shall be acquitted by verdict, such person or persons shall recover his costs in like manner as if a verdict had been given against the plaintiff, and acquitted all the defendants, unless the Judge certify as there stated. And by stat. 3 & 4 W. 4, c. 42, s. 32, it is enacted [*407] that, where several persons shall be made *defendants in any personal action, and any one or more of them shall have a verdict pass for him or them, every such person shall have judgment for and recover his reasonable costs, unless the Judge shall certify, &c. Where, therefore, all the defendants appear and plead by the same attorney, the taxing officers of K. B. have hitherto allowed thus. If they plead jointly, and the defence of one be the defence of all, nominal costs of 40s. only to the acquitted defendant, to cover his proportion of the ordinary costs of the defence, such as instructions to defend, entering appearance, &c. But, where the acquitted defendant severs in pleading, so much of the pleadings and briefs as would be applicable to his particular case, any witness or witnesses called solely on his behalf, a fair proportion of counsels' fees, &c. And, where the acquitted defendant has appeared and pleaded by a different attorney, the officers have invariably given him all his reasonable costs as in ordinary cases.

But, in *Griffiths v. Kynaston*, 2 Tyrwh. 757, the Court of Exchequer were of opinion that the successful defendant, though pleading the same plea and by the same attorney, was entitled to an aliquot portion of the whole costs of the defence. The same rule was also laid down by that Court in *Starving v. Cousins*, 1 Gale, 159, and in *Griffith v. Jones*, 4 Dowl. P. C. 159; but in deciding the latter case the Court seems to have considered that the old rule of allowing 40s. only in these cases was inflexible, a supposition which, as regarded the King's Bench, was incorrect.

The Master therefore stated the points for consideration here to be: "1. [*408] Whether, with reference to the *above decisions in the Exchequer, the practice in K. B., and the fact of Lord Falmouth's having failed on his special pleas in the first action, the costs in these actions have, as regards principal and single costs, been rightly taxed? 2. Whether, as the defendants pleaded specially, in addition to the general issue, Lord Falmouth and Austin are entitled to double costs? and, if so, whether the Earl's double costs should not be confined to the second action, his Lordship, as above observed, having failed as to part in the first action? 3. Whether, under all the circumstances, Lord Falmouth is entitled to set off his costs as prayed by the rule?"

Knowles, in last Easter term, showed cause.² First, the Master has done rightly in allowing the Earl only a reasonable portion of the costs apportioned between him and the other defendants, and not an aliquot part. He has exercised a discretion which he was entitled to use, since stat. 3 & 4 W. 4, c. 42, s. 32. *Starving v. Cousins*, 1 Gale, 159; *S. C.* (as *Starling v. Cozens*), 2 Cro. M. & R. 445; and *Griffith v. Jones*, 4 Dowl. P. C. 159, where the Court

¹ See *Lees v. Reffitt*, 3 A. & E. 707.

² May 7. Before Lord DENMAN, C. J., LITTLERDALE, PATTERSON, and COLERIDGE, Js.

of Exchequer held an aliquot part to be the proper allowance, are contrary to the practice here; and in those cases the defendants who obtained such costs had succeeded on all the issues; here the verdict, in one of the causes, was against the Earl upon one issue. *Holroyd v. Breare*, 4 B. & Ald. 43, 700, shows the principle adopted in such cases by this Court, and is applicable here. Then it is objected that the costs are allowed only as if the parties had appeared by the same attorney. [*Talfourd*, Serjt., *for the defendants, waived this point.] As to the allowance of double costs. At all events, the [*409] Earl cannot claim them in the first action, under stat. 11 G. 2, c. 19, s. 21,¹ because the judgment is not wholly against the plaintiff. And, as to each action, a defendant is entitled to double costs only where he has, according to sect. 21, pleaded the general issue and given the special matter in evidence. The double costs are a penalty, not to be enforced unless the defendant has brought himself strictly within the enactment. And it is not reasonable that he should recover them, where he has increased expense by incumbering the record with special pleas. [PATTESON, J. What necessary connexion is there between the two parts of the section? Suppose it appeared that the defendant did not take any goods at all, and no special matter were given in evidence, do you say that the defendant then would not be entitled to double costs?] He would, if he brought himself within the enactment in other respects. [PATTESON, J. Then you admit that the two branches of the section are distinct from each other. The latter clause, in mentioning "such action," cannot refer exclusively to actions in which the proceeding shall have been that before *described, because it speaks of the plaintiff discontinuing such action. Lord DENMAN, C. J. The object seems to be, that the landlord shall [*410] not be under the necessity of pleading specially the defences arising from the relation of landlord and tenant. And the words in the latter clause of the section are, that the defendant shall have double costs if the defendant become nonsuit, &c., "in such action;" not if he fail in any particular course of pleading.] The words "such action," in the latter clause of the section, refer to the "actions" twice mentioned in the earlier part, in which the defendant adopts the mode of pleading there spoken of. [PATTESON, J., referred to *Johnson v. Lawson*, 2 Bing. 341.] That was an action of replevin; and the question arose on a different section of the statute. Lastly, as to setting off the costs, the rule, Hil. 2 W. 4, l. s. 93, 3 B. & Ad. 388, directs that no set-off of costs shall be allowed to the prejudice of the attorney's lien in the suit against which the set-off is sought. *Cowell v. Betteley*, 10 Bing. 432, and *Domett v. Helyer*, 2 Dowl. P. C. 540, show the strictness with which that rule is enforced.

Talfourd, Serjt., contra. As to the first point, it is said that the Master has given reasonable costs, according to the discretion vested in him. But that is a discretion to be exercised on the principle recognised by the Court, which principle is matter of positive regulation. The convenient rule is, that the whole amount of costs due to the several defendants should be ascertained, and each allowed his proportion, without reference to the question of merits. Something was found against Lord Falmouth in this case; but the pleas *found [*411] for him went to the whole cause of action. As to stat. 11 G. 2, c. 19, s. 21, that section gives the defendant two privileges; first, the right to plead

¹ Stat. 11 G. 2, c. 19, s. 21, enacts that, "In all actions of trespass or upon the case to be brought against any person or persons entitled to rents or services of any kind, his, her, or their bailiff or receiver, or other person or persons, relating to any entry by virtue of this act, or otherwise, upon the premises chargeable with such rents or services, or to any distress or seizure, sale or disposal of any goods or chattels thereupon; it shall and may be lawful to and for the defendant or defendants in such actions to plead the general issue, and give the special matter in evidence; any law or usage to the contrary notwithstanding; and in case the plaintiff or plaintiffs in such action shall become nonsuit, discontinue his, her, or their action, or have judgment against him, her, or them, the defendant or defendants shall recover double costs of suit."

the general issue and give the special matter in evidence; secondly, double costs in the cases pointed out. There is nothing that makes the exercise of the former privilege a condition of the latter. The mention of discontinuing, in the second branch of the section, has been pointed out from the Bench. With respect to the set-off, it is not desired on the part of the defendants to interfere with the attorney's lien.

LORD DENMAN, C. J. No point remains as to the set-off, it being agreed that that must be subject to the attorney's lien. On the subject of double costs I entertain no doubt. The Earl might waive his privilege of pleading the general issue and giving the special matter in evidence; but he still retained his other rights under the statute as landlord. I see no reason for the special pleas pleaded by him in this case; but the act distinctly provides that, in the actions there described, if the plaintiff shall have judgment against him, the defendant shall recover double costs of suit. We have no power to say, in such a case as this, that the landlord is not entitled to them. As to the apportionment of costs, we will take time to consider.

LITLEDALE, J. Under stat. 11 G. 2, c. 19, s. 21, a defendant may or may not use the privilege given as to pleading; but the words in the latter part of the section, "in case the plaintiff or plaintiffs in such action shall become nonsuit, discontinue his, her, or their action, or have judgment against him, her, or them," [*412] refer to the actions "of trespass or upon the case" mentioned in the former part of the section. Here, though in one action the plaintiff succeeded on some of the pleas, he would take nothing even on that, by the general judgment. The first part of stat. 11 G. 2, c. 19, s. 21, is a general and comprehensive clause, and comprehends "all actions" of trespass or case brought for the causes there specified; the words "such action," in the latter clause, refer merely to the particular case where, in one of the actions before mentioned, a contingency there contemplated occurs. I have not the slightest doubt upon this point.

PATTESON, J. The early part of sect. 21 of this statute is merely descriptive of a certain class of actions; then a privilege is given to defendants in those actions, as to pleading; and, lastly, it is provided, that if the plaintiff or plaintiffs "in such action shall become nonsuit, discontinue his, her, or their action, or have judgment against him," &c., the defendant shall have double costs. This is an action of the class spoken of in the beginning of the section, "relating" to a "distress or seizure," and the plaintiff has had judgment against him in it. It is no matter what his pleas have been. The clause giving double costs is quite unconnected with the enactment as to pleading.

COLERIDGE, J., concurred.

As to the remaining question,

Our. adv. vult.

LORD DENMAN, C. J., now delivered the judgment of the Court. We disposed of all the points in this case [*413] at the time of the argument, except the question, where one of several defendants succeeds in an action, by what rule the taxation of his costs is to be regulated. We have considered the matter, and think ourselves bound by the rule laid down by Mr. Baron BAYLEY in *Griffiths v. Kynaston*, 2 Tyrwh. 760, and afterwards confirmed in *Griffith v. Jones*, 2 Cr. M. & R. 338, viz., that the successful defendant is to be allowed all his separate costs, and *prima facie* an aliquot part of the joint costs, unless the Master is satisfied that some smaller proportion should be allowed by reason of any other special circumstances. The rule for reviewing the taxation will therefore be absolute.

Rule absolute.

JONES v. EVAN RICHARD and Others. June 10.

In replevin for sheep, the defendants made cognizance, as bailiffs of the tenant of a messuage and lands called B., that the said tenants and all those whose estate, &c.,

occupiers of B., had the sole and exclusive right of pasture and feeding of sheep on L., the locus in quo, as to the said messuage, &c., appertaining; and that the plaintiff's sheep were damage-feasant. By another cognizance they alleged a right of common over L., as appurtenant to B. The plea in bar denied the above rights, and alleged that the plaintiff had right of common over L., as appurtenant to his messuage, &c., called T. Issues were joined as to the several rights.

At the trial it appeared that L. was a mountain sheepwalk, upon which no act of ownership had been exercised but the feeding of sheep. The defendants abandoned their alleged right of common; and, upon the issue as to the exclusive pasturage, the jury (having had their attention called to the difference between a mere privilege and the right of soil) found a verdict for the defendants, and "that L. was part of the farm of B.;" finding also as to the remaining issue, that the plaintiff had no right of common in respect of T.

On motion to enter a verdict for the plaintiff, or for a new trial, or judgment for the plaintiff non obstante veredicto on the issue as to the exclusive right of pasture, the Court held that, upon the evidence and finding, the cognizance could not be sustained; and they granted a new trial.

REPLEVIN for sheep and lambs. The defendants made cognizance, as bailiffs of Elizabeth Davies, that the Rev. Hugh Smith was seized in fee of a messuage, farm, lands, and premises called Blaenmerin, with the appurtenances, situate, &c., and that he and all *those whose estate he then had of and in the said messuage, &c., for the time being, from time whereof, &c., had had, [*414] used, and enjoyed, and had been used and accustomed, &c., and of right, ought, &c., and still of right ought to have, use, and enjoy for himself and themselves, and his and their tenants and farmers, occupiers of the said messuage, farm lands, and premises called Blaenmerin, the sole and exclusive right of pasture and feeding of sheep and lambs in, upon, over, and throughout a certain piece of land, situate in the county aforesaid, called Llechweddcarrgddio, as to the said messuage, farm, &c., called Blaenmerin, belonging and appertaining: that Smith being so seized, before the times when, &c., to wit, &c., demised the said messuage, farm, &c., to E. Davies, to hold from year to year, by virtue of which demise she, before the time when, &c., entered, and was and is possessed of Blaenmerin with the appurtenances for the term granted: and, because the sheep and lambs were damage-feasant upon Llechweddcarrgddio, so that E. Davies could not have or enjoy her said right of pasture and feeding there in so ample a manner, &c., the defendants, as bailiffs, &c., well acknowledge, &c. Verification. There was another cognizance by which E. Davies, as lessee of Smith, claimed common of pasture on Llechweddcarrgddio, for all her sheep and lambs levant and couchant on Blaenmerin, as belonging and appertaining to Blaenmerin; but this was abandoned at the trial.

To the first-mentioned cognizance (the second on the record), there were two pleas in bar. 1. Traversing the right of Smith in Llechweddcarrgddio, as pleaded in the second cognizance, and concluding to the country. 2. That plaintiff, before and at the time when, &c., was the *lawful occupier of [*415] a messuage, farm, lands, and premises called Tycoch, with the appurtenances, situate, &c., and that plaintiff and the occupiers for the time being of the said farm, &c., have respectively for and during the thirty years next before the commencement of this suit, and before the said time when, &c., had, used, and actually enjoyed of right without interruption, and claimed of right, common of pasture in and upon the said place called Llechweddcarrgddio, for all his and their sheep and lambs levant and couchant in and upon the said messuage, farm, and lands with the appurtenances every year at all times of the year, as to the said messuage, farm, and lands, with the appurtenances belonging and appertaining: wherefore plaintiff, before and at the time when, &c., put the sheep and lambs, &c., being his own sheep and lambs, levant and couchant, &c., into the said place in which, &c., to feed and depasture, and which said sheep and lambs were lawfully there feeding, &c., until defendants of their own wrong, &c.: verification. The replication traversed the thirty years' enjoyment of right of common as pleaded, concluding to the country.

On the trial before WILLIAMS, J., at the Spring assizes for Cardiganshire, 1835, it appeared that the Blaenmerin property consisted of a house, some enclosed land, and a tract of unenclosed mountain land forming sheepwalks. Elizabeth Davies, the lessee of Blaenmerin, claimed to have a right in the Llechweddcarregdio, as one of these sheepwalks. The plaintiff endeavored to prove a right of common appurtenant to Tycoch, on the Llechweddcarregdio sheepwalk; and the defendants gave evidence of an exclusive pasturing (but not any [*116] *other exercise of ownership) on the same tract.¹ But, with respect to this tract, one of the defendants' witnesses, who had lived with an occupier of Blaenmerin, stated that during that time the occupier claimed several hundred acres of mountain (including the tract in question) as belonging to Blaenmerin, and that he "claimed the mountain land as he claimed the rest." Language to a similar effect was used by other witnesses.

The circumstances of the trial were further stated as follows in the judgment of the Court upon the aftermentioned motion. "With respect to the second avowry, the learned Judge early in the cause intimated an opinion that the evidence, on each side, tended to prove that the 'sheepwalk' in question belonged to one or other of the contending tenements, and was a part of it 'as much as the house or building' belonging to either, according to the language of the witnesses. The case, however, was permitted to go on, to give the defendant an opportunity of having a verdict entered for him on the second avowry, in case the jury should find some right for him, and the Court should think (contrary to the opinion of the Judge at the trial) that the evidence might support that avowry. The evidence was accordingly left to the jury, which was a special one, with remarks upon the distinction between the right to the soil itself, and any right of common, or right of pasturage, in respect of it; and the jury were requested to say whether, upon the evidence, they were of opinion that the place in question, the Llechweddcarregdio, belonged to Blaenmerin, as an integral [*117] part *of it, like the house and buildings themselves, or whether they thought the defendant had a right of common or pasturage in respect of it. The jury found for the defendants,—that the Llechweddcarregdio was part of the farm of Blaenmerin,—and no right of common for Tycoch."

R. V. Richards, in Easter term, 1835, moved for a rule to show cause why the verdict should not be set aside, and a verdict entered for the plaintiff, on the ground that the defendants had failed in establishing the right under which they made cognizance, according to their pleading; or why there should not be a new trial, if the jury were to be considered as having found a right of feeding, merely, on the locus in quo, since the verdict, in that case, would be against the evidence; or why judgment should not be entered for the defendants on the issue upon the first plea in bar only, to the second cognizance, and, in that case, judgment be given for the plaintiff non obstante veredicto, inasmuch as the defendants, upon that issue, claimed to have land appurtenant to land; on which point *Richards* cited *Buszard v. Capel*, 8 B. & C. 141, S. C. (*Capel v. Buszard*) in Error, 6 Bing. 150. A rule nisi was granted.

Chilton, Evans, and *E. V. Williams*, showed cause in this term.² The real question which both parties intended to try was as to the right of exclusive pasturage, not the ownership of the land. The right to a sheepwalk is well understood in Wales, and is never considered as involving the claim of title to the [*118] *soil. [WILLIAMS, J. I had a strong impression throughout, that the evidence looked towards the right of soil, not that of common. I wished the jury to find what the right actually was, in order that the Court might afterwards give judgment according to the 'justice of the case, under stat. 3 & 4 W. 4, c. 42, s. 24.] The proof of a right of exclusive pasturage runs, to a considerable extent, in the same course with the proof of soil and freehold; and the

¹ Some evidence was given by the defendants, to show that the right of soil was in the Crown.

² June 6th. Before Lord DENMAN, C. J., LITLEDAL, PATTESON, and WILLIAMS, Js.

jury may have thought themselves warranted in finding that Mrs. Davies had the right of soil: but, if a party means to claim only a modified right, and gives evidence which supports it, a jury ought not to be allowed to say that the claim shall go farther and the party be thereby prejudiced. No evidence here, as to any matter of fact, was inconsistent with the modified right. It is not easy to say how the defendants could have given more precise evidence to show that Mrs. Davies had the pasturage only, and not the soil. [PATTESON, J. By showing that another person, claiming to be the lord, dug quarries in the land. Lord DENMAN, C. J. In the absence of any such fact, proof of exclusive pasturing would be evidence of a right to the soil; and it is for the jury to draw the inference.] The evidence would not have been satisfactory on a plea of liberum tenementum. And there was proof of a title in the Crown. Neither the jury nor the witnesses could be expected to understand accurately the distinction between the privilege actually claimed here, and an ownership of the land. The doctrine of appurtenances is not without difficulty, even to lawyers, as appears (for instance) from the discussions in *Yates v. Clincard*, Cro. Eliz. 704, and *Hill v. Grange*, Plowd. 170. In the latter *case it was said by the [*419] Court that the word appertaining (to the messuage) there should be taken in the sense of "usually occupied with," or "lying to," the messuage; "for when appertaining is placed with the said other words, it cannot have its proper signification, as it is said before, and therefore it shall have such signification as was intended between the parties, or else it shall be void, which it must not be by any means, for it is commonly used in the sense of occupied with, or lying to, ut supra, and being placed with the said other words, it cannot be taken in any other sense, nor can it have any other meaning than is agreeable with law, and forasmuch as it is commonly used in that sense, it is the office of Judges to take and expound the words, which common people use to express their meaning, according to their meaning, and therefore it shall be here taken not according to the true definition of it, because that does not stand with the matter, but in such sense as the party intended." The expression "belonging" and "part of the farm," here, must be construed with this latitude. [Lord DENMAN, C. J. The whole object of the summing up in this case was to draw the attention of the jury to the legal distinction between right of soil and right of pasturage.] There is no ground for judgment non obstante veredicto. The averment, that Smith, and his tenants, occupiers, &c., had the sole and exclusive right of pasture on the locus in quo, as belonging and appertaining to the messuage and farm, &c., is not on the face of it objectionable; *Potter v. North*, 1 Saund. 350, Serjeant Williams' note (2) to that case, 1 Wms. Saund. 353; *Hoskins v. *Robing*, 2 Saund. 324; *Harg. Co. Litt. 122 a*, note (6). [*420] In the last, cited case "it was adjudged that the prescription" (for the customary tenants of a manor to have the sole and several pasture yearly and every year for the whole year at their will and pleasure, as belonging to their customary tenements) "was good; for it does not exclude the lord from all the profits of the land, as he is entitled to the mines, trees, and quarries:" and the law has been so considered ever since; "though a man cannot prescribe to have common eo nomine, for the whole year, in exclusion of the lord, for this is held to be repugnant to the nature of the thing;" 1 Wms. Saund. 353, note (2) to *Potter v. North*, 1 Saund. 350, citing, among other authorities, *Co. Litt. 122 a*. And in *Hoskins v. Robins*, 2 Saund. 328, where the copyholders had the sole pasture, and it was therefore contended that the lord could not distrain damage-feasant, because he had no interest in the herbage, the Court answered, that "the lord may distrain for other damage in his soil the cattle of any who have no right to put in their cattle, although he has not any interest in the herbage;" and it is added in a note, 2 Wms. Saund. 328, note (13), "For the lord's interest in the mines, trees, bushes, &c., still continues, to which damage may be done as well as to the grass," 1 Vent. 123, 163, *Hoskins v. Robins*. *Buszard v. Capel*, 8 B. & C. 141, does not apply. There a distress for rent was made upon

the land, which (according to one of the suppositions put by the Court) was claimed as appurtenant to land. Here the defendants have merely distrained cattle damage-feasant, which distress even commoners may make. [PATTESON, *421] J. In *Davies v. *Pierce*, 2 T. R. 53, there was a cognizance stating that the locus in quo was part of "a certain tenement of land called Bulchystullen sheepwalk;" but no point of law was raised upon the allegation of title. Lord DENMAN, C. J. Nothing can be more ambiguous than the word "sheepwalk."]

John Wilson, R. V. Richards, and W. M. James, contra. The defendants claimed on this record either the land, or a right in another's soil; if the last, the jury has found against them; if the first, their claim, which the jury has supported, is of land appurtenant to other land, which the law does not allow of; Co. Litt. 121 b, Bro. Abr. Prescription, pl. 19. And in fact the exclusive pasture here claimed was a corporeal hereditament, which could not appertain to land. Similar rights have been held to be tenements on which a party might come to settle, within the meaning of stat. 13 & 14 Car. 2, c. 12, s. 1; *Rex v. Piddletrenthide*, 3 T. R. 772; *Rex v. Tolpuddle*, 4 T. R. 671. In *Bart v. Moore*, 5 T. R. 329, it was held that a party renting the milk of twenty-two cows, to be exclusively depastured on a certain meadow, had such an interest in the land that he might distrain the lessor's cattle damage-feasant there. In *Capel v. Buszard* (in error), 6 Bing. 150, it was agreed by the Court that the special verdict was inconsistent in stating that the exclusive use of the land was demised as appurtenant to the wharfs, but that the land itself was not demised; "because a grant of the exclusive use of the land is a grant of the land." [PATTESON, J. The exclusive use there was for all purposes. LITTLEDALE, *422] J. The tenant of Blaenmerin could not have turned horses and cattle on this pasture.] The doctrine of giving a wide construction to words in favor of the intention applies to deeds, but ought not to be extended to pleadings. That the exclusive right of pasturage in this case was substantially an exclusive right to soil is clear from the nature of the place, which can be used only as a sheepwalk. If the case had gone to the jury as upon a question between two parties claiming common and nothing more, and they had found for one, superadding to their verdict that the land was his, that finding might have passed as surplusage: but here the learned Judge expressly called their attention to the point, whether the right alleged by the defendants was a mere privilege or a right of soil and freehold. And that, upon the evidence given by them, was a fair question for a jury. It lay upon the defendants, who relied upon a limited right, to make it out conclusively. If the finding is, in effect, that Mrs. Davies had the pasture, not for the exercise of a privilege appurtenant to Blaenmerin, but as her own soil, that is equivalent to a verdict for the plaintiff. [PATTESON, J. The finding seems to leave it ambiguous.] *Cur. adv. vult.*

Lord DENMAN, C. J., now delivered the judgment of the Court.

After stating the nature of the action, and the pleadings, his Lordship proceeded:—Upon the trial, the jury have negatived the claim of the plaintiff in respect of Tycoch, upon satisfactory evidence, as we think. The first avowry [*423] was abandoned by the defendant. [His *Lordship then stated the other proceedings on the trial, and the finding of the jury. See p. 416, ante.] Upon this evidence and finding we think that the second avowry cannot be sustained.

Then, as to the application to enter a verdict for the plaintiff notwithstanding the verdict found, as it has been, for the defendants, it is to be observed that the plaintiff, as to the right set up by him (viz. right of common for Tycoch), has entirely failed; and therefore we do not think it right that he should be allowed to succeed in the cause, though, as has been stated, he had established no right, but the same has been, and we think properly, negatived by the jury.

There must therefore be a new trial.

Rule absolute for a new trial.

The KING *v.* SANKEY, SMITH, and WILLIAMS. *June 11.*

A town clerk has a lien on papers of the corporation with respect to which he has done work as attorney or solicitor, but not on such as he holds merely as town clerk. Semble, that, if property be granted to a corporation, subject to a payment for charitable purposes imposed by the grantor, this falls under the provisions of sect. 71 of stat. 5 & 6 W. 4, c. 76; and that sect. 68 applies, not to such property, but to cases where the payment has been made by the gift of the corporation itself.

MAULE had obtained a rule, in Easter term last, calling upon Richard Nicholas Sankey, and Humphrey Smith, Esqrs., late bailiffs of the town of Ludlow, and Mr. John Williams, late town clerk of the same town, to show cause why a mandamus should not issue, commanding them to deliver over to the present town clerk of Ludlow, all books, minute books, books of account, rentals, maps, bills, receipts, vouchers, leases and counterparts of leases, securities, muniments, records, *and papers, and all plate and other articles of every description [*424] whatsoever, of or belonging to the borough and corporation of the said town, or relating to the property thereof, in the custody, possession, or power of them, or either of them.

The affidavit, on which the rule was obtained, stated that Sankey was the high bailiff, Smith the low bailiff, and Williams the town clerk, of the corporation of Ludlow, before and up to the passing of stat. 5 & 6 W. 4, c. 76. That by the new town council, chosen under that act, William Downes was elected town clerk. That by charters of Edward 4th and Edward 6th certain lands had been granted to the corporation. That, on the election of the new town council and town clerk, it became the duty of Williams, Sankey, and Smith, to deliver up to them all papers, books, deeds, muniments, plate, leases, counterparts of leases, &c., belonging to the corporation. That applications had been made to the three to do so, by order of the town council; but that they refused.

In answer, Sankey and Smith made affidavit that, by a charter of 6 Edward 6th (26th April, 1552), the king, for the relief and better sustaining the town of Ludlow, and for other reasonable causes and considerations, granted all the site, circuit, and precinct of the late house of the Palmer's Guild, &c., in Ludlow, and all the houses and premises within, &c., and all messuages, &c., in the several parishes and hamlets of, &c., to the Bailiffs, Burgesses, and Commonalty of Ludlow (the then style of the corporation), to hold to them and their successors for ever; and the said king understanding that certain burgesses, predecessors of the then burgesses, had erected the guild to be serviceable to pious uses, to wit, *for sustaining the poor and impotent, and also, for maintaining [*425] a grammar school, and for other pious uses, had granted the said messuages and premises to the said guild, he therefore willed that the said bailiffs, &c., out of the issues and profits of the premises, should keep and continue the said grammar school, &c., the same to be kept by one master and one usher, and should keep and maintain thirty-three indigent persons within the said town, giving to every of them 4*d.* every week, and one chamber for every one of them to live in, and also that a discreet and able person, learned in holy writ, should be appointed preacher of the said town, and that another able and fit person should be chosen to be assistant to the rector of the church of Ludlow, both which persons should be for ever maintained out of the issues and profits of the said premises. That some other estates, not granted by the above charter, had vested in the said corporation for charitable purposes, before its dissolution. That the late members of the corporation, as trustees of the said charities, had retained possession of the books of account relating to the said estates. That neither of the deponents had now, nor had had at any time since the dissolution of the late corporation, in their custody, possession, power, or control (excepting certain articles named, which they had given up, or offered, before the application for the mandamus, and been at all times willing, to give up), any property, real or personal, or any deed, paper, or document whatsoever belonging to the

corporation, except that they had, since the dissolution of the late corporation, joined with the other persons, being members of the said corporation at the time of its dissolution, in retaining possession of the said *estate and property [*426] so vested as aforesaid, and the said books of account, deeds, and papers relating thereto.

Williams also made affidavit that he had delivered up all books, deeds, and papers belonging to the corporation, except some few leases and counterparts of leases, upon which he had a lien for professional business done, and which came into his possession as solicitor to the corporation: that, after receiving a notice to give up the books and papers, he told the new town clerk of the above circumstances, and asserted his lien on the leases and counterparts, to which the latter answered, "very true," and appeared to acquiesce in the claim; and that he, Williams, therefore understood that neither the town clerk nor the present council would claim the leases or counterparts adversely to the lien. That, at the time of granting the rule, he had not, nor had now, in his possession, or under his control, any deeds, documents, goods, chattels, or effects of the corporation, except the said leases and counterparts.

Sir John Campbell, Attorney-General, Sir F. Pollock, and Cleasby, now showed cause on behalf of Williams. Williams has refused nothing which the applicants had a right to demand from him. He was attorney as well as town clerk: he had, therefore, a lien on all papers respecting which he had done work professionally; and the fact that he was town clerk cannot deprive him of it, though it might be said that no lien could exist as to muniments of the corporation which he held merely in the character of town clerk.

Sir W. W. Follett and Chandless showed cause for Sankey and Smith. It does not appear that Sankey or *Smith have any property in their hands [*427] which they have refused to give up. And the present applicants have no right to the estates in question, nor to the documents relating to them. By stat. 5 & 6 W. 4, c. 76, s. 71, the old trustees are to hold the property on, till August 1st, 1836; after that their estate ceases; but the present corporation acquire no right even then. Besides, a mandamus is not the proper remedy for recovering the lands, even if they are not properly held in trust. And the documents are not such public documents as are the subject of mandamus: the proper remedy is trover; Anonymous Case in 2 Chitty's Reports, 255.

Maule and Erle in support of the rule. Under sect. 65 the deeds, &c., are to be kept where the council direct: and the town clerk is responsible for the charge. The estates in question are not held on charitable uses or trusts: the property is granted to the corporation, with an injunction from the Crown to perform certain charitable acts. The corporation, therefore, retains its property: there is no new creation of a corporation by the act. It is clear that the corporation never were trustees as to the whole property: and a mere injunction of this sort does not even make them trustees "in part," within the meaning of sect. 71. This is rather the case provided for by sect. 68; the corporation may be perhaps compellable to grant a bond for future payments. If this property were within the provisions of sect. 71, no case can be suggested to which sect. 68 would apply. As all the late members of the corporation claim to hold the [*428] property, it was necessary to join the town clerk. As to the lien which *the latter claims on the leases, he must have obtained possession, in the first instance, as town clerk: he has no more right to retain them than to retain any book in which he has made a single entry.

Lord DENMAN, C. J. There is no ground for this rule. The town clerk clearly has a lien on the papers which he claims to retain, for all which he has done in his professional character. And indeed he has not actually refused to deliver them up: for, when he made the claim of lien, there was an apparent acquiescence. Then the other parties are not in possession of anything which they have refused to deliver up. These facts make a short end of the case:

and the rule must be discharged with costs. The question on sections 68 and 71 does not therefore arise. If it did, I should strongly incline to think that sect. 68 relates merely to grants made by the corporation themselves.

LITLEDALE, J. I think the town clerk has a lien on the papers which he detains, though he would have none upon muniments with respect to which he had performed no service as attorney; for he would hold those only as servant to the corporation. Then the other parties have refused nothing. I think sect. 68 applies only to what the corporation itself gives. Sect. 71 provides for such property as is held "in whole or in part" upon charitable uses or trusts. The part for which this property is so held seems small: but in that the present corporation have no interest.

PATTESON, J. I have no doubt that a town clerk who does business as an attorney acquires a lien, *although he is town clerk, and although he has no lien on what he receives merely as town clerk, nor for business done [*429] merely in that character. I recollect no instance in which this distinction has been taken in the case of a town clerk: but it has often been mentioned in the case of a steward of a manor. In *Worrall v. Johnson*, 2 Jac. & W. 214, Sir THOMAS PLUMER, Master of the Rolls, pointed out that an attorney's lien extended merely to debts due to him as attorney. Here is a lien, though not to a definite amount, apparently acquiesced in; so that there is no refusal by him. Therefore, as to Mr. Williams, the rule must be discharged with costs. As to the other parties, it is left doubtful whether they have anything in their hands. If they had, the answer to this application would be either that the documents were in Mr. Williams's custody as their servant, or that they were retained under sect. 71. But we are not compelled to decide as to the effect of such an answer. I should, however, agree with my Lord and my brother LITLEDALE, that sect. 68 applies to cases where the grant is by the corporation, sect. 71 to cases where the corporation take property granted them by another wholly or partially in trust. This does not mean, where some is granted to one trustee, some to another: for that case is provided for by the words "solely, or together with any person," &c.: but where the property granted is held in trust as to a part of that property.
Rule discharged, with costs.¹

¹ WILLIAMS, J., was absent.

*The KING *v.* TWYFORD and GROVE, Esquires. June 11. [*430]

Under stat. 17 G. 3, c. 56, ss. 1, 2, 20, 22, two justices may convict and sentence to imprisonment and hard labor; and the party convicted may appeal to sessions, giving notice to the justices at the time of conviction, and at the same time entering into recognisance, with sufficient sureties, to try the appeal and abide the judgment of sessions; but, if he do not at such time enter into such recognisance, the convicting justices are to commit him till the sessions, unless such recognisance be sooner entered into, and are to transmit the conviction to the sessions; and the sessions, on proof of notice of appeal, and on receiving the conviction, are to hear the appeal; and, if the conviction be affirmed, the party is to suffer the punishment originally adjudged, the time of imprisonment, if inflicted, being computed from the time of affirmation, unless the party has been imprisoned under the original conviction, in which case the time for which he has been so confined is to be included in the order of confirmation.

A party convicted by two justices, and sentenced to eleven weeks' imprisonment, and hard labor, gave notice of appeal, and was committed for not entering into recognisance. By the practice of sessions, the appeal is to be entered, and the order for hearing it obtained, by the party disputing the conviction. The party not having entered the appeal, the sessions discharged him.

Seemingly, that the convicting magistrates had no longer power to commit in execution of the conviction.

But held that, at any rate, no mandamus should be granted to compel them to do so.

On the 9th of April, 1836, Richard Nash was convicted before Samuel Twyford and William Grove, Esqrs., two justices of the peace for Middlesex, of un-

lawfully purloining and embezzling certain articles of silk manufacture intrusted with him by Ambrose Moore to prepare and work up, he being hired and employed by A. M., &c., and was adjudged to be committed to the House of Correction at Cold Bath Fields for eleven weeks, to be kept to hard labor, under stat. 17 G. 3, c. 56, s. 1.

Upon the judgment being pronounced, Nash gave notice in writing of his intention to appeal¹ at the next *general sessions of the peace, but did not [*431] enter into recognisances with sufficient sureties, and was thereupon committed by the justices to the house of *correction, to be kept in custody [*432] till the next general sessions, unless such recognisances should be sooner entered into, or until he should be discharged by due course of law.

The practice of the Middlesex Sessions, on appeals against convictions, is, that, on the first or second day of a session, the appellant files a petition of appeal, and obtains an order of Court for hearing on the appeal day, a copy of which petition and order is served by him upon the convicting justices.

On the third day of the sessions, being the day next before the appeal day, the attorney for the prosecution ascertained that no appeal had been entered or petition filed (of which he procured the usual certificate from the clerk of the peace), and that Nash had been discharged out of custody on the second day of the sessions; upon which the attorney applied to Messrs. Twyford and Grove for a warrant against Nash, that he might be apprehended and committed in execution of the sentence passed by them; but they declined to grant the warrant, entertaining doubts of their power to do so.

On affidavit of the above facts, *Kelly*, in this term, obtained a rule nisi for a mandamus to the magistrates to issue their warrant for the apprehension and

¹ Stat. 17 G. 3, c. 56, s. 20, enacts that, if any person shall think himself aggrieved by the order or judgment of any two justices, before whom he shall have been convicted of any of the offences in the act, or in certain acts therein recited, he may appeal to the next general or general quarter sessions, giving notice in writing, at the time of the conviction, to the justices, and, at the same time, entering into a recognisance, with sufficient sureties, conditioned to try the appeal, abide the judgment of sessions, and pay such costs as shall be there awarded; "but if the person giving such notice of appeal shall not, at the time of giving such notice, enter into such recognisance as aforesaid, then the justices, to whom such notice of appeal shall have been given, shall and may commit such person or persons to the house of correction, or other public prison, of such county," &c., "there to remain until the said next general or general quarter sessions of the peace to be holden in and for such place, unless such recognisance shall be sooner entered into; and the said justices before whom such conviction shall have been made, or any other two or more justices of the same county," &c., "are hereby empowered and required to take, and the justices at such sessions are hereby authorized and required, upon due proof made of such notice of appeal, either by the acknowledgment of the justices to whom the same shall have been given, or otherwise, to hear and determine the matter of the said appeal, and to award such costs as to them shall appear just and reasonable to be paid by either party: and if, upon the hearing of such appeal, the judgment of the justices before whom the appellant shall have been convicted, shall be affirmed, such appellant shall, within forty-eight hours next after the same shall be so affirmed, suffer such corporal punishment as shall have been directed to be inflicted upon him or her for the offence whereof he or she shall have been convicted, or shall immediately pay the sum which he or she shall have been adjudged to forfeit, together with such costs as the justices in the said sessions shall award to be paid by him or her, for defraying the expenses sustained by the defendant or defendants in such appeal; or in default of making such payments shall be committed to the common gaol, or house of correction, in the same manner, and for the same time, to be computed from the affirmance of such conviction, as shall be directed by the original judgment of conviction, unless the person or persons so convicted shall have been imprisoned under the original conviction, in which case the time for which such person or persons shall have been so confined shall be included in the order of confirmation."

By sect. 22 the convicting justices are to transmit the conviction to the next general or next general quarter sessions, to be filed and kept amongst the records of the sessions: and, in case of appeal, the justices at sessions are "required, upon receiving the said conviction drawn up in the form aforesaid, to proceed to the hearing and determination of the matter of the said appeal," according to the direction of stat. 22 G. 2, c. 27.

commitment of Nash pursuant to the record of conviction. The record, commitment for want of recognisance, and certificate of the clerk of the peace, were annexed to the affidavit; and the following entry appeared upon the commitment:—"Discharged by the Court," signed by the clerk of the peace, and dated 17th of May, 1836, the second day of the sessions.

**Barstow* now showed cause. The magistrates have no power to issue [433] this warrant, whether it be considered analogous to *mesne process* or to execution. The Court of Quarter Sessions, in discharging Nash, have either exercised a proper jurisdiction or acted illegally. On the former supposition, Nash is entitled to be at liberty; on the latter supposition, what has taken place is in the nature of an escape, and the power of the defendants is exhausted. They have no legitimate knowledge that Nash is not in custody. Perhaps, if he had actually entered into recognisances, and had not performed the condition, application might have been made for a fresh warrant: but here there has been no default. It is understood that the sessions made the order for his discharge supposing that the return of the conviction gave them jurisdiction and made them cognisant of the appeal, and that then it was for the prosecutor to sustain the conviction.

Kelly contra. If Nash had not given notice of appeal, it would have been the duty of the convicting magistrates, immediately upon the conviction, to make out a warrant of commitment in execution. That duty was suspended by the notice of appeal. Then it was for the appellant to take certain steps, in default of which, according to the practice (and the act must be construed with reference to that), the sessions had no power to proceed. The respondent could not, by admitting the notice, have a conviction affirmed against which no appeal was entered. Thus the commitment was at an end: the justices had no power to order the prisoner to be detained, nor the gaoler to detain him. Then the case stood as it did after the conviction and before the commitment for want of recognisance. The convicting magistrates were therefore to make [434] out the warrant of final commitment. [PATTESON, J. How are they to make allowance for the time during which the convict has been confined, as would have been done if the conviction had been affirmed on appeal under stat. 17 G. 3, c. 56, s. 20?] Such allowance could be made only in case the appeal had been prosecuted: the party convicted, as he has not chosen to prosecute it, cannot complain. [PATTESON, J. I think that imprisonment, for want of recognisance, and unless recognisance be sooner entered into, is an imprisonment "under the original conviction," within the meaning of the legislature in stat. 17 G. 2, c. 56, s. 20; then you are asking us to imprison a second time.] The imprisonment already suffered can scarcely be called a part of the imprisonment for eleven weeks under the conviction: if it were, the *mandamus* might be framed accordingly, ordering a commitment for the residue of the time; but the party convicted has lost the benefit of this provision by his default in not prosecuting the appeal. Part of the punishment adjudged was hard labor; none has been suffered during this imprisonment.

Lord DENMAN, C. J. Before we grant the *mandamus* which is asked for, we must clearly see that the convicting magistrates have power to do what is demanded. But I rather think they have not the power. For an imprisonment for want of recognisance seems to be considered by the legislature, in some sense, a part of the imprisonment under the conviction. The utmost that can be said (and it is a point on which we are not bound to give an opinion) is, that the original sentence is to stand. But it is so doubtful whether the [435] convicting justices have not done all they have power to do that I think we cannot grant this *mandamus*.

LITLEDALE, J. Whether the magistrates have any power is a question so doubtful that we ought not to grant the *mandamus*, lest we should subject the magistrates to an action for false imprisonment. Their power was suspended by the notice of appeal. The party giving the notice is committed for want of

recognisance. Suppose a party, being under such circumstances, or having entered into a recognisance, takes no step. What follows? The conviction is transmitted to the sessions by the convicting magistrates. Can the sessions do anything? That we need not decide: they do not in fact offer to do anything. The justices at sessions, therefore, have no power to detain, though the party convicted is not discharged by what is commonly called proclamation. Then have the convicting justices power to act upon their conviction? They have not, unless what has passed since the conviction amount to nothing. Section 20, though not precisely worded, seems to authorize only a continuation of the imprisonment in the event of the conviction being affirmed on appeal. If the convicting magistrates were now to issue their warrant to imprison for eleven weeks, it might turn out that half the imprisonment originally adjudged had been already suffered. It is a very doubtful case, not, I think, provided for by the act. The inclination of my opinion is, that the convicting justices had no longer any power: certainly it is not a case for a mandamus.

[*436] *PATTESON, J. At all events this is a very doubtful case; and therefore there can be no mandamus. The act clearly means that, where there is notice of appeal, the convicting magistrates are to commit in case of a recognisance not being given, and that only till the sessions. Then the sessions have power to order imprisonment, but only in the case of the appeal being confirmed by them. If there be no recognisance, and the appeal be not prosecuted, a case arises which the act does not seem to have contemplated. Whether the sessions have an original power to bring the matter forward, I do not know; but I cannot see that the act reserves any jurisdiction to the convicting magistrates in case of notice of appeal being given. Rule discharged.¹

¹ WILLIAMS, J., was absent.

WILLIAM GWINNELL v. EDWARD HERBERT. June 11.

The endorser of a promissory note does not stand in the situation of maker relatively to his endorsee.

The endorsee of a note cannot declare against his endorser as maker, even where the latter has endorsed a note not payable or endorsed to him, and where, consequently, his endorsee cannot sue the original maker.

ASSUMPSIT. The declaration stated that the defendant, on, &c., made his promissory note, and thereby promised to pay the plaintiff 7*l.* 12*s.* 6*d.*, one month after date, which period had elapsed. There was also a count on an account stated. Pleas, that defendant did not make the said note in manner, &c.; concluding to the country: and, as to the account stated, the general issue. On the trial before the under-sheriff of Gloucestershire, February 19th, 1836, the note was put in. It was payable to William Gwinnell or order, signed

[*437] Herbert Herbert, and endorsed, in the defendant's handwriting, *E. Herbert. Under that name was written William Gwinnell. The note had an eighteenpenny stamp. The under-sheriff objected that, Edward Herbert not being named on the face of the note, but on the back as an endorser, he was not maker as stated in the declaration. For the plaintiff, Penny v. Innes, 1 Cro. M. & R. 439; S. C. 5 Tyrwh. 107, was cited. No notice of dishonor was proved to have been given to Edward Herbert. The under-sheriff stated to the jury that, on the authority of the case cited, Edward Herbert must be considered as a new maker; and that, as against a maker, notice of dishonor was unnecessary. The plaintiff had a verdict, but the under-sheriff certified (under stat. 3 & 4 W. 4, c. 42, s. 18), to stay judgment till a new trial could be moved for. *Busby*, in the ensuing term, moved for a new trial on the grounds that, assuming an endorser to stand in the situation of a new maker, he was not to be described in pleading as the maker; and that he was not, in effect, a maker. A rule nisi was granted.

R. V. Richards now showed cause. The under-sheriff's ruling, on the authority of *Penny v. Innes*, 1 Cro. M. & R. 439; S. C. 5 Tyrwh. 107, was right. In that case a bill drawn by Wilson, payable to his own order, and by him specially endorsed to Brookes and Penny, was next endorsed by Innes, and then by Brookes and Penny. Lord LYNCHURST there said "The endorsement of this bill by the defendant gave it all the effect of a new instrument as against him, though it did not in fact create a new instrument. It was competent to Brookes and Penny to strike out their own endorsement; and then the bill would have stood *as a bill endorsed by the defendant in blank." *Plimley v. Westley*, 2 New Ca. 249, may be mentioned as a contradictory authority; [*438] but there the note was not payable to order. Here, the instrument being negotiable, a new stamp was not necessary to render the endorser liable as a new maker. The note was a new instrument in some respects, but not in all. If a party is possessed of a note or bill without proper title, and transfers it, he is liable, because the law will not allow him to say "I have no title, and therefore my endorsee can have none against me." [PATTESON, J. Every endorser of a bill may be a new drawer; but the maker of a promissory note is an acceptor.] Unless the defendant here can be sued as maker, there is no remedy; he ought not to be discharged merely because a person who ought to have endorsed has omitted doing so.

Busby, contra. By the custom of merchants, the endorser of a note stands in the place of the drawer of a bill, as is said in *Heylyn v. Adamson*, 2 Burr. 676; but he is never declared against as a drawer in fact. As to the maker of a note, Lord MANSFIELD observes, in the case just cited, 2 Burr. 676, that he is an acceptor (not a drawer), and that, when the note is endorsed, the endorser stands in the situation analogous to that of the drawer of a bill. He could not, indeed, stand in the situation of acceptor, because then he and the maker would both fill that character; and there cannot be two acceptors; *Jackson v. Hudson*, 2 Camp. 447. It is not necessary, therefore, to call in question the authority of *Penny v. Innes*, 1 Cro. M. & R. 439; S. C. 5 Tyrwh. 107. Here, the defendant might have been sued upon the original consideration: *but, if sued [*439] upon the note, he should have been declared against as endorser; in which case it would probably have been held that he was estopped from setting up as a defence the want of an endorsement to himself.

Lord DENMAN, C. J. The under-sheriff has acted upon a misapplication of *Penny v. Innes*, 1 Cro. M. & R. 439; S. C. 5 Tyrwh. 107. The law there laid down as to the effect of endorsement might be correct as to a bill of exchange, but does not apply to a promissory note. The judgment of TINDAL, C. J., in *Plimley v. Westley*, 2 New Ca. 249, seems intended not to overrule anything laid down in *Penny v. Innes*, 1 Cro. M. & R. 439; S. C. 5 Tyrwh. 107, but to be consistent with what was there decided.

LITTLEDALE, J. The declaration here charges Edward Herbert as the maker of the note. It must be taken that in point of fact the note was made by Herbert Herbert; then the question is, whether he is discharged, and a new instrument created, by Edward Herbert's name being put on the back of the note. I cannot understand how that should be. It is said that in the case of a bill of exchange, every endorser is a new drawer. But even that requires qualification. Bills are drawn according to the custom of merchants all over the world; and merchants would be much surprised at being told that an endorser might be considered a new drawer in all respects. It may be correct to say that an endorsement of a bill is in the nature of a new drawing. But, suppose the endorser of a bill to be strictly in the situation of a drawer, it does not follow that the endorser of a note is a maker. The drawer of a bill is *liable only after [*440] presentment to the acceptor; but the maker of a note is in the situation of acceptor. In this case, therefore, it cannot be said that the endorser became a maker, or that the putting of Edward Herbert's name on the back of this bill had, for the present purpose, cancelled the engagement of Herbert Herbert. The

observation, which has been referred to, of Lord ELLENBOROUGH, in *Jackson v. Hudson*, 2 Camp. 448, appears to me correct.

PARTESON, J. The issue here is, whether or not the defendant made the note. There is no conflict between the cases on this subject. The whole question turns on the distinction between a bill and a note. On a bill, each endorser is a new drawer, as was stated in *Penny v. Innes*, 1 Cro. M. & R. 439; S. C. 5 Tyrwh. 107; but the drawer of a bill is liable only on default made by the acceptor. The maker of a note is liable in the first instance; and, if each endorser became a maker, he also would be liable in the first instance. There is a difficulty, therefore, in the case of a note, which does not exist in that of a bill. The point in *Plimley v. Westley*, 2 New Ca. 249, was, that, the note not being on the face of it negotiable, the persons whose names appeared on the back were not endorsers, and might have been treated as makers if the instrument had been properly stamped. Here the instrument was negotiable; so that the point discussed in *Plimley v. Westley*, 2 New Ca. 249, does not arise. This case is more like *Jackson v. Hudson*, 2 Camp. 447, where, the drawee having accepted a bill, and another person, not a drawee, having accepted it also, it was held that the latter could not be sued as an acceptor. So, here, the defendant was not a maker, but, as [*441] was said *in that case, should have been declared against on his collateral undertaking. In the report of *Plimley v. Westley*, in 1 Hodges, 325, the Lord Chief Justice says, "that a bill or note cannot be enforced against the original maker, by a person who takes by endorsement, unless the instrument contains words which authorize the endorsement." A proper distinction is there kept in view. Some confusion has arisen in many of the cases from not attending to the distinction between a bill and a note. The rule must be absolute.

WILLIAMS, J., concurred.

Rule absolute.

The KING v. JAMES ISLEY, and GRACE, his Wife. June 11.

H., the father of two children, on his wife's death, requested her father and mother to come from America, where they were settled, to England, and there take charge of the children, which they did. About four years afterwards H. died, having made his will the day before, in which he left his property to trustees to be converted into money and divided between his two children when of age, the interest to be applied in the mean time, by the trustees, for their education, &c.; and he appointed the trustees guardians of the persons and estates of the children, and requested them to cause the children to be properly educated. 3000*l.* bank annuities was vested in other trustees for the benefit of the children, under the testator's marriage settlement. No real property passed to either child from the testator. The grandfather and grandmother, who, ever since their coming to England, had had the custody of the children, refused to deliver them up when demanded by the guardians. The Court, on habeas corpus, ordered them to do so.

While the habeas corpus was depending, the grandfather and grandmother filed a bill in Chancery, on behalf of the children, against the guardians, for an account, and to have the children and their property put under the protection of that Court. The guardians put in their answer, about a month before the above decision.

Seem, that, if it had been shown to this Court that a speedy decision in Chancery was to be expected, they would have delayed enforcing the writ.

In last Hilary term, the Court, at the instance of Samuel Gregory and William Wilkins, the guardians after named, granted a habeas corpus (returnable [*442] before a Judge at chambers) directed to James Isley and Grace, *his wife, commanding them to bring up the bodies of Matilda Harris and Benjamin Harris. The writ was granted upon a statement, in substance as follows:

Benjamin Harris, the father of Matilda and Benjamin, died May 17th, 1835. By his will, dated May 16th, 1835, he bequeathed all his real and personal estate and effects to the said S. Gregory and W. Wilkins, in trust to convert into money all his personal estate not consisting of money, and to sell the real estate, and to

put out the proceeds (after payment of debts, &c.) at interest on government or freehold security, "the principal to be divided between my two children, Matilda and Benjamin, share and share alike, and to be paid on his or her attaining the age of twenty-one years, the interest in the mean time to be applied for their benefit, advantage, and education, in such manner as to my said trustees or the survivor of them, his executors or administrators, shall seem meet." The will concluded as follows:—"I appoint the said Samuel Gregory and William Wilkins executors of this my last will and testament, and also guardian and guardians of the persons and estates of my children. And I earnestly request that my said trustees and executors will, according to their discretion, cause my said children to be properly brought up and educated; and I authorize them, my said trustees and executors, to retain and reimburse themselves and himself out of the moneys that shall come to their or his hands or hand by virtue of the trusts hereby in them reposed, all costs, charges, and expenses which they shall be put unto in execution hereof." Gregory and Wilkins proved the will and took upon themselves execution. The children were in the custody of James and Grace Isley, their grandfather and grandmother, *who refused, when required [*443] by the trustees, to give them up. The trustees now stated that James and Grace Isley were very improper persons to have the custody of the children, moving in a sphere of life below that to which the children's expectations authorized them to aspire;¹ and that it was necessary that the children should be delivered up to the trustees, in order that they might carry into effect the testator's intentions, and educate and provide for the children in a manner suitable to their fortune, and agreeable to the testator's wishes.

Isley and his wife claimed to retain the custody on the following grounds. That the mother of the children, who was Isley's daughter, died about five years ago, and on that occasion Isley came, with his wife and family, from America, where he then resided, at a considerable inconvenience and sacrifice, on the testator's written request, for the purpose of taking care of the children, who were then placed under Mr. and Mrs. Isley's charge, and had continued with them ever since. That Mr. and Mrs. Isley came to England, and undertook this charge, in consequence of a promise to the mother, and would not have done so, but for such promise. That the father had often, in his lifetime, expressed himself grateful for their care and attention, and declared his intention never to remove the children as long as they were kindly treated. That the children were aged respectively nine and six years, one of them weak in intellect, and both delicate in health and requiring much care: and that they had in fact been kindly and carefully treated by Mr. and Mrs. Isley. It further appeared that, by a settlement made on the *marriage of the testator and his late wife, 3000*l.* [*444] 4 per cent. bank annuities were vested in other trustees than Gregory and Wilkins, for the benefit (among other purposes) of the issue of the marriage, and that the trustees under the settlement continued so interested, for the benefit of the children, Matilda and Benjamin.

The parties attended before PATTESON, J., at chambers, in pursuance of the writ, and, on February 16th, the learned Judge (after having taken time for consideration) stated that he felt so much difficulty in the case that he thought the question ought to be referred to the Court in the next term. Shortly after this time, Isley, as the grandfather and next friend of the children, filed a bill in Chancery on their behalf against Gregory and Wilkins, as executors of Benjamin Harris's will, for an account, and for the purpose of placing the children and their property under the protection of that Court. Gregory and Wilkins filed their answer on the 9th of May.

Erle now moved, on behalf of the prosecutors, for the order of the Court. An additional affidavit, by the testator's brother, was put in, stating that the testator had, before his death, expressed a wish that the children should not remain with their grandmother, whom he considered an unfit person, and had desired

¹ Isley described himself as "of Trowbridge, carpenter."

the deponent to ask Gregory and Wilkins if they would become the guardians of the children in the event of his death.

Cresswell and *Joseph Addison*, for the defendants. It is a preliminary objection to any proceeding for the purpose of changing the custody, that a bill in [*445] Chancery is depending, which involves this very question. And, further, it may be questioned whether Gregory and Wilkins can entitle themselves in this case as guardians under stat. 12 Car. 2, c. 24, s. 8, for the statute seems to contemplate the appointment of guardians in those cases only where there might have been guardians in socage. In *Bedell v. Constable*, Vaugh. 183, VAUGHAN, C. J., says, "I take the sense of the act, collected in short, to be, whereas all tenures are now socage, and the next of kin to whom the land cannot descend is guardian until the heir's age of fourteen; yet the father, if he will, may henceforth nominate the guardian to his heir, and for any time, until the heir's age of one-and-twenty: and such guardian shall have like remedy for the ward, as the guardian in socage by the common law hath." But, even if the Court should think that these are guardians in socage, still this is not a case for interference on habeas corpus. The rule in cases of habeas corpus to bring up infants is stated by Lord MANSFIELD, in *Rex v. Delaval*, 3 Burr. 1436, to be, that "the Court is bound, *ex debito justitiæ*, to set the infant free from an improper restraint: but they are not bound to deliver them over to anybody nor to give them any privilege. This must be left to their discretion, according to the circumstances that shall appear before them." In a case referred to in *Lyons v. Blenkin*, 1 Jacob's Rep. 254, note (b), Lord ELDON observed that there were circumstances which might have weight on an application made in a cause to alter the custody of wards of the Court (as where their expectations from relatives might be interfered with by their continuance with the father), but which could not be attended to on a habeas corpus. Here, even if [*446] the father had been *alive, the Court would not have taken the children from the defendants at his instance, after the sacrifice they had made in consequence of his own arrangement. But this is a will made by the testator only the day before his death, in opposition to his formerly declared intentions. The bulk of the property, being in trustees under the marriage settlement, cannot be affected by the result of this application.

Erle and *Leigh*, *contrà*. The arrangement made by the father could be considered only as a temporary one. It must have been obvious that circumstances might arise (without any immoral or improper conduct on the part of the defendants) which would make the removal of the children expedient. Even supposing the facts to be such as would have entitled the defendants to sue the father, if still alive, for withdrawing the children, that would be no answer to an application for a change of custody with a view to the children's interest. An actual covenant by the father, in a deed of separation, that the children shall remain in a certain custody, is no answer to an application on his part by habeas corpus to have them delivered up to him; Ex parte Earl of Westmeath, 1 Jacob's Rep. 251; note (c) to *Lyons v. Blenkin*. As to the right of testamentary guardians under stat. 12 C. 3, c. 24, s. 8, where there could not have been a guardian in socage, the statute gives the father power to dispose of the custody and tuition of his child or children, while under the age of twenty-one, without any restriction of the kind which has been suggested. The limitation inferred from the dictum of VAUGHAN, C. J., in *Bedell v. Constable*, Vaugh. 183, is not supported by any other *authority. Then, [*447] is the interposition here called for such as the Court has been accustomed to grant? *Rex v. Delaval*, 1 W. Bla. 410; S. C. 3 Burr. 1434, shows that it is to be granted on proper occasions. *Rex v. Johnson*, 1 Stra. 579; S. C. 2 Ld. Ray. 1333, is more in point. In the case before Lord ELDON, referred to on the other side, his Lordship said "that the jurisdiction which he had upon an habeas corpus was exactly the same as if it was before a judge, and he apprehended that a judge attended to nothing but cruelty or personal ill-usage

to the child, as a ground for taking it from its father ;" 1 Jacob's Rep. 254 ; note (b) to *Lyons v. Blenkin*. Whatever can be said of a father on this point applies also to testamentary guardians, who, according to many authorities, are in loco parentis ; *Eyre v. Countess of Shaftesbury*, per Lord Commissioner Jekyll, 2 P. Wms. 115 ; *Butler v. Freeman*, per Lord Hardwicke, C., Amb. 302. [Lord DENMAN, C. J., asked if there was any prospect of a speedy decision in Chancery. No answer was given, but by referring to the affidavit on this head, the substance of which has been stated.]

LORD DENMAN, C. J. There is no ground for arguing that this appointment of guardians was not really the will of the testator. He has clearly appointed the parties, now prosecuting, guardians to his children. Under these circumstances, although we should not consider our discretion tied up if there were a reasonable prospect of an order of the Court of Chancery being obtained, we think we ought not to make a delay *which might appear like tampering [*448] with the rights of the guardians. We have, I think, no choice as to the course we should pursue, but must order the children to be delivered up to them.

LITTLEDALE, J. I am of the same opinion. A guardian appointed as these are is in the same situation as a parent. We must enforce the right of the guardians, unless we could see that the will was made in a manner contrary to the real wish of the testator. But it appears that his intention in fact was to remove the children in the manner which the will points out. If we saw reason to expect a decision in equity on the point, our course of proceeding might be different.

PATTESON, J. I was not satisfied at chambers, nor am I yet, that the father really intended the custody of his children to be changed. But I think we have no choice as to our mode of proceeding. I hoped at first that, by not now changing the custody, we might give an opportunity for the point to come before the Court of Chancery ; but, as there appears no likelihood of that, the strict legal rights of the guardians must prevail.¹

An order was afterwards made (June 13th) that the defendants should deliver up the bodies of the children to the guardians.

¹ WILLIAMS, J., had left the Court.

*DOE on the several Demises of HURST and Others v. CLIFTON. [*449]
June 11.

This case is reported, 4 A. & E. 809.

The KING v. JOHN WILSON. June 13.

This case is reported, 3 A. & E. 817.

PEACOCK, Assignee of JOHN JONES, an Insolvent Debtor, v. HARRIS.
June 13.

In assumpsit by the assignee of an insolvent debtor, for money due to the insolvent debtor before his petitioning, defendant pleaded that the insolvent, before he petitioned, and more than three months before the commencement of his imprisonment, assigned his debts and effects to W., in trust for creditors, and made W. his attorney ; that W. demanded the debt of defendant ; that defendant paid him ; and that the insolvent did not execute the indenture with intent to petition. Replication, that the indenture was executed by the insolvent, being then in insolvent circumstances, voluntarily and within three months before the commencement of his imprisonment, and with intent to petition. Rejoinder, traversing the intention only.

Held, that the plaintiff could not give in evidence, in support of this issue, the contents of the schedule delivered by the insolvent to the Insolvent Debtor's Court, more than four months after the execution of the indenture.

The verdict having been for plaintiff, and a new trial having been granted on account of the admission of such evidence, plaintiff gave fresh notice of trial, whereupon defendant withdrew his pleas, and suffered judgment by default; and a writ of inquiry was executed: Held, that plaintiff was not entitled to his costs of the first trial.

ASSUMPSIT for goods sold and delivered, and for work and labor performed by the insolvent; promise to him before his petition. Damages 40*l*.

[*450] *1st plea, non assumpsit. 2d plea, as to 28*l*. 7*s*. 6*d*., parcel, &c., that, before the insolvent petitioned, and three months and more before the commencement of his imprisonment, to wit, 1st of January, 1833, by indenture then made (and of that date) by the insolvent of the first part, one Samuel Whooley of the second part, and all others the creditors of the insolvent who should execute that indenture of the third part, he, the insolvent, bargained and sold, assigned, transferred, and set over to Whooley all and singular his household goods and furniture, stock in trade, chattels, book debts, and effects, in trust for Whooley and such creditors as should sign the indenture, and thereby made Whooley his attorney to ask, demand, sue for, recover, and receive the said stock, debts, &c.: averment, that the indenture was not made within three months before the imprisonment commenced, nor with the view or intention that the insolvent should petition the Court for the relief of insolvent debtors for his discharge from custody: that, before and at the time of making the indenture, the defendant was indebted to the insolvent in 28*l*. 7*s*. 6*d*., parcel, &c., and no more: that the defendant was required by Whooley to pay that sum to him: and that he did pay it to Whooley, who accepted and received it, in full satisfaction and discharge thereof, for the purposes in the indenture mentioned. Verification.

Replication. That the indenture was made and executed by the insolvent, then being in insolvent circumstances, voluntarily, and within three months before the commencement of his imprisonment, and with the view and intention [*451] of his petitioning the Court for relief *of Insolvent Debtors for his discharge from custody. Verification.

Rejoinder. That the indenture was not made and executed by the insolvent with the view, &c. Conclusion to the country.

On the trial before BOLLAND, B., at the Denbighshire Spring assizes, 1835, the plaintiff's counsel, in support of his issue on the second plea, put in the insolvent's schedule, by which it appeared that his petition had been filed on 1st of May, 1833: and the account given by the insolvent in the schedule, as to his estate, liabilities, &c., was insisted upon as evidence of his intention at the time of executing the indenture. The defendant's counsel objected to this, as amounting merely to evidence of declarations made by the insolvent subsequently to his execution of the indenture. The learned Judge received the evidence; and the jury found for the plaintiff on both issues, damages 30*l*. In Easter term, 1835, *R. V. Richards* obtained a rule nisi for a new trial.

John Jervis and *Welsby* showed cause in this term.¹ The evidence objected to was given only in answer to a plea pleaded to a part of the demand: the jury have found damages beyond the part: therefore the plaintiff is at least entitled to retain the difference between 30*l*. and 28*l*. 7*s*. 6*d*. But the evidence is admissible. The signing of the schedule was an act done by the insolvent; and that is evidence of his intention in executing the previous deed, stronger [*452] than any declaration, being a formal act under the authority of the *Insolvent Debtors' Court. Now his declaration would have been admissible, to show the intent; and, à fortiori, his acts must be so, the plaintiff's case being that the whole transaction was collusive, so that the execution of the schedule is a part of the fraud charged. In *Ridley v. Gyde*, 9 Bing. 349, in

¹ June 6. Before Lord DENMAN, C. J., LITLEDALE, PATTERSON, and WILLIAMS, Js.

an action by assignees of a bankrupt, the commission was disputed: the act of bankruptcy relied on by the plaintiff was a security given by the trader on the 25th of October, which, it was contended, was a fraudulent preference: and the plaintiff was allowed to give in evidence a declaration by the alleged bankrupt, made on the 20th of November following, respecting his object in giving the security. In that case there was less ground for treating the declaration as part of the *res gestæ* than there is here for so treating the execution of the schedule. *Vacher v. Cocks*, Moo. & M. 353; *Herbert v. Wilcocks*; *Newman v. Stretch*, Moo. & M. 338, are to the same effect. The insolvent is in fact a party concurring in setting up an adverse title; and therefore his declarations, and still more his acts, are evidence against such title. It is true (though there are authorities the other way) that, if the question were between the trustees under the deed and the insolvent, declarations or acts by the latter could not be admitted to impeach the deed: but that is upon a principle not applicable here. At all events, the schedule was admissible in evidence for some purposes: as to show the state of the insolvent's debts and credits, and that he took the benefit of the act, and went through the regular course. If it be said that the evidence was used for other purposes, that was not the objection taken at the trial.

**R. V. Richards*, *contra*. If the evidence was inadmissible, the defendant is entitled to a new trial, though the issue on which it was admitted [*453] goes only to part of the demand. The schedule can amount to no more than a declaration made by the insolvent, at the time of his executing it, of the state of his affairs. It is not true that it proves his discharge: that is proved by the order. It proves nothing which was in issue on this record. *Ridley v. Gyde*, 9 Bing. 349, may require reconsideration: the only safe rule is that a declaration, immediately connected with an act, is admissible to explain the act. Here the evidence offered is of an independent declaration, made after the petition was filed, and therefore more than four months after the execution of the indenture. In *Newman v. Stretch*, Moo. & M. 338, the declaration was part of the act. The suggestion that there was collusion among the parties is unwarranted: there was no evidence of this, except upon the assumption of the bankrupt's intention; and that was the fact to be proved by the evidence now in question. The objection is strengthened by the circumstance that the party here making the declaration is in truth interested in the result, as he is entitled to the surplus. But even a release of the surplus would not cure the objection.

Cur. adv. vult.

Lord DENMAN, C. J., now delivered the judgment of the Court. The case relied upon, in answer to the objection here taken, was *Ridley v. Gyde*, 9 Bing. 349. But there the statement made was in explanation, and, as it were, continuation of the former discourse which led to the *transaction in question. Here the evidence is of something done under the statute, *alio* [*454] intuitu. And, even if this were not so, a contemporaneous declaration may be admissible as part of a transaction, but an act done cannot be varied or qualified by insulated declarations made at a later time. Rule absolute.

The rule drawn up was, "that the verdict obtained in this cause be set aside, and a new trial had between the parties." The plaintiff gave fresh notice of trial; but the defendant withdrew his pleas and suffered judgment by default; whereupon a writ of inquiry was executed, and the plaintiff had a verdict for 30*l.* 6*s.* 5*d.* The Master, on taxation, allowed the plaintiff his costs of the first trial. This was objected to; but the objection was overruled, on the authority of *Jackson v. Hallam*, 2 B. & Ald. 317. A summons was obtained to show cause before a judge at chambers why the Master should not review his taxation; and the learned Judge ordered proceedings to be stayed, to give time for an application to the Court. In Michaelmas term, 1836, a rule nisi was obtained for reviewing the taxation.

¹ Note to *Vacher v. Cocks*, Moo. & M. 355.

John Jervis, in the same term, November 25th, showed cause. This case comes within the principle of *Booth v. Atherton*, 6 T. R. 144, and *Jackson v. Hallam*, 2 B. & Ald. 317, in which cases the defendant, after obtaining a rule for a new trial, gave a cognovit, and, the rule being silent as to costs of the first trial, the plaintiff was held entitled to them. No distinction can be drawn, as to this point, between giving a cognovit and suffering judgment by default. [*455] *The rule Hil. 2 W. 4, I. s. 64, 3 B. & Ad. 383, that, "if a new trial be granted without any mention of costs in the rule, the costs of the first trial shall not be allowed to the successful party, though he succeeded on the second," was passed for the purpose of assimilating the general practice of the Courts of Common Pleas and Exchequer, as to costs of a first trial,¹ to the practice of the King's Bench, but not with reference to the particular case arising here. [COLERIDGE, J. The rule is laid down more plainly in *Gray v. Cox*, 5 B. & C. 458, than in *Jackson v. Hallam*, 2 B. & Ald. 317. In *Sweeting v. Halse*, 9 B. & C. 369, note (a), where the plaintiff, after failing on the first trial, obtained a rule for a new trial, and then discontinued, *Jackson v. Hallam*, 2 B. & Ald. 317, was recognised as an authority in point.] In *Gray v. Cox*, 5 B. & C. 458, the plaintiff, who had obtained a verdict, discontinued upon a new trial being granted; but, as Lord TENTERDEN said in *Sweeting v. Halse*, 9 B. & C. 369, note (a), where a discontinuance is allowed, the terms are in the discretion of the Court. [Lord DENMAN, C. J. No terms had been imposed in those cases: the questions in them arose upon motions to review taxation.]

R. V. Richards, contra. Even in the absence of authorities, the allowance of costs in a case like this would appear unreasonable. But the allowance or disallowance of costs in these cases, which was formerly matter of practice, is now expressly governed by the rule, Hil. 2 W. 4, I. s. 64, 3 B. & Ad. 383, and, "when a new trial is granted, and nothing is said about the costs of the first trial, they fall to the ground, as a matter of course;" per LITLEDALE, *J., [*456] in *Newberry v. Colvin*, 2 Dowl. P. C. 416; *Porter v. Cooper*, 2 Cro. M. & R. 232; S. C. 5 Tyrwh. 798, is also an authority against this allowance.

Lord DENMAN, C. J. We have no power to allow these costs.

PATTESON, WILLIAMS, and COLERIDGE, Js., concurred. Rule absolute.*

¹ See *Loader v. Thomas*, 1 Cro. & J. 54.

² See the next case.

CHARLES FREDERICK, BARON DE RUTZEN, and MARY DOROTHEA, his Wife, v. LLOYD.

In case, by the lord of a manor, for disturbance of a market, if the lord prove a market immemorially holden in certain places within the manor, it is not a necessary legal inference (no grant being produced) that the market was granted to be holden in those places only; but a jury may presume, from circumstances, that the market was granted to be holden in any convenient place within the manor.

Plaintiff obtained a verdict, and a new trial was granted on account of the admission of improper evidence. Plaintiff drew up the rule for the new trial, and served it on defendant, who informed plaintiff that he would not avail himself of the rule.

The Court ordered that the postea should be delivered to plaintiff, and that he should have his costs of the trial.

But the Court allowed neither party the costs of the rule for a new trial, or of the rule for giving the postea and costs to the plaintiff.

CASE for disturbance of the plaintiffs' market at Narberth, in Pembrokeshire, by setting up another market. Plea, the general issue. On the trial before GURNEY, B., at the Pembrokeshire Spring assizes, 1834, a verdict was found for the plaintiffs, damages 1s., but leave reserved to move to enter a nonsuit. In the ensuing term a rule nisi was obtained, according to the leave reserved, upon grounds which will appear by the judgment of the Court. A rule was also ob-

tained to show cause why there should not be a new trial, upon *several points, and, among others, upon that taken in *De Rutzen v. Farr*, 4 A. [*457] & E. 53, the admission of improper evidence; and upon that ground the rule for a new trial in the present case was made absolute. On the rule for entering a nonsuit, cause was shown in last Hilary term, January 23d, by Sir *John Campbell*, Attorney-General, *Cresswell*, and *Evans*, and the rule was supported by *John Wilson* and *E. V. Williams*.¹ The case (as regards the point decided) is so fully discussed in the judgment of the Court, that a detail of the arguments is considered unnecessary.

Lord DENMAN, C. J., in this term (May 23d) delivered the judgment of the Court.

In this case the Court had directed a rule absolute for a new trial upon a point of evidence, which had been considered in the case of *De Rutzen v. Farr*, 4 A. & E. 53. The counsel for the defendant, however, upon points not decided in that case, have pressed for a nonsuit: it has, therefore, now become necessary to decide them.

It appeared upon the trial that the legal estate in the market in question was not in the plaintiffs; and it was alleged that the legal estate was not deduced to the trustees, upon which it was contended that they alone could have maintained the action, and that, on the present evidence, it would have failed even if brought in their names, on account of the defect in the proof of their title.

As a preliminary answer to these objections, it was urged that this was only a possessory action, in which proof of title was superfluous; and that no failure to deduce *a regular title from the Crown ought to defeat their right to recover by reason of their possession. [*458]

The counsel for the defendant, in reply, did not dispute the general truth of the first of these propositions, but denied that it was applicable under the particular circumstances of the case; and the Court took time to consider of its judgment, for the purpose of looking into the evidence as to those particular circumstances, and the deduction of the title; and after such examination we are of opinion that the rule for entering a nonsuit cannot be made absolute.

It appeared that the Narberth market, till the year 1832, had been held in certain places within the town and manor, some descriptions of articles being usually exposed to sale in the streets, but the greater number within and around a market-house, standing upon the soil of the defendant; and that the plaintiffs, and those whom they represent, had received the market tolls, wherever the articles were exposed, while the defendant, and those whom he represents, received stallage in respect of the stalls and standings within and immediately around the market-house.² In November, *1832, the plaintiffs had opened a new market-house, erected by themselves, of convenient dimensions and [*459] in a convenient place within the town and manor, upon their own land. The defendant thereupon erected a market-house on the old site, and procured tollable articles to be exposed for sale there on the market day, for which injury the present action was brought: it appeared also that the plaintiffs, and those whom

¹ Before Lord DENMAN, C. J., LITLEDAL, WILLIAMS, and COLERIDGE, Js.

² *Wilson*, in moving for a new trial, contended that the immemorial perception of picage and stallage by the defendant, concurrently with the taking of tolls by the plaintiffs and their predecessors, ought to have been considered by the jury as raising a presumption that the right to picage and stallage had at some time been severed from the estate to which the market belonged, and granted, by those whom the plaintiffs represented, to the predecessors of the defendant. And he contended that, assuming a right in the plaintiffs, if no such grant had been made, to remove the market, they could not do so in derogation of the grant; but that the defendant might still carry on the market on the old site. But the Court (Lord DENMAN, C. J., LITLEDAL and PATTERSON, Js.) refused to grant a rule on this ground, Lord DENMAN, C. J., observing that the right to picage and stallage was only a compensation for the use of the soil, and that the enjoyment of it was no restriction on the right of the lord (if otherwise established) to remove the market to a different place.

they represent, received payments from the shows standing at the fairs in any part of the town.

Upon this state of facts the counsel for the defendant contended that, as all the evidence of possession down to 1832 applied to a perception of tolls in the old market-house, and the places before used, the only inference of right thence to be drawn was of a right to hold the market there; and that it became necessary, in order to show the market, in the place in which it was now held, to be legal, that a grant from the Crown should be produced authorizing the removal. A charter was accordingly produced, giving the right to hold the market anywhere within the manor, to which, according to the doctrine of *Curwen v. Salkeld*, 3 East, 538, the right of removal would be incident. But then it was contended that this would avail nothing to the plaintiffs, because they failed to connect themselves with it by a regular deduction of title.

Unless, however, the first of these points be correctly made, the second is immaterial; the question therefore will be, whether, from the evidence of a market immemorially held in certain places within a manor by the apparent lord [460] of such manor, and those whom he represents as *such, the necessary legal inference be that of a grant restrictively to hold it in such places only, and with no power of removal; or whether those facts are not premises from which a jury may properly infer a grant of the market to be held in any convenient place within the manor, and, of course, with the power incident thereto of removal from time to time. If the latter be the proper answer to this question, the present finding of the jury may, as regards this point, be sustained.

The object of the inquiry would be to determine the extent and terms of the grant, the mere existence of which was already inferred from the user, all consideration of the charter actually produced, and of the defective title, being by the argument excluded. Now, in conducting this inquiry, the jury would properly consider the character of the grantee, the lord of a manor, the nature of the thing granted, a market, and its object, the grantee's profit, and the general convenience of the residents and the vicinage. Considering these, it appears to us the most reasonable conclusion of fact to be drawn, that the grant, whenever or by whomsoever made, had been of a market to be held generally, that is, at any convenient place within the manor. And if, upon the considerations just stated, that would be the reasonable conclusion to be drawn, we cannot see that it is necessary or even proper to infer a restriction upon the grant from the fact that the market appears always to have been held on any particular spot or spots within the manor. It is true that, where a grant is to be inferred from user alone, its extent as between the grantor and grantee is, in many instances, limited by the extent of the user, for it is not to be presumed against him that he has granted more than he appears to have permitted [461] *the grantee to enjoy. But, even in such cases, we think the jury would be warranted in finding a grant, including all such terms as are usual and reasonable incidents to a grant of the description inferred. In the present case, however, where the jury is called upon to determine, not merely the existence of a grant from the Crown, but the terms of the particular grant in question, we do not see how they can forbear to take into account every circumstance legitimately tending to affect the probabilities of the case; and, if those circumstances point to wider limits than the mere user has extended to, but which are not inconsistent with such user, the jury may, indeed ought, to conclude in favor of such limits.

This reasoning will be found to be directly sanctioned by a well-considered authority, the case of *Rex v. Cotterill*, 1 B. & Ald. 67. A material point there to be decided was, whether the corporation of Walsall had rightfully removed their market from the High Street, in which it had been holden immemorially, to a new market-house. There, as here, no charter was produced, giving a market within any prescribed limits; but a charter of Ch. 2 granted "all and

all manner of liberties, franchises, immunities, privileges, jurisdictions, markets, and hereditaments, which the mayor and commonalty" "now hold, use, and enjoy, or have held," &c. What then was the market enjoyed at the date of the charter—a market to be held in the High Street, and so irremovable from it, or one to be held within the borough, and so removable to any convenient spot within it? That was the question—*which, in terms, the charter [462] threw no light upon; and it was argued, as here, that the user alone was to determine it. The Court, however, held the other way, the different members attaching different degrees of weight to particular circumstances, but all agreeing in the principle that all the circumstances were to be taken into account, and no limits to be implied but such as might fairly be deduced as probable inferences from all those circumstances.

In that case some reliance is placed by the Judges on the fact, that the grantee of the supposed charter was a corporation and not an individual: that, however, was a fact only increasing the probability of a grant co-extensive with the borough: we are now only considering whether there was any evidence of a grant co-extensive with the manor: it is unnecessary, therefore, to observe that ABBOTT, J., seems to consider that an equal probability exists of a grant to the lord being co-extensive with the manor, as of a grant to a corporation being co-extensive with the borough.

We entirely agree with this case; and we think that the learned Judge not only was not called upon to nonsuit the plaintiffs, but, upon this evidence, and as to this point, would have been justified in directing the jury that, if they were satisfied of the existence of the grant, it was most probably a grant to be exercised anywhere *infra manerium*.

It becomes, therefore, unnecessary to consider the second point, or to examine whether, if established in fact, it would have led to the consequences insisted on by the defendant; because the plaintiffs might have rested on their possessory evidence, and are not to be *prejudiced by having attempted and failed [463] to make out a documentary title by purchase. The rule, therefore, will remain absolute in its original terms.

Rule as to entering a nonsuit, discharged.

The rule for a new trial was drawn up (without mention of costs,) and the agent for the plaintiffs, on May 26th following, served it on the agent for the defendant, who, on June 4th, 1836, wrote to the plaintiffs' agent as follows:—"My client will not avail himself of the privileges granted by the Court of a new trial in this cause, the points relating to the nonsuit having been decided against him."

In Michaelmas term, 1836, *Evans*, on affidavit of the above facts, obtained a rule to show cause why the rule for a new trial should not be discharged, and the *postea* delivered to the plaintiffs, and why the plaintiffs should not be at liberty to sign judgment and tax their costs thereupon. In Trinity term following, June 9th, 1837,

E. V. Williams showed cause. The plaintiffs are not entitled to the costs of the trial. By the rule, Hil. 2 W. 4, I. 64, 3 B. & Ad. 383, "If a new trial be granted without any mention of costs in the rule, the costs of the first trial shall not be allowed to the successful party, though he succeed on the second." Here the rule made no mention of costs: the plaintiff, therefore, could not have obtained the costs of the first trial, whatever the event *of the second trial [464] had been. The defendant, by not insisting on the second trial, cannot be placed in a worse situation than if he had proceeded to trial and failed. And, if this rule be discharged, the plaintiffs will be placed in as good a situation as if they had succeeded on a second trial. They keep the verdict without additional expense, the defendant having taken the least vexatious course. Even if the defendant had formally withdrawn his plea, the plaintiffs could not have had

¹ It was assumed, in the argument and judgment, that the rule was drawn up by the plaintiffs, though the fact was not expressly stated on affidavit.

lawfully purloining and embezzling certain articles of silk manufacture intrusted with him by Ambrose Moore to prepare and work up, he being hired and employed by A. M., &c., and was adjudged to be committed to the House of Correction at Cold Bath Fields for eleven weeks, to be kept to hard labor, under stat. 17 G. 3, c. 56, s. 1.

Upon the judgment being pronounced, Nash gave notice in writing of his intention to appeal¹ at the next *general sessions of the peace, but did not [*431] enter into recognisances with sufficient sureties, and was thereupon committed by the justices to the house of *correction, to be kept in custody [*432] till the next general sessions, unless such recognisances should be sooner entered into, or until he should be discharged by due course of law.

The practice of the Middlesex Sessions, on appeals against convictions, is, that, on the first or second day of a session, the appellant files a petition of appeal, and obtains an order of Court for hearing on the appeal day, a copy of which petition and order is served by him upon the convicting justices.

On the third day of the sessions, being the day next before the appeal day, the attorney for the prosecution ascertained that no appeal had been entered or petition filed (of which he procured the usual certificate from the clerk of the peace), and that Nash had been discharged out of custody on the second day of the sessions; upon which the attorney applied to Messrs. Twyford and Grove for a warrant against Nash, that he might be apprehended and committed in execution of the sentence passed by them; but they declined to grant the warrant, entertaining doubts of their power to do so.

On affidavit of the above facts, *Kelly*, in this term, obtained a rule nisi for a mandamus to the magistrates to issue their warrant for the apprehension and

¹ Stat. 17 G. 3, c. 56, s. 20, enacts that, if any person shall think himself aggrieved by the order or judgment of any two justices, before whom he shall have been convicted of any of the offences in the act, or in certain acts therein recited, he may appeal to the next general or general quarter sessions, giving notice in writing, at the time of the conviction, to the justices, and, at the same time, entering into a recognisance, with sufficient sureties, conditioned to try the appeal, abide the judgment of sessions, and pay such costs as shall be there awarded; "but if the person giving such notice of appeal shall not, at the time of giving such notice, enter into such recognisance as aforesaid, then the justices, to whom such notice of appeal shall have been given, shall and may commit such person or persons to the house of correction, or other public prison, of such county," &c., "there to remain until the said next general or general quarter sessions of the peace to be holden in and for such place, unless such recognisance shall be sooner entered into; and the said justices before whom such conviction shall have been made, or any other two or more justices of the same county," &c., "are hereby empowered and required to take, and the justices at such sessions are hereby authorized and required, upon due proof made of such notice of appeal, either by the acknowledgment of the justices to whom the same shall have been given, or otherwise, to hear and determine the matter of the said appeal, and to award such costs as to them shall appear just and reasonable to be paid by either party: and if, upon the hearing of such appeal, the judgment of the justices before whom the appellant shall have been convicted, shall be affirmed, such appellant shall, within forty-eight hours next after the same shall be so affirmed, suffer such corporal punishment as shall have been directed to be inflicted upon him or her for the offence whereof he or she shall have been convicted, or shall immediately pay the sum which he or she shall have been adjudged to forfeit, together with such costs as the justices in the said sessions shall award to be paid by him or her, for defraying the expenses sustained by the defendant or defendants in such appeal; or in default of making such payments shall be committed to the common gaol, or house of correction, in the same manner, and for the same time, to be computed from the affirmance of such conviction, as shall be directed by the original judgment of conviction, unless the person or persons so convicted shall have been imprisoned under the original conviction, in which case the time for which such person or persons shall have been so confined shall be included in the order of confirmation."

By sect. 22 the convicting justices are to transmit the conviction to the next general or next general quarter sessions, to be filed and kept amongst the records of the sessions: and, in case of appeal, the justices at sessions are "required, upon receiving the said conviction drawn up in the form aforesaid, to proceed to the hearing and determination of the matter of the said appeal," according to the direction of stat. 22 G. 2, c. 27.

do not know whether that was allowed on terms of paying costs.¹ At any rate, the record had assumed a new position.

*PATTERSON, J. The defendant, having obtained the rule for the new trial, was the proper party to draw it up. If neither had drawn it up, [467] there would of course have been no rule; and then the plaintiffs must have had the costs of the trial. But the plaintiffs, for the sake of expedition, drew up the rule; and then the defendant says he will not avail himself of it. The plaintiffs then require to be placed in the same position as if they had not unnecessarily drawn up the rule. In *Peacock v. Harris*, antè, p. 454; S. C., 1 N. & P. 240, the rule was in fact drawn up by somebody, and acted on. Notice of trial was given, and application made to withdraw the pleas, and granted. That was a matter of favor, not of right; and it may be looked upon as a sort of bargain, in which the defendant did not submit to more than he would have been liable to if a new trial had been had, and a verdict found against him. *Robertson v. Liddell*, 10 East, 416, was a different case. There the parties, instead of going to a new trial, agreed to let matters stand as if the special case had been reserved on the first trial. *Jackson v. Hallam*, 2 B. & Ald. 317, indeed, goes further, and seems inconsistent with *Peacock v. Harris*, antè, p. 454; S. C., 1 N. & P. 240.

WILLIAMS, J. The circumstances are peculiar; and I have felt much difficulty. By the practice of this Court, before and since the rule of Hil. 2 W. 4, the plaintiff, if he succeeded on both trials, would not have had the costs of the first, no mention being made of them in the *rule for a new trial. It [468] seems therefore hard that a defendant, by abandoning his defence, and declining a vexatious resistance, should be in a worse position than if he had insisted upon it and failed. But, as he has not acted upon his rule at all, the case stands as if the defendant had never applied for a new trial.

Rule absolute.²

¹ It appears, by one of the affidavits in that case, that, after giving notice of trial, the plaintiff had obtained a rule for a special jury, and an appointment had been served to reduce the jury, when the summons was served to show cause why defendant should not be at liberty to withdraw his pleas; that on the attendance upon such summons, the plaintiff's attorney contended that the defendant should pay the costs of the special jury; but the order was made generally, that the defendant be at liberty to withdraw his pleas.

² No costs of either rule were given.

The KING v. MARSH. June 13.

(Case of ALKINGTON Poor Rate.)

A parish was divided into four tithings, A., B., C., and D., A. containing the parish church. Each titthing maintained its own poor, and each had a churchwarden, elected at a vestry of the parish in general, but from and by its own inhabitants. The minute of appointment included all the four, and stated them to have been nominated to serve the office of churchwardens for the tithings for the year ensuing. All were sworn in together at the archdeacon's visitation, the oath being administered to them and each of them, "truly to execute the office of churchwarden within your parish." None ever acted out of his own titthing, unless in signing the annual presentments to the archdeacon of the state of the church, &c. Each of the tithings (except A., which was exempt) raised its own church rate, and paid it to the vestry clerk; and he kept a separate account for each churchwarden, who accounted with the inhabitants of his own titthing.

A commissioner of inclosure under a local act and the general act, 41 G. 3, c. 109, s. 3, made an order settling the boundaries between the above parish and another parish adjacent, and adjudging certain lands to be in the latter; and he, within a month, served a description of the boundaries on a party then acting as churchwarden of titthing A. Until the order, the lands in question had been rated to titthing B.

On appeal against a poor-rate made upon the above lands as situate in titthing B., notwithstanding the commissioner's order:

Held, that the description of boundaries had been sufficiently served according to the proviso of stat. 41 G. 3, c. 109, s. 8, requiring such description to be served upon "one of the churchwardens or overseers of the poor of the respective parishes." Although the party served had finished his year of office, but continued to do the duties, because his successor had not been sworn in or acted.

Held, also, that the sessions had acted rightly in rejecting evidence offered to show that the commissioner, in his inquiry into the boundaries, had not conducted his examination in the manner required by stat. 41 G. 3, c. 109, s. 8.

On appeal by John Marsh against a poor-rate for three pieces of land, signed by the churchwarden and overseers of the poor of the tithing of Alkington, in the parish of Berkeley, the sessions confirmed the rate, subject to the opinion of this Court on the following case.

[*469] *The question was whether the lands were in the tithing of Alkington, or in the parish of Leonard Stanley. Up to 17th November, 1832, they had been rated to Alkington. An act was passed, 11 G. 4, c. 7, Private, (which was to be taken as part of this case), for the inclosure, inter alia, of lands in the parish of Leonard Stanley; and it recited the General Inclosure Act, 41 G. 3, c. 109. The commissioner appointed under it made the following determination, with reference to the boundaries of the parishes of Berkeley and Leonard Stanley, on the 17th November, 1832.

"Whereas by an act passed" 11 G. 4, "entitled an act for inclosing lands in the parishes of Stanley St. Leonard's, otherwise Leonard Stanley, and Eastington, or one of them, in the county of Gloucester, and for discharging from tithes lands in the said parish of Stanley St. Leonards, otherwise," &c., "I, the undersigned Daniel Trinder, was appointed commissioner for carrying the said act into execution; and whereas disputes or doubts having arisen whether certain old inclosures called respectively, The Ham, The Langett, and Motford (all of which are part of the estate of the Rev. Thomas Heberden, and are in the occupation of John Marsh, as his tenant), are parcel of the parish of Stanley St. Leonard's, otherwise," &c., "or of the parish of Berkeley: I the said D. T., in pursuance of the powers and in compliance with the provisions contained in the said act and the therein recited act, have ascertained the boundaries of the said parishes respectively where they adjoin each other: Now, therefore, I the said D. T. do hereby set out, determine, and fix that the said inclosures respectively [*470] *are parcel of the parish of Stanley St. Leonard's, otherwise," &c., "and that the boundary fences of the said inclosures respectively are the boundaries between the said parish of Stanley St. Leonard's, otherwise," &c., "and the said parish of Berkeley, where they adjoin each other.

(Signed) "DANIEL TRINDER."

The sessions thought that under stat. 41 G. 3, c. 109, s. 3, see page 472, note (2) post, it was necessary to have proof that the means of appeal had been afforded by a due service of the descriptions of boundaries as therein provided, but that, if this were done, no appeal having ever taken place, they could not now inquire by what means and through what steps the commissioner had arrived at his decision; and they interrupted evidence which had been commenced on that point, particularly as to his having examined witnesses without oath, and as to whether there had been any disputes, before his perambulation commenced, concerning the boundaries in question.

With regard to the proper services of the description of boundaries: Berkeley parish is divided into four tithings, Berkeley town, Alkington, Ham, and a fourth composed of Hinton, Hamfallow, and Breadstone. There is but one church, which is in Berkeley, and one chapel of ease, which is in Ham. Each of the tithings has separate poor-rates, and manages its poor separately, and removes paupers from one tithing to another. Berkeley, Alkington, and Ham have each one churchwarden and two overseers. Hinton and Hamfallow have one overseer each, and Breadstone two, and there is one churchwarden for the [*471] three. The churchwardens *for all are appointed at Berkeley. The following is the form of the appointment.

At a vestry meeting held in the vestry-room of the parish church of Berkeley, this day of , the following persons were nominated as proper persons to serve the office of churchwardens for the town and tithings for the year ensuing, viz. A. B., C. D., E. F., G. H. In the presence of us (here follow the names of the parishioners assembled in vestry).

The outgoing churchwarden generally nominates his successor for the same titthing; but, in case of dispute, inhabitants of one titthing do not vote in the election of the churchwarden of another. None are chosen churchwardens of either of the tithings but such as are inhabitants of that particular titthing. Berkeley church is repaired by church-rates levied separately on the tithings.

The description of boundaries was served, 23d November, 1832, by the commissioner, duly as regarded the parish officers of Leonard Stanley and the lords of the manors, but not on any churchwarden or overseer in respect of Alkington as distinct from the rest of the parish of Berkeley. It was served on one Seaborne, who had been duly elected churchwarden of Berkeley town for the preceding year, but whose original year of office was expired, and who continued to act in consequence of the person appointed as his successor not having been sworn in, or served.

The questions were, 1. Whether the quarter sessions ought to have received evidence as to the steps taken by the commissioner, and the other circumstances prior to his adjudication? 2. Whether they were entitled to require proof of the due service of the description *of boundaries? 3. Whether, if so, [*472] service on the churchwarden of Berkeley was sufficient? 4. Whether Seaborne could be considered as such churchwarden?

The case came on for argument in last Hilary term.¹

Sir J. Campbell, Attorney-General, and Greaves, in support of the order of sessions. The rate is correctly imposed on the appellant's lands as lying in Alkington, unless it be conclusively shown that the commissioner made a valid order, fixing them in Leonard Stanley. He acted on a limited authority, and was bound (upon the principles recognised in *Bruyeres v. Halcomb*, 3 A. & E. 381), to perform strictly the conditions under which it was to be exercised. The authority in question is given, and the conditions prescribed, by stat. 41 G. 3, c. 109, s. 3.² Then, first, the order is void, *as it does not show, on the face of it, that the conditions have been fulfilled; *Rex v. Croke*, 1 [*473]

¹ January 27th. Before Lord DENMAN, C. J., LITTLEDALE, WILLIAMS, and COLERIDGE, J.

² Stat. 41 G. 3, c. 109, s. 3, after reciting that "disputes or doubts may arise, concerning the boundaries of parishes, manors, hamlets, or districts, to be divided and inclosed, and of parishes, manors, hamlets or districts, adjoining thereto," enacts that the commissioners under any inclosure act shall, and he is thereby authorized and required, to inquire into such boundaries by examination on oath or affirmation, and by such other legal ways and means as he shall think proper; and, if it shall appear to him that the boundaries are not then sufficiently ascertained, to ascertain and determine the same. "Provided always, that such commissioner or commissioners (before he or they proceed to ascertain and set out the boundaries of such parishes, manors, hamlets, or districts) shall, and he or they is and are hereby required to give public notice, by writing under his or their hands to be affixed on the most public doors of the churches of such parishes, and also by advertisement to be inserted in some newspaper to be named in such act, and also by writing to be delivered to or left at the last or usual places of the abode of the respective lords or stewards of the lords of the manors in which the lands and grounds to be inclosed shall be situate, and of such adjoining manor or manors, ten days at least before the time of setting out such boundaries, of his or their intention to ascertain, set out, determine, and fix the same respectively; and such commissioner or commissioners shall, within one month after his or their ascertaining and setting out the same boundaries, cause a description thereof in writing to be delivered to or left at the places of abode of one of the churchwardens or overseers of the poor of the respective parishes, and also of such respective lords or stewards." It is further provided, that, if any person "or persons interested in the determination of the said commissioner or commissioners respecting the said boundaries shall be dissatisfied" with the order, he or they may appeal to any general quarter session for the county, to be holden within four calendar months "next after the aforesaid publication of the said boundaries, by delivering or leaving such description as aforesaid;" and the decision of the justices shall be final, and not removable by certiorari or otherwise.

Cowp. 26. Secondly, if this be not so, still the parties relying on the order were bound to prove the performance of all the conditions. And, thirdly, at all events, the opposing party was at liberty to impeach the proceedings, by showing that the directions of the statute had not been complied with, so as to make the act of the commissioners a lawful exercise of jurisdiction; *Welsh v. Nash*, 8 East, 394. But the appellant, here, was prevented from giving evidence for that purpose. The description of boundaries in this case was not served upon one of the "churchwardens or overseers" of the poor of Alkington, as it ought to have been. The only service was on Seaborne, who had been churchwarden of Berkeley town. Alkington was a district separately maintaining its own poor, and for the present purpose a distinct parish. And Seaborne was not even churchwarden of Berkeley town at the time of the service.

**W. J. Alexander and Cripps*, contra, were then called upon by the [*474] Court as to the service. Stat. 41 G. 3, c. 109, s. 3, requires the notice, after setting out the boundaries, to be delivered to "one of the churchwardens or overseers of the poor of the respective parishes." That has been literally obeyed. With nothing but this clause to guide him, the commissioner could serve the description of boundaries on the churchwarden only of the mother church. The notice, previous to ascertaining the boundaries, is to be fixed upon the doors of the parish churches: the parish church of Alkington is in Berkeley. According to *Spitalfields v. Bromley*, 18 Vin. Abr. 468, Removal (H), pl. 5, and *PARTESON, J.* (referring to that case), in *Rex v. Bishop Wearmouth*, 5 B. & Ad. 942, magistrates in making an order of removal are not bound to notice the divisions of parishes into townships maintaining their own poor; a fortiori, a commissioner under the Inclosure Act is not called upon to observe them. Stat. 48 Eliz. c. 2, s. 9, preserves the authority of churchwardens over the whole parish, although there may be districts within it, which, for some purposes, have jurisdictions of their own; and the section was construed accordingly in *Rex v. Gordon*, 1 B. & Ald. 524. [*COLERIDGE, J.* That section does not apply here. The service here is made necessary by a distinct act of parliament, for a purpose not contemplated by the former act.] Churchwardens are representatives of the body of the parish; 1 Bla. Com. 394; and they are sworn to execute their office within the parish generally. [*COLERIDGE, J.* That is said of the churchwardens of a parish.] There is *no prescribed oath for a churchwarden of [*475] a township or tithing. The churchwardens of the district in which the parish church is have the charge of the registers. The parish chest is in their care: the indenture of an apprentice bound in one of the townships would come from their custody. It is sufficient here if the churchwarden of Berkeley was one of several persons, any one of whom might properly have been served. The case finds that Alkington and other tithings have each one churchwarden; and there may be a custom that each of the several tithings which make up the parish should elect one. But it does not follow that each acts only for his own tithing; or that, if the churchwarden of Berkeley were ill, the churchwarden of Alkington would not be compellable to act in his place. [*WILLIAMS, J.* If you contend that the churchwarden of one of these districts may act in any other throughout the parish, *Rex v. Nantwich*, 16 East, 228, is against you.] That case was decided with much doubt; and the only point determined was that stat. 13 & 14 Car. 2, c. 12, s. 21, was not controlled by the certificate acts subsequently passed. The difficulty which arose in that case was removed shortly afterwards by stat. 54 G. 3, c. 107, s. 2. There can be no exercise of the office of churchwarden with reference to a township, except for execution of the poor-laws. The office is properly one having relation to a parish church; and in *Rudd v. Morton*, 2 Salk. 501, where the question was whether Stratton was a reputed parish of itself or part of the parish of Biggleswade, it was held that, to make it a reputed parish within stat. 48 Eliz. c. 2, it must have had "a parochial chapel, *and [*476] chapelwardens" at the time when the statute passed; and because Stratton "had but one chapelwarden whose office it was to collect the rates taxed

put out the proceeds (after payment of debts, &c.) at interest on government or freehold security, "the principal to be divided between my two children, Matilda and Benjamin, share and share alike, and to be paid on his or her attaining the age of twenty-one years, the interest in the mean time to be applied for their benefit, advantage, and education, in such manner as to my said trustees or the survivor of them, his executors or administrators, shall seem meet." The will concluded as follows:—"I appoint the said Samuel Gregory and William Wilkins executors of this my last will and testament, and also guardian and guardians of the persons and estates of my children. And I earnestly request that my said trustees and executors will, according to their discretion, cause my said children to be properly brought up and educated; and I authorize them, my said trustees and executors, to retain and reimburse themselves and himself out of the moneys that shall come to their or his hands or hand by virtue of the trusts hereby in them reposed, all costs, charges, and expenses which they shall be put unto in execution hereof." Gregory and Wilkins proved the will and took upon themselves execution. The children were in the custody of James and Grace Isley, their grandfather and grandmother, "who refused, when required [*443] by the trustees, to give them up. The trustees now stated that James and Grace Isley were very improper persons to have the custody of the children, moving in a sphere of life below that to which the children's expectations authorized them to aspire;¹ and that it was necessary that the children should be delivered up to the trustees, in order that they might carry into effect the testator's intentions, and educate and provide for the children in a manner suitable to their fortune, and agreeable to the testator's wishes.

Isley and his wife claimed to retain the custody on the following grounds. That the mother of the children, who was Isley's daughter, died about five years ago, and on that occasion Isley came, with his wife and family, from America, where he then resided, at a considerable inconvenience and sacrifice, on the testator's written request, for the purpose of taking care of the children, who were then placed under Mr. and Mrs. Isley's charge, and had continued with them ever since. That Mr. and Mrs. Isley came to England, and undertook this charge, in consequence of a promise to the mother, and would not have done so, but for such promise. That the father had often, in his lifetime, expressed himself grateful for their care and attention, and declared his intention never to remove the children as long as they were kindly treated. That the children were aged respectively nine and six years, one of them weak in intellect, and both delicate in health and requiring much care: and that they had in fact been kindly and carefully treated by Mr. and Mrs. Isley. It further appeared that, by a settlement made on the marriage of the testator and his late wife, 3000*l.* [*444] 4 per cent. bank annuities were vested in other trustees than Gregory and Wilkins, for the benefit (among other purposes) of the issue of the marriage, and that the trustees under the settlement continued so interested, for the benefit of the children, Matilda and Benjamin.

The parties attended before PATTESON, J., at chambers, in pursuance of the writ, and, on February 16th, the learned Judge (after having taken time for consideration) stated that he felt so much difficulty in the case that he thought the question ought to be referred to the Court in the next term. Shortly after this time, Isley, as the grandfather and next friend of the children, filed a bill in Chancery on their behalf against Gregory and Wilkins, as executors of Benjamin Harris's will, for an account, and for the purpose of placing the children and their property under the protection of that Court. Gregory and Wilkins filed their answer on the 9th of May.

Erle now moved, on behalf of the prosecutors, for the order of the Court. An additional affidavit, by the testator's brother, was put in, stating that the testator had, before his death, expressed a wish that the children should not remain with their grandmother, whom he considered an unfit person, and had desired

¹ Isley described himself as "of Trowbridge, carpenter."

district was not affected by the proceeding, and who, therefore, had no interest in communicating the notice; or even to a party interested in withholding it. [LITLEDAL, J. The act, in prescribing the notice, seems not to contemplate any particular description of interest in the parties who are to be served; but to regard them merely as public officers. The interests contemplated seem to be those which commoners and others may have in the lands themselves.]

[*479] *The power of appeal depends on the service of notice, because the time for appealing is limited to four months next after publication of the boundaries.

As to the objection that Seaborne's year had expired. He was not *de jure* churchwarden, but his successor was. Two persons cannot be in of the same office; and if a man may execute the office of churchwarden before he is sworn, as was held in the Anonymous case in 1 Ventris, 267, and in *Rex v. Corfe Mullen*, 1 B. & Ad. 211, it is only because he is in of such office. The canon is, inferentially, overruled by the later authorities. Churchwardens are a lay corporation, existing independently of the canons, by common law; *Dawson v. Fowle*, Hardr. 378; *Stutter v. Freston*, 1 Stra. 52; *Catten v. Barwick*, 1 Stra. 145. Swearing is a proper sanction introduced by canon, but not necessary to the lawful holding of the office. The appointment, here, is "for the year ensuing."

As to the preliminary proceedings, *Rex v. St. Mary in Bury St. Edmunds*, 4 B. & Ald. 462, does not show that any irregularity in them might not have been inquired into at the sessions. In that case it was not suggested that the proceedings of the commissioners had not been regular.

Lord DENMAN, C. J. This is a question of great difficulty, and important in its consequences; and we wish the case restated so as to afford us more information as to the appointment of these officers, their oath, and the limits within which they act.

[*480] *The Court directed

That the orders returned with the writ of certiorari in this prosecution be sent back to the sessions to be restated, this Court wishing to know,—Whether any custom prevails as to the election of parochial officers within the parish of Berkeley, and what is the precise form of their appointment, and the form of the oath of office taken by them: and also whether any of the officers act out of the tithings for which they are respectively appointed. In answer to these inquiries, the following addition was (by consent) made to the case:—

1. By custom in the parish of Berkeley (divided as it is into the several tithings as mentioned in the case), there are four churchwardens, the customary mode of electing whom is as follows. A notice is given in the parish church that the churchwardens desire a meeting at the vestry, on Easter Tuesday, to choose churchwardens for the town and tithings for the year ensuing. At the meeting held in pursuance of such notice, an inhabitant of each tithing is separately proposed and nominated as the new churchwarden for such tithing. The churchwarden for the tithing of Alkington is usually nominated first in order, and afterwards the rest one after another. It is customary for the outgoing churchwarden of each tithing to propose his successor; and the person so proposed is usually nominated without opposition; but, in case of opposition, the successor is nominated by the majority of the inhabitants then present, of the tithing for which he is to serve, in which nomination the inhabitants of the other tithings never interfere. As far as living memory goes, each churchwarden has been an inhabitant of the tithing for which he served.

[*481] *2. After the nomination of the churchwardens as aforesaid, a minute thereof is usually made, in the form set out in the case, for presentation to the archdeacon at his annual visitation. No other minute of appointment is made or delivered to any of the churchwardens.

3. They are all sworn in together at the archdeacon's visitation. The oath administered is in the following form:—You and each of you shall swear truly and

faithfully to execute the office of churchwarden within your parish, and according to the best of your skill and knowledge present such things and persons as to your knowledge are presentable by the laws ecclesiastical of this realm, so help you God and the contents of this book."

4. No churchwarden ever acts out of the tithing for which he is appointed, except the signing the presentments annually made to the archdeacon, of the state of repair of the church and other presentable matters, which are signed by all four churchwardens, can be so considered. There is no church-rate made for the tithing of the town of Berkeley; but the church is repaired by rate out of the other tithings. When a sum of money is required for other expenses towards which the church-rate is applicable, the parish clerk, who is also vestry clerk, divides the amount required into three equal parts, and makes a separate rate for each of the three other tithings for one-third, although the extent and value of such tithings are not equal. Such rate is allowed by the inhabitants of each of such tithings in vestry. The rate, when collected, is paid to the vestry clerk, who keeps separate accounts for each of the churchwardens of such tithings, and such accounts are allowed by the inhabitants of each of such tithings.

*The case was further argued in this term.¹

Sir *J. Campbell*, Attorney-General, and *Greaves*, in support of the [*482] order of sessions. It is clear from the facts now stated, that Seaborne could not be considered as churchwarden for Alkington. Berkeley town, for which he acted, had no interest in the church-rate, nor in the Alkington poor-rate; and the removal of these lands tended to burden Alkington more severely in respect of both. The custom now stated, that the church should be maintained by three of the tithings and not the fourth, may well have had a legal origin. The lord, when he endowed the living, might appropriate to this purpose such revenues as he thought fit. It may be said that Seaborne was at all events a churchwarden "of the parish," within the letter of the statute. But the election is by the inhabitants of each tithing separately, for that tithing, and the written appointment is framed accordingly. The officer of each township, therefore, is a churchwarden in, not of, the parish. The argument on the other side rests upon a strict construction of the word "parish," as signifying the district which comprehends the lesser divisions. But the recital of 41 G. 3, c. 109, s. 3, refers to the settlement of disputes as to boundary, not only between parishes, but between manors, hamlets, and other districts; and therefore there must be cases in which the clause as to notice will refer to officers of divisions less than parishes. And the word "parish" has often been construed in the less comprehensive sense. In stat. 43 Eliz. c. 2, s. 3, it has been held applicable to vills; *Anonymous case, *Foley's Poor Law*, 35, 3d ed. Ac- [*483] cording to the argument on the other side, if a district were extra parochial, no notice would be necessary. The intention of the statute must be looked to, which is, that warning should be given to the parties interested. The principle of construction should be that which was adopted in *Saunders v. Wakefield*, 4 B. & Ald. 595, where the word "agreement," in the latter part of stat. 29 Car. 2, c. 3, s. 4, was held to be a word of reference, carrying on, by implication, the words "special promise," "contract," &c., which occur in the earlier part.

W. J. Alexander and *Cripps*, contra. There is nothing in the form of appointment to show that the party is churchwarden for one township rather than another. In *Saunders v. Wakefield*, 4 B. & Ald. 595, the word "agreement" formed part of the same sentence with the other words which (perhaps by a strained construction) were read as connected with it. Here the frame of the clause is different. If the churchwardens of the several districts are not all churchwardens of the parish generally, to whom must notice be given under the act? The officer for the division which has the mother church and the parish chest will still be the fittest person. Publicity, the object for which the

¹ June 4. Before Lord DENMAN, C. J., LITLEDAL, PATTESON, and WILLIAMS, Js.

notice is required, will be best attained by service on him. [PATTESON, J. In drawing this act, it has been forgotten that parishes might contain districts maintaining their own poor. Upon what overseers should the notice be served in such a parish?] The commissioner, in this case, was bound to follow the [*484] words of the act as nearly as he could; and he has taken *the course best calculated, consistently with the act, to make this notice public to the people of Alkington. The question raised in *Rex v. Nantwich*, 16 East, 228, as to the jurisdiction of churchwardens over the poor of townships, is entirely distinct from that now before the Court. It would be very inconvenient to require that a commissioner of inclosure should ascertain who were the district officers, for the purpose of giving his notices. But, further, it has not been shown that Seaborne was not, in point of law, a churchwarden for the whole parish, or that there can be churchwardens for anything less than a parish. In the present case all the churchwardens make joint presentments to the archdeacon. All form one body corporate. The office of churchwardens existed long before the statute 43 Eliz. c. 2, and is not affected by its provisions; nor is there any statute by which the extent of their jurisdiction has been limited. Assuming the mode of election in these townships to be good, the churchwardens are not the less officers for the whole parish. It is said in *Dawson v. Fowle*, Hardr. 378, that, "of common right, every parish ought to choose their own churchwardens: but because the manner of election varies and is uncertain, a custom may be alleged: and issue may be taken, whether a special and select vestry, or the whole parish, ought to choose their churchwardens." But the mode of election, whatever it may be, will not affect the extent of the jurisdiction. The proviso of 41 G. 3, c. 109, s. 3, as to serving notice of boundaries, does not make that service a necessary condition precedent to the order [*485] becoming valid. It is a direction to the commissioner. * [Lord DENMAN, C. J. The time for appeal depends upon it, by the next proviso.] *Cur. adv. vult.*

Lord DENMAN, C. J., now delivered the judgment of the Court.

The question in this case has arisen out of the ascertainment of boundaries between certain parts of the parish of Berkeley, in the county of Gloucester, and the parish of Leonard Stanley in the same county, under the third section of 41 G. 3, c. 109 (the General Inclosure Act), by a commissioner acting under it, and an act of 11 G. 4, for the inclosure of the parish of Leonard Stanley. And it seems to us that the difficulty, which has arisen, is not attributable to any error or misconduct of that commissioner, but to the imperfection and confusion of the General Inclosure Act itself.

It certainly would seem probable that the settlement of boundaries would be equally useful and necessary in the case of an inclosure taking place in or adjoining to parishes divided into many districts, as where a parish consists of one undivided district. And accordingly, the earlier part of the third section recites, that disputes may arise respecting the boundaries of "parishes, manors, hamlets, or districts," about to be divided and enclosed; and, for preventing or adjusting those disputes, the commissioner, under the powers thereby conferred upon him, is to settle the boundaries. Previously, however, to his executing this duty, he is to give several very formal and public notices, to attract and insure attention to the manner of his performance of it. Subsequently to the commissioner's settling the boundaries he is required by the act to give a notice to [*486] "one of the churchwardens or overseers of the poor of the respective parishes," omitting entirely any mention of the officers of districts; and out of this omission the question before us has arisen.

In the parish of Berkeley above mentioned, there are four districts called *tithings*, which districts, according to the statement in the case, have, so far back as memory goes, each nominated a separate churchwarden, who, after his appointment, uniformly acts within and for his own district, "except the signing the presentments annually made to the archdeacon, of the state of repair of the church

and other presentable matters, which are signed by all four churchwardens." They are also sworn to execute the office of churchwarden "within their parish." An inclosure having taken place within the adjoining parish of Leonard Stanley, the commissioners for settling boundaries had adjusted them between that parish and the adjoining part of the parish of Berkeley which lay in the tithing of Alkington, and, in so doing, had fixed certain lands, of which the defendant is occupier, to be in the parish of Leonard Stanley. And the single question is, whether the act of the commissioner was invalid; in which case the lands would remain in Alkington, and the defendant would be properly rated for them; otherwise not.

The sessions, properly as we think, refused to hear evidence as to the giving or omitting the preliminary notices, and reserved for us the question, whether a notice served upon one Seaborne, who had been appointed churchwarden for the tithing of Berkeley, was a service upon a churchwarden of the parish of Berkeley.

It is said that there is no such person as a churchwarden of the parish of Berkeley; and, if that be said **truly*, it follows that it was impossible [*487] for the commissioner to comply, literally, with the provisions of the statute: for it has been already noticed that no officer of a district is therein mentioned; and yet it cannot, we presume, be doubted but that the case was clearly within the contemplation and objects of the statute. It has been urged, in furtherance of the objection, that the commissioner should have served a notice upon an officer of each tithing, or, at least, upon that of Alkington. If he had adopted either course, we are by no means sure that he would not have been met by an objection, exactly the converse of this, that, by law, no such officer as a churchwarden of a portion of a parish can exist.

Placed, therefore, as the commissioner certainly was, in a difficulty, in a case too where he was, as certainly, meant to act, we think that we should see very clear and convincing reasons for considering his act invalid, before we arrive at that conclusion. And in the result we are not so satisfied. Generally speaking, the churchwarden is peculiarly, and emphatically, a *parish* officer. The nomination may be (not unusually is) by a portion of, or even by a person in the parish; but the office is not thereby affected. He is still of, and for, the parish. We think that this may be considered as a somewhat unusual case, of separate appointment, and separate acting, without affecting the proper and legal character of churchwarden. It may have been an arrangement for some purpose of real or supposed convenience. They are sworn in as *for the parish*; the acts, before particularly alluded to, are *for the parish*; the general and undoubted character of the office is *for the parish*. Upon the whole, we are of opinion that the **ascertainment* of boundary by the commissioner was, under these circumstances, well performed, and that the defendant was improperly rated [*488] in Alkington. The order of sessions must therefore be quashed.

Order of sessions quashed.

IN THE EXCHEQUER CHAMBER.

(ERROR FROM THE KING'S BENCH.)

THE KING *v.* THOMAS JOHNSON.

A custom of the city of London, for the Court of Mayor and Aldermen to examine and determine whether or not a person elected alderman of a ward, and returned to the said court as such alderman, be, according to their discretion and sound consciences, a fit and proper person and duly qualified, is a valid custom.

So a custom, that, when the inhabitants of any ward shall three times return to the said court the same person to be alderman, who shall be by the said court, according to

the former custom, adjudged on such three returns, according to the discretion and sound consciences of the mayor and aldermen, not a fit person to support the dignity and discharge the duties of the office, the mayor and aldermen may, for remedy thereof, nominate, elect, and admit a fit person, being a freeman, out of the whole body of the citizens, to be alderman of such ward.

The latter custom is not abrogated by stat. 11 G. 1, c. 18, s. 7.

Nor by the by-law of the city, 18 Ann., "for reviving the ancient manner of electing aldermen," which (after reciting that, by the ancient custom of the city, when any ward became vacant of an alderman, the inhabitants of that ward, having right to vote, were wont to choose one person only, being a citizen and freeman, to be alderman of the ward), enacts that, for reviving that custom, and restoring to the inhabitants their ancient right of choosing one person only to be their alderman, there shall from thenceforth, in all elections of aldermen of the city, at a wardmote to be holden for that purpose, be elected, according to the said ancient custom, only one able and sufficient citizen and freeman, to be returned to the Court of Mayor and Alderman, which person so elected shall be by them admitted and sworn.

On quo warranto for exercising the office of alderman of London, the defendant pleaded the two first-mentioned customs, and that, M. S. being three times returned by the ward, and adjudged unfit by the mayor and aldermen, they elected the defendant. The relator took issue upon the existence of the customs, and replied that M. S. was a fit, &c., upon which issue was joined. The jury having found the customs, the Judge, without consent of parties, discharged the jury from giving a verdict on the issue as to the fitness, &c., of S.

Held, that he might properly do so.

QUO WARRANTO for the office of alderman of the city of London.

Pleas. 1. That the city of London is, and from time immemorial hath been, an ancient city, and that the citizens and freemen of the said city during all [*489] that time have been a body corporate, &c.; the plea then stated ("as in Rex v. The Mayor of London, 9 B. & C. 1), the constitution of the city as to its wards and aldermen, and the Court of Mayor and Aldermen,¹ and the custom of holding wardmote courts for election to offices. It then described, as in that case (page 4), the Court of Common Council, and stated, as there, the authority of the mayor, aldermen, and commons, assembled in common council, to make by-laws: and that, from time immemorial,—until the making of a by-law or act of common council, 21 Ric. 2, touching the election of aldermen, whereby it was ordained that for the future, in the elections of aldermen, two at least, honest and discreet men, should be chosen and presented to the mayor and aldermen, so that either of them, whom they should choose, might be admitted and sworn; and also after the making of another by-law or act of common council of 13 Ann., "for reviving the ancient manner of electing aldermen," whereby, "after reciting (amongst other things) that, by the ancient usage and custom of the city of London, when any ward of the said city became vacant and destitute of an alderman, the inhabitants of that ward, having a right to vote in such elections, were wont to choose one person only, being a citizen and freeman of the same city, to be alderman of the same ward, for reviving the said ancient custom, and restoring to the said inhabitants their ancient rights and privileges of choosing one person only to be their alderman, it was enacted that, from thenceforth, in all elections of aldermen of the said city at a wardmote to [*490] be holden for that purpose, there *should be elected, according to the said ancient custom, only one able and sufficient citizen and freeman of the said city, not being an alderman, to be returned to the Court of Mayor and Aldermen, which person so elected should be by them admitted and sworn, well and truly to execute the said office of alderman;" and from thence hitherto,—the aldermen of the divers wards, and amongst others of the ward of Portsoken, have of right been elected and chosen at such wardmote courts as aforesaid, holden as aforesaid, in the respective wards by virtue of precepts, &c., one alderman for each ward. The plea then stated,

"That the said Court of Mayor and Aldermen, holden as aforesaid, accord-

¹ Adding, as one of the functions of this court, the admitting and swearing in of persons duly elected aldermen.

ing to the custom of the said city from time immemorial, have had, and of right ought to have had, and still of right ought to have, the cognizance, jurisdiction, and authority of examining, hearing, determining, and adjudging of and concerning the election and return of every person elected into a place or office within the said city at any such wardmote court holden as aforesaid, whensoever the merits of such election or return have been brought into question by the petition of any person interested therein, to the said Court of Mayor and Aldermen holden as aforesaid, and also of examining and determining whether or not any person so returned to the said Court of Mayor and Aldermen, as an alderman of any ward of the said city, is, according to the discretion and sound consciences of the mayor and aldermen of the said city for the time being, a fit and proper person and duly qualified in that behalf, whensoever the fitness and qualification of the person so returned has been brought into question by the petition of any person interested therein to the *said Court of Mayor and Aldermen holden as aforesaid, to wit, at the city of London aforesaid, [*491] and that, according to the custom of the said city from time immemorial, it hath been and still is a necessary qualification of the person to be elected, admitted, and sworn into the place and office of an alderman of any ward of the said city, that such person should be a fit and proper person to support the dignity and discharge the duties of the said office of an alderman of the said city, and the honor and charges of the said city, according to the discretion and sound consciences of the mayor and aldermen of the said city for the time being, to wit," &c. "That within the said city of London there now is, and from time immemorial there hath been, and still is, a certain ancient and laudable custom there used and approved of, viz., that, whenever it should happen that the inhabitants of any ward of the said city should three times return to the said Court of Mayor and Aldermen the same person to be alderman of any such ward, who should be by the said Court, according to the custom aforesaid, adjudged and determined, according to the discretion and sound consciences of the said mayor and aldermen, not a person fit and proper to support the dignity and discharge the duties of the said place or office of an alderman of the said city upon such three several returns, that then the said Court of Mayor and Aldermen lawfully might and may, for remedy in that behalf, nominate, elect, and admit, and they have been used and accustomed so to nominate, elect, and admit, a fit and proper person, being a freeman of the said city, out of the whole body of the citizens of the said city, to be alderman of any such ward, being so made destitute of an alderman, to wit, at," &c.

*The plea then stated that a wardmote court was holden, February 8th, 1831, to elect an alderman for Portsoken (that office being vacant [*492] by the resignation of Sir James Shaw), at which election Michael Scales was a candidate, and had a majority of votes, and was returned to the Court of Aldermen as elected; but, on petition, the Court of Mayor and Aldermen, after hearing the parties (on March 22d, 29th, &c., 1831) touching the merits of the election and the qualification and fitness of M. S., adjudged and determined (May 10th, 1831), according to their discretion and sound consciences, that M. S. was not a person fit and proper to support the dignity and discharge the duties of the said office; and he was then by the said then Court of Mayor and Aldermen rejected as insufficient for the said office. That, the vacancy by Sir James Shaw's resignation not having been filled up, another wardmote court was held. The plea then stated the proceedings on a second election, when Scales was again returned; and that, on petition to the Court of Mayor and Aldermen, he was again, January 3d, 1832, rejected as not being a person fit and proper, &c., see *Rex v. The Mayor and Aldermen of London*, 3 B. & Ad. 255; *Rex v. Same*, 5 B. & Ad. 233. The plea then stated a third election, June 26th, 1833, at which Scales and the defendant were candidates, and Scales was returned; and that, upon petition, the Court of Mayor and Aldermen, on October 29th, 1833, did take the said last-mentioned petition into consideration, and, having heard the petitioners by themselves,

their agents, and witnesses, and also having heard the said M. S. touching the merits of the said last-mentioned election, and the qualification and fitness of the said M. S. to be such alderman as aforesaid, and the *said M. S. not producing any witnesses on his behalf, and the said last-mentioned Court having referred to the minutes of the proceedings of the said Court held on the 29th day of March, &c., 1831, and also having referred to the minutes of the proceedings of the said Court, held on the 3d day of January, 1832, and due deliberation being thereupon had, the said Court of Mayor and Aldermen did, on the said 29th day of October, 1833, to wit, at, &c., adjudge and determine, according to their discretion and sound consciences, that the said M. S., upon and from the said 26th day of June, 1833, as well as upon and from the said 10th day of May, 1831, and continually from thence to the said 29th day of October, 1833, had been and then still was not a person fit and proper to support the dignity," &c., nor to be admitted and sworn into the office; and the said Court did further adjudge and determine that he was not duly elected to be alderman of Portsoken at the last-mentioned election; and that the said M. S. was, on, &c., again rejected by the said Court as insufficient, &c. The plea then stated, "That, on its appearing to the said Court of Mayor and Aldermen holden," &c., October 29th, 1833, "that the said Michael Scales had been three several times returned by the inhabitants of the said ward of Portsoken to the said Court of Mayor and Aldermen as having been elected to be alderman of the said ward, and that the said several elections of the said M. S. to be such alderman had, upon each such return, been rejected by the said Court of Mayor and Aldermen, and that the said M. S. had, upon such return, been adjudged by the said Court of Mayor and Aldermen to be a person not fit and proper to support the dignity and discharge the duties of the said place and *office of an alderman of the said [*494] city, nor a fit and proper person to be admitted and sworn into the place and office of alderman of the said ward, the said Court of Mayor and Aldermen did, in pursuance of and according to the said ancient custom in that behalf, nominate and elect the said defendant, citizen, and cooper of London, out of the whole body of the citizens of the said city, as a fit and proper person to be alderman of the said ward, and a fit and proper person to support the dignity and discharge the duties of the place and office of an alderman of the said city, to wit, at," &c., "and thereupon the said defendant was by the said last-mentioned Court of Mayor and Aldermen in due manner elected, chosen, and nominated to be alderman of the said ward of Portsoken, according to the said ancient custom in that behalf, in the room and stead of Sir James Shaw," &c. The plea then stated the swearing in and admission of the defendant: by reason of which said several premises, &c. Traverse of usurpation. Verification.

2d Plea. Similar to the first, except that, in stating the right to examine and determine upon elections, it omitted the qualification "whenever the merits of such election or return have been brought into question by the petition of any person interested therein;" and it made the like omission in the clause asserting the right to determine on the qualification of any person returned, adding, after the words "qualified in that behalf,"—"and thereupon to reject such person as in their discretion and sound consciences was not a fit and proper person, and duly qualified for the said place and office:" and, in stating the rejections, it did not mention any petition. And, in setting out the custom to elect after three [*495] rejections, it added, after the words "alderman of the said city,"—"and be thereupon rejected by the said Court of Mayor and Aldermen, as insufficient for the said place and office, for the reason and according to the custom aforesaid." The 3d plea alleged that, on the election at which Scales and the defendant were candidates, the latter was duly elected. Each concluded with a verification.

Replication. 1. Denying that the Court of Mayor and Aldermen, by the custom of the city, from time whereof, &c., have had and ought to have had, &c., the cognizance and jurisdiction of determining upon elections, and

upon the qualification of persons elected, on petition, as alleged in the first plea. Conclusion to the country.

2. Traversing the custom for the mayor and aldermen to elect after three rejections of the same person, as alleged in the first plea. Conclusion to the country.

3. and 4. Similar replication, *mutatis mutandis*, to the second plea.

5. To the third plea, denying that defendant was duly elected, and concluding to the country.

6, 7, 8. To the first plea, alleging, respectively, that Scales, at the times of the first, second, and third elections, and of his rejections thereupon, was an able and sufficient citizen and freeman, and a fit and proper person to support the dignity and discharge the duties, &c. Verification. Issues thereon.

9, 10, 11. Similar replication, *mutatis mutandis*, to the second plea. Issues thereon.

The cause was tried before Lord DENMAN, C. J., at the sittings in London, after Michaelmas term, 1834. Evidence being tendered on behalf of Mr. Scales upon the issues as to his sufficiency, the Lord Chief Justice refused to admit such evidence, holding the issues to *be immaterial; and he discharged the jury from giving any verdict upon them. On the other [496] issues, the jury found a verdict generally for the defendant. A bill of exceptions was tendered, on the grounds stated thirdly and fourthly in the writ of error after mentioned. The *postea* was drawn up, with a finding for the defendant upon the four issues as to the customs stated in the first two pleas, but against him upon the issue on the third plea: and, as to the remaining issues, the *postea* stated that the jurors were discharged from giving any verdict: and the judgment was, that the office, &c., claimed by the defendant be allowed and adjudged to him, and that he be discharged of the premises, &c., and depart hence without day, &c., and recover for his costs, &c.

Error was brought upon the judgment, and the following grounds assigned:—
1. That judgment was given for the defendant on the issues as to the custom for the mayor and aldermen to elect after three rejections as stated in the first two pleas; whereas it appears by the record that there now is not, nor hath been from time whereof, &c., any such custom, but, on the contrary, it appears by the record that a certain by-law, &c., was duly made (reciting the by-law of 13 Ann. p. 489, *anté*). 2. That by pleas 1 and 2 it is alleged *that the Court of [497] Mayor and Aldermen may elect a freeman to be alderman of any ward destitute of an alderman, which right hath been put in issue (referring to the particular issues), and judgment thereupon given for the defendant, whereas it appears by the record that the inhabitants of any ward, having a right to vote, are to elect a citizen and freeman to be alderman, which person so elected shall be admitted and sworn in by the Court of Mayor and Aldermen. 3. That the counsel for the Crown tendered witnesses on the issues as to Scales's sufficiency, but the defendant's counsel contended that they ought not to be received, and thereupon the Lord Chief Justice delivered his opinion to the jury that they ought not to be examined, and refused to permit them to be examined, and discharged the jury from giving a verdict on those issues. 4. That the counsel for the Crown referred to a statute (11 G. 1, c. 18) for regulating elections within the city of London, &c., and insisted that, on the proper construction of that act, the jury should be directed to find for the relator on the issues as to

¹ This was stated on the record as follows:—"And as to the issue," &c., "whether the said Michael Scales at the time of the election, in the said first plea of the said Thomas Johnson first mentioned, and also at the time when he was so rejected," &c., "as in the said first plea mentioned, was an able and sufficient citizen and freeman," &c., "in manner and form," &c., "or not;" "And as to the issue," &c. (similar introduction referring to the other issues upon the first and second pleas, as to the several elections therein mentioned), "the jurors of the said jury are by the Court here altogether discharged from giving any verdict of and upon the premises in the said several issues so," &c., sixthly, seventhly, "within joined, or any of them."

the alleged customs, but the defendant's counsel insisted to the contrary, and the Lord Chief Justice directed the jury that, if they were of opinion that the custom set forth in the first and second pleas had existed from time immemorial down to 1689,¹ then, in his opinion, the said statute did not put an end to such custom, or prevent their finding, and that they should find, a verdict for the defendant upon the last-mentioned issues; and they did so. 5. That the verdict, [498] and 6, that the judgment, upon the last-mentioned issues was for the *defendant, whereas it ought to have been for the Crown. Joinder in error.

The writ of error was argued in the Exchequer Chamber, during this term.²

Erle, for the Crown. It has not been thought necessary to bring before this Court the alleged custom for the Court of Mayor and Aldermen to determine upon the fitness of persons elected and returned to them by the wardmote, the points stated in the assignment of errors being deemed sufficiently clear and decisive. Then, as to the custom pleaded below, for the mayor and alderman to elect after three rejections of the person elected and returned by the wardmote: that custom, if it ever existed, is abolished, in the first place by stat. 11 G. 1, c. 18, s. 7.³ The intention of that enactment appears from the preamble to the statute, and the recital of the section itself. Disputes had arisen concerning the right of election of aldermen; and, to settle these for the future, the clause was introduced, enacting that the right of election of alderman should belong to free- [499] men of the city, being householders, paying scot and bearing *lot, and to none other whatsoever. The enactment is express, and, therefore, sufficient to abrogate the custom relied upon by the defendants, even if valid in itself. Sects. 15 and 16, show that, where the mayor and aldermen desired to retain rights under this act, care was taken to reserve and define them expressly. This is not a description of right in favor of which anything will be presumed, the claim being one which tends to withdraw the right of choosing aldermen from the inhabitants of the wards, and place it in the hands of the mayor and aldermen. In *Rex v. The Mayor and Aldermen of London*, 3 B. & Ad. 255, where the question was as to the validity of the alleged custom for the mayor and aldermen to inquire into the fitness of any person returned to them as an alderman elect, it was urged at the bar that the custom did not contravene stat. 11 G. 1, c. 18, s. 7, because such custom related, not to elections, but to the examination and approval of persons already elected; and Lord TENTERDEN's judgment, on this point, proceeded wholly on the same distinction. But his Lordship said (after observing that the right of election had been settled by the legislature), "it is impossible to say that any other mode of election, otherwise than according to the right so settled and ordained can be a good election." In a former case of *Rex v. The Mayor of London*, 9 B. & C. 1, Lord TENTERDEN said, "All ancient customs and prescriptions are to be considered with reference to the rules of the common law; if found to be repugnant to those rules, and contrary to law on any ground, they have always been held to be invalid. And an act of parliament confirming, in general terms, the ancient usages and customs [500] of a city, must, as I apprehend, be *considered to confirm those only which have not such repugnance or contrariety." B. 29. And again,

¹ Evidence had been given to show the existence of the customs down to that time.

² June 2d. Before TINDAL, C. J., PARK, GASELLE, BOSANQUET, and VAUGHAN, Js., PARKS, BOLLAND, GURNEY, and ALDERSON, Bs.

³ Stat. 11 G. 1, c. 18, s. 7, "And whereas divers controversies and disputes have arisen in the said city of London touching the right of election of aldermen and common councilmen for the respective wards of the said city; for quieting all such disputes and controversies for the future, it is hereby further enacted by the authority aforesaid, that from and after" June 1st 1725, "the right of election of aldermen and common councilmen for the several and respective wards of the said city shall belong and appertain to freemen of the said city of London, being householders, paying scot as herein-after is mentioned and provided, and bearing lot, when required, in their several and respective wards, and to none other whatsoever." The qualification of the electors is farther defined in the subsequent sections.

as to the operation of the statute now in question: "It is not necessary to consider the effect of the statute 11 G. 1, c. 18, upon the by-laws of the corporation, (though, without doubt, where they are inconsistent with each other, the regulations ordained by the statute must prevail)." P. 30. *Regina v. The Mayor and Aldermen of Norwich*, 2 Ld. Ray. 1244, and *Wright v. Fawcett*, 4 Burr. 2041, are among the cases which illustrate the distinction between electing and approving.

Secondly, the by-laws of 13 Ann., set out in the first plea, enacts that from thenceforth, in all wardmote elections of aldermen, one person only shall be elected, to be returned to the Court of Mayor and Aldermen, which person so elected shall be by them admitted and sworn. That by-law, not being contradicted by any statute, was, in effect, an abolition of the custom now in question. The binding effect of a by-law of the city of London, where it does not contravene any statute, is recognised in *Rex v. The Mayor and Aldermen of London*, 9 B. & C. 1, already cited. The ordinances of the city of London have indeed a peculiar authority, as is stated in the judgment of BRIDGMAN, C. J., in *Hutchins v. Player*;† and *in particular, with respect to the alteration of customs that need amendment. The by-law of 13 Ann., evidently [*501] has reference to the same disputes as the statute 11 G. 1, c. 18, and was passed with the same intent as sect. 7. of that act.

Thirdly, the evidence of fitness for the office ought not to have been rejected. The mayor and aldermen claim a right to sit in judgment and accept or reject the nominee of the parties empowered to elect; and it is said that, in so doing, they may act (in the words of the alleged custom) according to their "discretion and sound consciences." But they are claiming to adjudge upon a right in dispute between other parties; and they must, therefore, exercise their discretion upon assignable grounds. The issue here, upon the fitness or unfitness of the party rejected by them, was proper and material. Even if the defendants had an irresponsible discretionary power, yet, as they have raised the question of fitness by their pleadings, and joined issue upon it, their exercise of discretion has become a proper subject of inquiry. The case is so far like *Rex v. The Bailiffs, &c., of Ipswich*, 2 Ld. Ray. 1240, where the defendants *claimed [*502] an absolute power of removing their recorder, his office being *ad libitum*; but as they had, on *mandamus*, returned a cause for removing him (which the Court deemed insufficient), it was held that they could not afterwards avail themselves of their *ad libitum* power in opposition to a rule for a peremptory *mandamus*. But the present case is not within the authority of those in which the exercise of discretion has been held exempt from inquiry. Thus in *Rex v. The Borough of Andover*, 1 Ld. Ray. 710, the question arose, not upon a claim of the defendants to interfere with the right of others to elect or retain, but upon their exercise of an authority vested in themselves to remove "*quando-cunque illis placuerit*." The express words of the charter gave them an arbi-

† Sir O. Bridgman's Judgments, 272. The passage cited above is as follows:—Speaking of the custom that the mayor and aldermen, by consent of the commonalty, should ordain a remedy if any customs in the city should be found hard or defective, &c., the Lord Chief Justice says (p. 279), "I think it is good; and therefore of necessary use to be set forth to show, that by their custom, which is confirmed by parliament, they have power to make ordinances, or acts of common council; and that ordinances, so made according to that custom, so confirmed by act of parliament, and according to the qualification prescribed, do bind; and that therefore these ordinances are not to be compared to a power by charter, or custom in general, to make by-laws. This was the opinion, not only of the counsel in *Wagoner's case*" (8 Rep. 121 b), "but in infinite precedents before that case, and since, where, upon returns to writs of *habeas corpus*, in the front this custom of supplying defects in former customs, or putting new remedies, if the case requires, is set forth. And it is the foundation of most of the ordinances now in force in London for the government of the city; which would be shaken if you take away this pillar, and leave to London no more power touching by-laws than you do to every ordinary corporation or company." As to the confirmations of the above custom, see Appendix to the Report of the Municipal Commissioners for England and Wales (London and Southwark, sect. 10, p. 6, sect. 12, p. 12, sect. 14, p. 16).

trary authority. *Rex v. The Mayor, &c., of Stratford-upon-Avon*, 1 Lev. 291, and *Rex v. The Churchwardens of Thame*, 1 Stra. 115, were similar cases. So, in *Rex v. The Bishop of Gloucester*, 2 B. & Ad. 158, where the Court held that the Bishop could not be called upon to assign his reasons for approving or disapproving of a deputy appointed by his registrars, the registrars derived their power of appointment from the Bishop, subject to the condition that their appointment was such as he approved of. But the authority here exercised is analogous to that of a bishop in determining on the sufficiency of a clerk presented to a living. The bishop there sits as judge, and, if he rejects, is bound to assign the cause of his refusal; 1 Bla. Com. 389; *Specot's Case*, 5 Rep. 57 b, 58 a: the principle is also admitted in *Rex v. The Bishop of London*, 1 Wils. 11, [*503] and in *Rex v. The Bishop of *London* (on the application of Dr. Povah), 13 East, 419, where the Court declined acting upon it, only because there was another jurisdiction concurrent with that of the bishop, which had not been resorted to.

Sir J. Campbell, Attorney-General, contra. It may be assumed, from the course of argument on the other side, that the custom for the mayor and aldermen to judge of the fitness of persons returned by the wardmote cannot be effectually disputed. If, then, the mayor and aldermen have a veto upon the elections, there ought to be some means of terminating the contest, which may arise if the wardmote continues to return the same person; otherwise the office of alderman might be kept perpetually vacant. It is therefore probable, at least, that the custom now in question should have existed; whatever affects this tends to abrogate the other. The statute 11 G. 1, c. 18, s. 7, merely regulates the proceedings of the wardmote; it does not touch upon the powers of the mayor and aldermen; nor do those powers appear, either from the general preamble of the act, or from the recital of sect. 7, to have been among the matters in dispute when the act passed. Sects. 15 and 16 have no reference to the Court of Mayor and Aldermen. They continue to choose the lord mayor out of the two persons returned by the livery; yet that is not among the powers saved by sect. 16. If the election of an alderman by them, after three rejections, was one of the customs of the city confirmed by statute, it would require very strong words in any subsequent enactment to abolish that custom: but sect. 7 of stat. 11 G. 1, *c. 18, is not inconsistent with it. Then as to the by-law of 13 Ann. [*504] The custom, assuming it to exist, must be taken to originate in a charter or statute. A by-law may be made in furtherance of a custom so established, but not to cut down, and essentially change it; *Rex v. Cutbush*, 4 Burr. 2204, *Newling v. Francis*, 3 T. R. 189. Besides, the by-law of 13 Ann. only restores the ancient privilege of the wards to elect one alderman, instead of returning two, of whom the mayor and aldermen were to choose one. The ward is now to elect and return one person to be alderman, which person, so elected, is to be admitted and sworn in; but this provision does not, expressly or impliedly, take away the right of the mayor and aldermen to judge whether the person is duly elected, and to reject him if he is unfit; nor, therefore, does it interfere with their privilege of electing after three rejections of the same person. [PARKE, B. Mr. *Erle* contends that the corporation of London have a peculiar power of altering their ancient customs.] They cannot alter them so as to destroy the powers residing in integral parts of the corporation. Then, as to the rejection of evidence; if the issues upon which the evidence was tendered became immaterial, it was right to reject the evidence and discharge the jury from giving any verdict; *Coasey v. Diggons*, 2 B. & Ald. 546. [PARKE, B. referred to *Powell v. Sonnett*, 3 Bing. 381, S. C. in *D. P. 1 Bligh*, N. S. 545.] That these issues were immaterial appears from *Rex v. The Mayor and Aldermen of London*, 3 B. & Ad. 255, where it was held a valid custom that the mayor and aldermen should decide according to their discretion on the fitness of a party returned to [*505] them as alderman; and, *on mandamus to admit, this Court considered it a sufficient return that, in the exercise of such discretion, they had ad-

judged the elected party to be insufficient, although they assigned no reasons. There may be many cases where the party may be properly deemed unfit, and yet the reasons may not be capable of direct proof. Indeed the question for their decision, according to the custom, is, not whether the party be fit, but whether he be so "according to the discretion and sound consciences" of the mayor and aldermen; their opinion being thus made an essential ingredient in the determination. The pleas here do not allege that the party was simply unfit. The circumstance of the defendant having joined issue upon the question of absolute fitness cannot make that material which in itself is not so. [PARKER, B. In *Bowman v. Rostrom*, 2 A. & E. 295; note (b), S. C. (as *Bowman v. Rostrow*), HARR. & W. 221, where the defendant had pleaded matter which he was clearly estopped from setting up, but the plaintiff had taken issue on the pleas, it was held that the defendant was entitled to offer evidence upon them. Has not a party, in such a case, a right to have a finding of the jury put upon the record, so that he may obtain a decision of the House of Lords upon it; whereas, if the jury are discharged, he can only have a *venire de novo*?] That may be inconvenient; but it would be a much greater inconvenience that all issues, however, absurd, should be gone into and submitted to the jury. It must be assumed that the judge is able to decide whether a particular issue is material or not.,

Erle, in reply. Stat. 11 G. 1, c. 18, s. 7, does not relate merely to the proceedings in wardmote. The *recital of the statute, sect. 1, is general, [*506] that "of late years great controversies and dissensions have arisen in the city of London at the elections of citizens to serve in parliament, and of mayors, aldermen, sheriffs, and other officers of the said city." The enactment of sect. 7 must be referred to that. And sect. 15 shows that the act does not contemplate the proceedings in wardmote merely. The custom here alleged might be carried to the extent of enabling the mayor and aldermen to nominate for all the wards in the city. And the arguments on the other side would apply equally to a claim of electing after only two rejections. [TINDAL, C. J. The reasonableness of a custom must always be one of the grounds on which it is to be supported.] Supposing a custom established, for the mayor and aldermen to decide upon the fitness of parties returned, it does not necessarily follow that a custom for them to elect after three rejections should be valid. That power is at least not so necessary, nor so apparently advantageous. The custom in question, if existing, might be altered by the by-law of 13 Ann. *Hutchins v. Player*,¹ shows that the customs of the city of London may be so altered, and that the making of such alteration by a by-law is one of the customs which are the subject of the parliamentary confirmation of 7 Ric. 2, set out in *The City of Colchester v. The City of London*, 1 (W.) Jones, 240. The by-law of 13 Ann. is, in terms, sufficient to alter the custom now alleged; and that by-law was not rightly presented to the consideration of the jury. As to the issues which the defendant has taken on the question of fitness or unfitness, and which are now alleged to have been immaterial, the *observation of TAUNTON, J., in *Rex v. The Mayor and Aldermen of London*, 3 B. & Ad. 274, may be adopted: "that where a corporate office is held *durante bene placito*, it is a sufficient return to a *mandamus* that the corporation have determined their pleasure; but if the corporation are so candid as to state their reasons, and allege bad ones, this Court will in such cases interfere." In *Bowman v. Rostrom*, HARR. & W. 222, PATTESON, J., asked, "Are you aware of any case in which it has been held that a Judge at *Nisi Prius* has a right to reject evidence in support of a plea upon which a specific issue has been raised?" and no case was cited. [TINDAL, C. J. There have been instances in which it has been done. PARKER, B. The judgment of BEST, C. J., in *Powell v. Sonnett*, 3 Bing. 381, see *Tinkler v. Rowland*, 4 A. & E. 868, seems to imply that there may have been a consent to withdraw the immaterial issues.] *Cur. adv. vult.*

¹ Sir O. Bridgman's judgments (see p. 500, ante).

TINDAL, C. J., in this term, June 8th, delivered the judgment of the Court.

This case comes before us on a bill of exceptions tendered to Lord DENMAN on the trial of this cause by the counsel of the party on whose relation the information proceeded.

The exceptions taken to the direction of the Lord Chief Justice to the jury were two: first, that he refused to allow witnesses to be examined in support of the issues raised upon the pleadings with respect to Michael Scales being an able and sufficient citizen and freeman of the city of London, and a fit and proper [*508] person to support the dignity and discharge the duties *of an alderman of that city, and that he wholly discharged the jurors from giving any verdict upon those issues. And, secondly, that the said Chief Justice directed the jury, that, if they thought the customs set forth in the first and second pleas had existed from time immemorial down to the year 1689, the 11 G. 1, c. 18, did not put an end to such customs, and in that case they should find a verdict for the defendant on the four issues first in order on the record.

It will be more desirable in the first place to state our opinion as to the second exception, as the judgment formed by us on that exception will form the groundwork of the opinion at which we have arrived upon the subject of the first.

The custom which forms the subject of the first and third issues is a custom that the Court of Mayor and Aldermen from time immemorial have had the cognizance and determination of the election and return of every person elected into any place or office at any wardmote court, whenever the merits of such election were brought into question, and of examining and determining whether any person, returned to them as an alderman of any ward of the city, is, according to the discretion and sound consciences of the mayor and aldermen, a fit and proper person and duly qualified in that behalf. The custom which forms the subject of the second and fourth issues is a custom that, whenever it should happen that the inhabitants of any ward should three times return to the Court of Mayor and Alderman the same person to be an alderman of any such ward, who should, according to the former custom, be adjudged and determined, and according to the discretion and sound consciences of the mayor and aldermen, not a person [*509] *fit and proper to support the dignity and discharge the duties of the place and office of an alderman of the said city upon such three several returns, that the Court may, for remedy in that behalf, nominate, elect, and admit a fit and proper person, being a freeman of the said city, out of the body of the whole citizens, to be an alderman of such ward so made destitute of an alderman.

The first custom set up is, therefore, a custom to approve or reject: the second is a custom to nominate and elect, in case the same person is three times returned by the wardmote, and three times rejected as unfit by the Court of Mayor and Aldermen.

Now the only exception taken to the direction of the Lord Chief Justice, which goes to the validity of the custom above set forth, is, that the jury should have been directed by him that the statute 11 G. 1, c. 18, is in direct contravention of these customs, and in effect has abrogated them altogether.

To the validity of the first custom but little objection was made in the course of the argument. Indeed after the determination of the case of *The Mayor and Aldermen of London*, 3 B. & Ad. 255, where the legality of the custom of approval or rejection was brought distinctly before the Court of King's Bench, it is impossible to contend that it was not a legal custom still existing in full force, notwithstanding the statute of G. 1. The question, therefore, principally turns upon the effect of the statute as to the custom secondly set forth. Now we think that custom, considered in itself, a legal and reasonable custom, supplying [*510] a remedy *where an evil is likely to occur from the exercise of the custom to approve or reject, and without which remedy the first would become neither useful nor reasonable, from the consequences that might be expected necessarily to follow in many instances from its exercise. The question, there-

fore, becomes this, whether this custom in the second plea is repealed by the statute 11 G. 1. And we are all of opinion that it is not in any way affected thereby.

That statute was passed, principally for the purpose of regulating the course of elections which take place at the wardmotes of the city; both of citizens to serve in parliament, of mayors, and other officers, and, as the first section expresses, "of aldermen and common councilmen chosen at the respective wardmotes of the said city;" and the first six sections of the statute are exclusively occupied with regulations as to the mode of taking the poll. The seventh section, after reciting that divers controversies and disputes had arisen in the city of London touching the right of election of aldermen and common councilmen for the respective wards of the city, enacts that, after the day therein specified, the right of election of aldermen and common councilmen for the several and respective wards of the city shall belong and appertain to freemen of the said city, being householders, and paying scot and bearing lot when required, and to none other whatsoever. The seven following sections contain provisions as to particular cases of qualifications for voting at such elections; and the sections which follow are foreign altogether to the subject-matter of the present inquiry. So that the statute, taken altogether, is no more than an enactment that the right of electing aldermen, amongst *other officers, shall be by the freemen of the city, being householders, at the wardmotes of the respective [511] wards, the poll to be taken, and the right of voting to be determined, in the manner and under the regulations described in the act.

Now the ancient customs which are the subject of the present discussion have themselves been confirmed, amongst the other ancient by-laws and customs of the city, by parliament. And the first observation that arises thereupon is that, as these customs were in full operation at the time of the statute, and as the statute is altogether silent about the powers of the Court of Lord Mayor and Aldermen, there is nothing that can be construed into a repeal of either of the customs. In the next place, it is to be observed that the exercise of this custom is in no way inconsistent with the statute; for the custom does not begin to operate until after the statute, and all the provisions contained in it, have had their full operation and effect. The alderman must be first elected at the wardmote, by the electors, qualified according to the provisions of the statute, at a poll taken in the manner therein prescribed, before he can be returned to the Court of Lord Mayor and Aldermen for approval or rejection. Then it is, for the first time, that the two ancient customs begin to have their force. They contain a mode of trial of the fitness of the return, made under the statute, after the election has taken place; and apply to a point of time which is altogether out of the provisions, and even contemplation, of the statute.

In fact, the operation of the two customs, which are to be held of the same binding force as acts of parliament, is this: that, by the first, the election which has taken place at the wardmote is annulled; and, by the *second, after [512] three rejections, no further election at a wardmote can take place. Now these provisions are not at all inconsistent with a statute which only professes to regulate elections in the case of their taking place at a wardmote of the city.

The statute, therefore, and the two ancient customs may both stand well together; and we see no reason whatever for holding that the customs are not in full force, notwithstanding the provisions of the act.

It was further insisted, in the course of the argument on the part of the relator, that the by-law of the 13th Aⁿn. had the same effect, as to the annulling the customs set forth, as the statute has. It appears to us, however, to be unnecessary to give any other answer to this objection than that which has already been given as to the statute of G. 1. Both objections stand precisely upon the same ground; the only difference between the two being this: that, whilst the statute is, by necessary implication, only to be construed as speaking of the election at wardmotes of the city, the by-law is confined in express terms to that mode of election.

The other exception tendered to the Lord Chief Justice at the trial related to his refusal to receive evidence tendered to him upon the several issues before referred to, and discharging the jury from giving any verdict on the same.

It appears to us that, the four issues which are first in order upon the record having been found in favor of the defendant, and the defendant being entitled in our opinion, notwithstanding the objections which have been taken, to judgment on those issues, it has become perfectly immaterial in favor of which of [*513] the two parties the jury might have found their verdict on the issues *in question. For the fitness or unfitness of the party to fill the office of alderman having been already determined by a Court, not only of competent, but exclusive jurisdiction, any finding of a jury on that point is altogether inoperative and useless. If this record had contained a verdict in favor of the relator upon these issues, we should have allowed the defendant, notwithstanding such verdict, to enter up judgment for himself; and it is therefore unnecessary to say that we cannot agree to send those issues to be tried, at a very useless expense, before a second jury. Indeed, the case of *Powell v. Sonnett*, in error in the House of Lords, 1 Bligh, N. S. p. 552, furnishes a decisive authority that, when the jury have found their verdict on all the material issues joined, the remaining issues being perfectly immaterial as between the parties, the jury may be discharged, by the Judge who tries the cause, from returning any verdict on such immaterial issues, without the consent of the parties.

We therefore think the judgment of the Court of King's Bench must be affirmed. Judgment affirmed.

END OF TRINITY TERM.

C A S E S

ARGUED AND DETERMINED

IN THE

COURT OF KING'S BENCH,

AND

ON WRITS OF ERROR FROM THAT COURT TO THE EXCHEQUER
CHAMBER,

IN

Michaelmas Term,

IN THE SEVENTH YEAR OF THE REIGN OF WILLIAM IV.

The Judges who usually sat in Banc in this term were,

LORD DENMAN, C. J.
PATTESON, J.

WILLIAMS, J.
COLERIDGE, J.

DOE on the Demise of PERRY *v.* GEORGE NEWTON, and Mary his Wife.
November 2.

On a question as to the genuineness of handwriting, a jury may compare the document with authentic writings of the party to whom it is ascribed, if such writings are in evidence for other purposes of the cause; but not else.

ON the trial of this ejectment, before COLERIDGE, J., at the last Summer Assizes for Cumberland, the defendants produced the alleged will of one John Brockbank, on which they rested their title. The genuineness of the signature, purporting to be that of the testator, was disputed, and contradictory evidence given respecting it, *for the plaintiff and defendants. The plaintiff's counsel, in cross-examining one of the defendants' witnesses, put into [*515] his hand some letters, which the witness said he believed, from the character, to be of Brockbank's writing. It was afterwards proposed, on behalf of the plaintiff, to submit these letters to the jury, in order that they might compare them with the disputed signature, and thereby judge both of its genuineness and of the credit due to the witnesses on this subject. The letters were not in evidence for any other purpose. The learned Judge would not allow them to be put in; and the defendants had a verdict.

Alexander now moved for a new trial, on the ground (among others) of the rejection of evidence. It has lately been decided, in *Griffith v. Williams*, 1 Cro. & J. 47, that the jury may compare documents for the purpose of ascertaining whether one is or is not genuine. It is true that the letters there compared appear to have been part of the evidence in the cause for other purposes; but that makes no difference. [Lord DENMAN, C. J. A party wishing to disprove his own handwriting may easily produce writings made unlike on purpose.] In *Allesbrook v. Roach*, 1 Esp. 351, which was an action on a bill of exchange, against the acceptor, the defendant's counsel, to show that the acceptance was not genuine, offered to the jury other bills, admitted to be of the defendant's

handwriting, and desired that they would compare them with the acceptance and draw their own conclusion. This was objected to; but Lord KENYON said, [*516] "Some judges have doubted of the policy of that rule of evidence *respecting the allowing of the jury to judge by comparison of hands, because often at a distance from the metropolis, the jury are composed of illiterate men, incapable of drawing proper conclusions from such evidence. For my part, I have been always inclined to admit it; and shall do so in this case." Lord KENYON's attention had been drawn to the same subject but a short time before, in *Stranger v. Searle*, 1 Esp. 14. In *Solita v. Yarrow*, 1 M. & Rob. 133, the jury were permitted to compare a genuine writing of the defendant with a disputed one ascribed to him; but there both documents were in evidence for other purposes of the cause. The distinction on this ground, however, appears to have been first suggested by BOLLAND, B., in *Rex v. Morgan*, 1 M. & Rob. 134, note, and is not warranted by *Griffith v. Williams*, 1 Cro. & J. 47, to which the learned Judge referred in that case. Nor does there appear to be any difference in principle between writings put in for the sole purpose of contradiction, and writings in evidence for other purposes, if the genuineness of the document be clearly established in each case. The objection, that a jury may perhaps be illiterate, cannot have much weight at this day; and it is answered in 2 Stark. on Ev. p. 375 (2d edit.). The argument, that writings produced for the purpose of contradiction may be unfairly selected, would apply equally to ancient documents; but, in ascertaining the genuineness of those, a comparison with other writings from the same hand is constantly resorted to.

Lord DENMAN, C. J. This is a point on which we ought not to raise any doubt. I rather think the decision *in *Griffith v. Williams*, 1 Cro. & J. [*517] 47, has been considered to go a long way; but the real ground upon which that rests appears to me to be that the comparison is unavoidable. There being two documents in question in the cause, one of which is known to be in the handwriting of a party, the other alleged, but denied to be so, no human power can prevent the jury from comparing them with a view to the question of genuineness; and therefore it is best for the Court to enter with the jury into that inquiry, and to do the best it can, under circumstances which cannot be helped. I cannot easily reconcile Lord KENYON's ruling in *Allesbrook v. Roach*, 1 Esp. 351, with what has been done in any other case. The facts indeed were peculiar; but I think that at present no judge would come to the same decision. The best rule is, that comparison of writings by the jury shall not be allowed in any case where it can be avoided. When we consider that the same course which is permitted in a case like this may also be resorted to in a criminal case for the purpose of a conviction, we cannot draw the limit too carefully.

PATTESON, J. I always thought that the rule laid down in *Griffith v. Williams*, 1 Cro. & J. 47, was limited to documents which were already before the jury. It is not said in the report of that case that necessity was the ground upon which the comparison was allowed; but I think that must have been so. It was impossible, in such a case, to prevent the jury from making a comparison. I have rejected evidence upon the ground of distinction now taken, in a case which came before me *at Gloucester, I think on the Crown side; [*518] my opinion on the point, therefore, is not now formed for the first time. I did not know of the case of *Allesbrook v. Roach*, 1 Esp. 351; but, whatever respect I may feel for the authority of Lord KENYON, I think that in ruling as he did there he went beyond the law, and introduced a practice which would be dangerous if followed up.

WILLIAMS, J. I doubt if the facts of *Allesbrook v. Roach*, 1 Esp. 351, are correctly given; for the rule, if laid down there as it is stated, does not appear to have been acted upon since, although it might be supposed that such a decision by Lord KENYON, whose judgment on points of evidence is so much respected, would have been followed up in other cases. I question the authority

of the case, as there has been no corresponding practice. If the comparison here contended for were admitted, the party disputing a document ascribed to him, might produce to the jury for that purpose a selection from any number of papers written by himself, which would be very dangerous. The decision in *Griffith v. Williams*, 1 Cro. & J. 47, no doubt proceeded upon the ground that comparison of the documents, when they are in evidence for other purposes, cannot be avoided, and therefore it is better that the comparison should be made under the direction of the Court than in a corner.

COLERIDGE, J. I am of the same opinion. It is true that the objection now taken applies in some degree to the proof of ancient writings by comparison, which is constantly allowed. But that is an excepted case, from necessity, the documents not being capable of proof in *the usual way; and the danger [*519] of improper selection is less than in the case of modern writings. In addition to the reasons which have been given in this case, it must be considered how many irrelevant issues a jury would have to try if the proposed comparison were allowed. Documents bearing upon the cause must be proved with reference to the main points in issue, independently of the question of handwriting; but, for the purpose of such a comparison, many documents quite irrelevant to the cause must be admitted, with the disadvantage that the opposite party could not be prepared for such evidence. It might even become necessary that the contents of such documents should be gone into. Rule refused.¹

¹ See *Bromage v. Rice*, 7 C. & P. 548; *Waddington v. Cousins*, 7 C. & P. 595; and *Doe dem. Mudd v. Suckermore*, which was argued in this term, November 17th, and in which judgment was given in Trinity term, June 8th, 1837.

REGULA GENERALIS.

Michaelmas Term, 7 W. 4. (3d November, 1836.)

IT IS ORDERED that, from and after the last day of this term, all rules upon sheriffs other than the sheriffs of London and Middlesex, to return writs either of mense or final process, and rules to bring in the bodies of defendants, be eight day rules instead of six day rules.

(Signed by the fifteen Judges.)

*DOE on the several Demises of ROWLANDSON, Assignee of MARGARET WILLIAMS, an Insolvent Debtor, of MARGARET [*520] WILLIAMS, and of JEREMIAH WILLIAMS, v. WAINWRIGHT and LEDGERWOOD. Nov. 3.

1. In an ejectment tried at Liverpool, notice to produce a deed of feoffment was given to the defendant on the commission day of the assises, and the trial took place fourteen days after. The Judge at nisi prius having held this to be sufficient notice to let in secondary evidence, the Court refused to disturb the ruling.
2. Held, that an abstract, which had been compared with the deed of feoffment, was good secondary evidence of the contents, no proof being given on either side of the existence of any copy of the deed. *Quære*, whether, if the existence of such a copy had been proved, the abstract would have been evidence?
3. It appeared, by the abstract, that the deed of feoffment purported to be executed by the parties; and it was proved that one H. had, after the date of the feoffment, been in possession of the premises, and of the deed; that he had conveyed (in what way it did not appear) to defendant, and, at the time of the conveyance, had handed over the feoffment to the defendant, and that the feoffment was comprehended in the abstract of title then made, which was the abstract produced at the trial. The witness, who proved as above, stated also that there were attesting witnesses to the feoffment, and that a memorandum of livery of seisin was endorsed upon it, and witnessed. Held that, as against the defendant, there was proof of the due execu-

tion of the deed, and that it was unnecessary to call an attesting witness, or prove livery of seisin.

4. In ejectment on the several demises of A. and B., proof having been offered in support of both A.'s and B.'s title, defendant tendered evidence after the close of plaintiff's case, which was admissible only as against B.'s title: Held, that the plaintiff might, at that stage, abandon the demise of B., and that, on his doing so, the evidence was inadmissible as against A.'s title.

EJECTMENT for messuages in Liverpool. On the trial before COLERIDGE, J., at the last Liverpool assizes, no evidence was offered in support of Rowlandson's demise. The demises were laid on 10th of June, 1836. Wainwright defended as landlord, Ledgerwood as his tenant. It was proved, on the part of the plaintiff, that a person named Oldham was formerly owner of the premises; and the last two lessors of the plaintiff claimed under an indenture of feoffment, said to be dated the 9th of July, 1807, between one Rogers of the first part, Oldham of the second, Michael Williams of the third, and Jeremiah Williams, the lessor of the plaintiff, of the fourth; by which Rogers and Oldham granted, bargained, sold, enfeoffed, and confirmed a parcel of ground comprehending the premises in question to *Michael and Jeremiah in fee, habendum to [*521] them in fee, to the use of Michael and Jeremiah and the heirs of Michael, in trust, as to Jeremiah's estate, for Michael in fee. To prove the execution of this indenture, a witness named Ridgway was called, who stated that he had been in the employment of a person named Houghton; that Houghton had occupied the premises after 1807, and had sold them to the defendant Wainwright;¹ that, at the time of the conveyance in 1807, an abstract of the title, of which the feoffment formed part, was made, and had been compared by the witness with the feoffment; and that, when Wainwright took possession, the feoffment, with other title deeds, was handed over to him. The witness produced an abstract, which he stated that he had, at the time of the sale, compared with the deeds. It was then proved that the notice to produce the feoffment had been given to the defendants, on the commission day of the assizes, August 10; the trial taking place on the 24th. All the parties resided in Liverpool. It was objected that this notice had not been early enough to entitle the plaintiff to give secondary evidence; but the learned Judge overruled the objection. The plaintiff's counsel then proposed to read the abstract; when the counsel for the defendant contended that proof ought to be given that there was no copy of the deed; but this objection also was overruled. The witness having stated that there were attesting witnesses to the deed, the counsel for the defendants contended that the abstract could not be read till one of the witnesses was called, or their absence accounted for: but the learned Judge was of opinion that Wainwright was shown to claim under the deed, and [*522] that therefore the execution *need not be proved. The abstract was then read; and the deed appeared from it to be as above stated. The witness stated that a memorandum of livery of seisin was endorsed on the indenture of feoffment, and witnessed. The defendants' counsel then contended that livery of seisin must be proved; but the learned Judge held that the same answer applied to this as to the preceding objection. His Lordship, however, reserved leave to move for a nonsuit, on all the objections. It appeared further that Michael Williams was in possession at the time of his death, October 17, 1821, that he devised the premises to his widow, Margaret Williams, the lessor of the plaintiff, for life, and that she had occupied for some years after Michael's death, and before Houghton was in possession.

The defendants put in and proved an indenture of mortgage, dated the 15th of October, 1808, by Michael Williams of the first part, Jeremiah Williams of the second, and two persons named Holden and Gordon of the third, by which Michael and Jeremiah Williams conveyed to Holden and Gordon, in fee, certain premises, which, as the defendants alleged, comprehended those in question;

¹ This appeared to have taken place about 1827 or 1828.

but this was disputed on the part of the plaintiff. The defendants also tendered in evidence indentures, dated the 26th and 27th of October, 1824, by which Margaret Williams mortgaged to one Etches in fee certain premises, comprehending, as was contended, the premises in dispute. It was objected, for the plaintiff, that, as Margaret Williams appeared to have only an equitable estate at the time of the last conveyance, that conveyance was not evidence to show an outstanding legal estate. The learned Judge ruled that, as Margaret Williams was one of the lessors of the plaintiff, the deed was evidence, unless the plaintiff's counsel abandoned *that demise. He elected to do so; and [*523] the deed was rejected. His Lordship, in summing up, left it to the jury whether, upon all the facts, they were of opinion that the premises were comprehended in the deed of 1808. Verdict for the plaintiff, on the demise of Jeremiah Williams.

Neville now moved for a nonsuit, according to the leave reserved, or for a new trial, on the ground of misdirection and rejection of evidence; and also upon other grounds which it is not thought necessary to state. First. The notice to produce was insufficient. It ought to have been given before the commencement of the assizes. In a large commercial town, like Liverpool, it is common for deeds to be deposited with bankers; and full time should be allowed for taking the measures necessary to withdraw the documents from such custody. Secondly. It should have been proved that there was no copy, before the abstract was read. [Lord DENMAN, C. J. Have you any authority for that? If secondary evidence be made admissible, is not all secondary evidence let in.] The rule is that the best evidence must be given that the circumstances of the case will allow. [COLERIDGE, J. The best in kind, but not necessarily the best in degree. WILLIAMS, J. Suppose the secondary evidence had consisted merely of what the witness recollected, what objection could there have been?] No decision in the common law courts has been found precisely in point. In *Munn v. Godbold*, 3 Bing. 295, the Court adopted the dictum of Lord HARDWICKE, in *Villiers v. Villiers*, 2 Atk. 72, "If an original deed is lost, the counterpart may be read; *and if there is no counterpart forthcoming, then a copy [*524] may be admitted;" Lord HARDWICKE adds, "and even if there should be no copy, there may be parol evidence of the deed." If the existence of a counterpart exclude the copy, the existence of a copy must exclude parol evidence. [Lord DENMAN, C. J. But you did not prove the existence of any copy.] That should have been negatived on the other side, to let in the inferior evidence. Thirdly. One of the witnesses, at least, to the deed of feoffment, ought to have been called, according to the peremptory rule laid down in 1 Stark. Ev. 320 (2d ed.); *Gillies v. Smither*, 2 Stark. N. P. C. 528. It was said, however, that the defendants claimed under the deed, and therefore could not dispute it; and *Doe dem. Tyndale v. Heming*, 6 B. & C. 28, was cited. But, in that case, the attorney of the party had recognised the validity of the instrument: here nothing appeared, but that Houghton had sold the premises to the defendant Wainwright, and, at the time of the sale, had handed over this deed among others. The bare receipt of a deed is not a recognition of its validity. [COLERIDGE, J. It formed part of the abstract of title.] The defendants were not privy to the abstract produced. Besides, it was not shown that any legal estate was at that time conveyed to Wainwright. The evidence of Ridgway proved at the utmost no more than a parol contract. Fourthly. There should have been evidence of livery of seisin. Writing is essential to a feoffment only by the Statute of Frauds, 29 Car. 2, c. 3, s. 1: livery is still the essential part, the formalities for which are prescribed, both in the case where there is a deed, and in that where there is not, in Co. Lit. 49 b. In *Gilbert on Ev.* *75 (6th ed.), a question is made whether, if a feoffment by deed be [*525] pleaded, a parol feoffment can be given in evidence; which shows that feoffment by parol, and consequently livery of seisin, accompanied feoffments by charter. It is true that, where there has been possession coupled with the

their agents, and witnesses, and also having heard the said M. S. touching the merits of the said last-mentioned election, and the qualification and fitness of the said [*493] M. S. to be such alderman as aforesaid, and the *said M. S. not producing any witnesses on his behalf, and the said last-mentioned Court having referred to the minutes of the proceedings of the said Court held on the 29th day of March, &c., 1831, and also having referred to the minutes of the proceedings of the said Court, held on the 3d day of January, 1832, and due deliberation being thereupon had, the said Court of Mayor and Aldermen did, on the said 29th day of October, 1833, to wit, at, &c., adjudge and determine, according to their discretion and sound consciences, that the said M. S., upon and from the said 26th day of June, 1833, as well as upon and from the said 10th day of May, 1831, and continually from thence to the said 29th day of October, 1833, had been and then still was not a person fit and proper to support the dignity," &c., nor to be admitted and sworn into the office; and the said Court did further adjudge and determine that he was not duly elected to be alderman of Portsoken at the last-mentioned election; and that the said M. S. was, on, &c., again rejected by the said Court as insufficient, &c. The plea then stated, "That, on its appearing to the said Court of Mayor and Aldermen holden," &c., October 29th, 1833, "that the said Michael Scales had been three several times returned by the inhabitants of the said ward of Portsoken to the said Court of Mayor and Aldermen as having been elected to be alderman of the said ward, and that the said several elections of the said M. S. to be such alderman had, upon each such return, been rejected by the said Court of Mayor and Aldermen, and that the said M. S. had, upon such return, been adjudged by the said Court of Mayor and Aldermen to be a person not fit and proper to support the dignity and dis- [*494] charge the duties of the said place and *office of an alderman of the said city, nor a fit and proper person to be admitted and sworn into the place and office of alderman of the said ward, the said Court of Mayor and Aldermen did, in pursuance of and according to the said ancient custom in that behalf, nominate and elect the said defendant, citizen, and cooper of London, out of the whole body of the citizens of the said city, as a fit and proper person to be alderman of the said ward, and a fit and proper person to support the dignity and discharge the duties of the place and office of an alderman of the said city, to wit, at," &c., "and thereupon the said defendant was by the said last-mentioned Court of Mayor and Aldermen in due manner elected, chosen, and nominated to be alderman of the said ward of Portsoken, according to the said ancient custom in that behalf, in the room and stead of Sir James Shaw," &c. The plea then stated the swearing in and admission of the defendant: by reason of which said several premises, &c. Traverse of usurpation. Verification.

2d Plea. Similar to the first, except that, in stating the right to examine and determine upon elections, it omitted the qualification "whenever the merits of such election or return have been brought into question by the petition of any person interested therein;" and it made the like omission in the clause asserting the right to determine on the qualification of any person returned, adding, after the words "qualified in that behalf,"—"and thereupon to reject such person as in their discretion and sound consciences was not a fit and proper person, and duly qualified for the said place and office;" and, in stating the rejections, it did not mention any petition. And, in setting out the custom to elect after three [*495] rejections, it added, after the words "alderman of the said city,"—"and be thereupon rejected by the said Court of Mayor and Aldermen, as insufficient for the said place and office, for the reason and according to the custom aforesaid." The 3d plea alleged that, on the election at which Scales and the defendant were candidates, the latter was duly elected. Each concluded with a verification.

Replication. 1. Denying that the Court of Mayor and Aldermen, by the custom of the city, from time whereof, &c., have had and ought to have had, &c., the cognizance and jurisdiction of determining upon elections, and

secondary evidence. Here, however, no copy has been shown to exist; and the abstract is clearly evidence. As to the sufficiency of the notice, I recollect that there was once a supposition that notice given during the assizes was too late, as if the same rule were applicable to the assizes for Yorkshire, and to the assizes for Rutland. The question is, whether there has been reasonable time. *The proof of livery of seisin, and the calling the subscribing witness, [529] were both dispensed with by the proof that the defendant claimed under Houghton. Houghton had possession; and the feoffment must have been handed over to him for some purpose, and, if so, as part of the title.

COLERIDGE, J. As to the sufficiency of the notice, I always thought that, on such a question, the Judge was in some sort both Judge and jury, and must satisfy his own mind, as he must on the questions whether there has been a reasonable search for a document, and the like. Now the assizes at Liverpool lasted a fortnight, and all parties resided there. As to the question whether it became necessary to call the attesting witness, I thought I must see whether the case came under the principle of those in which a party claiming under a deed produces it. A man of the name of Houghton is found in possession of the property, and also of the feoffment: it then appears that there has been a sale by him to the defendant, and an abstract, comprising the feoffment, prepared on that sale; and that the feoffment is handed over to the defendant, who is in possession. Under these circumstances, it is not enough for the defendant to say, I do not claim under the deed, the circumstances most clearly showing *prima facie* that he does so claim. It was therefore not necessary to produce the attesting witness. As to the question of a copy, I adopt what has been already said: the point does not arise for decision. But, if a copy had been produced, parol evidence would have been necessary to show that it was a copy. The question as to proof of the livery of *seisin, which was endorsed [529] and attested on the deed, turns upon the same point which decides the former question, namely, whether the party claimed under the deed.

The rule was refused on the above points, but the Court, during the term, granted a rule nisi for a new trial on another ground.

JONES v. READE. *November 5.*

Plaintiff declared in debt for work and labor performed as an attorney for defendant, on his retainer, and for fees due and of right payable in respect thereof; defendant paid a sum into Court, and pleaded non indebitatus as to the residue. Held, that defendant might prove that the plaintiff agreed to do the work (on a certain event, which had occurred) for costs out of pocket, which should not exceed a sum named.

DEBT. The declaration stated that the defendant was indebted to the plaintiff in 95*l.*, for work and labor of the plaintiff, done and performed "as the attorney and solicitor of and for the defendant, and upon his retainer, and at his request, and for fees due and of right payable to the plaintiff in respect thereof," and for journeys and attendances about the defendant's business and at his request, and in 95*l.* for money paid, and in 95*l.* on an account stated.

The defendant pleaded *nunquam indebitatus*, except as to 28*l.* 2*s.* 8*d.*; as to 15*l.*, parcel of the said 28*l.* 2*s.* 8*d.*, a set-off; and the residue, 13*l.* 2*s.* 8*d.*, he paid into Court. The plaintiff admitted the set-off, and entered a *nolle prosequi* as to the 15*l.*; he took the 13*l.* 2*s.* 8*d.* out of Court, and averred that the defendant was indebted to him, *ultra* 28*l.* 2*s.* 8*d.*

On the trial before VAUGHAN, J., at the last Chester assizes, the plaintiff proved a demand, to the amount of 95*l.*, for conducting on behalf of the defendant, and upon his retainer, an action of ejectment which was unsuccessful. In answer to this case, the defendant *proved that the plaintiff had [530] engaged, if the action failed, to charge only the sum expended by him out of pocket, which should not exceed 25*l.*; and it was admitted that the set-

off and money paid into Court more than covered the money out of pocket. The counsel for the plaintiff objected to evidence being given of such a contract; but the learned Judge received it, and the defendant had a verdict. His Lordship then gave leave to the plaintiff to move to enter a verdict for the taxed costs above the 28l. 2s. 8d.

John Jervis now moved accordingly. First, by the rules Hil. 4 W. 4, Pleadings in particular Actions, II. 3, 5 B. & Ad. viii., the plea of *nunquam indebted* in debt has the same effect as *non assumpsit* in *assumpsit*; that is, by the same rules, I. *Assumpsit* 1, 5 B. & Ad. vii., it "operates only as a denial in fact of the express contract or promise alleged, or of the matters of fact from which the contract or promise alleged may be implied by law." It may be inferred from *Edmunds v. Harris*, 2 A. & E. 414, that the defendant, under such a plea, could not avoid the original and direct liability charged in the declaration, by showing a separate contract to receive payment to a particular extent only. [Lord DENMAN, C. J. That case is overruled.]¹ At any rate the payment of money into Court admits the contract as laid. Now the contract laid is for work done in the character of an attorney, on the defendant's retainer; and the right to recover fees is alleged. This is inconsistent with the contract set up by the defendant. [PATTESON, J. For work done as an attorney the plaintiff might declare simply as for work and labor.] In that [*531] *case the present argument could not be urged: but here the plaintiff does not simply so declare; and from the retainer, which is admitted, and the character of the plaintiff, the law raises a right to certain legal fees, which can only be avoided by an express inconsistent agreement; such agreement should be pleaded.

Lord DENMAN, C. J. The issue is as to the amount of the debt: that raises the question, what the contract is. If it be other than that laid in the declaration, why may not the defendant show this?

PATTESON, J. The fallacy lies in assuming that work done in the character of attorney may be done upon a contract such as that set up by the defendant.

WILLIAMS and COLERIDGE, Js., concurred.

Rule refused.

¹ See *Hayseiden v. Staff*, ante, p. 158, and the cases there cited.

[*532] *DOE on the joint demise of BURGESS and HARRISON v. THOMPSON. Nov. 5.

Copyhold property, in a manor belonging to the see of Ely, was surrendered to B., who was admitted on this surrender, at a court purporting to be a court of J. Bishop of Ely, lord of the manor. At the time of the admission, no grant of the temporalities had been made to J. since the death of the preceding bishop; nor had J. been confirmed. Held, that the admission was nevertheless good, the lord's title being immaterial, since the admission was not a voluntary act, but in pursuance of a surrender.

W. being owner in fee of certain lands, I. occupied them for twenty years, and until his own death, which was before W.'s death. After I.'s death, his widow, and afterwards the defendant, who was eldest son of I., held on, till and after the death of W., and until ejectment was brought by W.'s devisee, within five years of the passing of stat. 8 & 4 W. 4, c. 27. The jury found that the possession was not adverse to W.: Held, that the lessor of the plaintiff was not barred by sects. 2 and 7, but had five years from the passing of the statute, under sect. 15; and that the defendant could not resist the action on the ground that having had no notice, he still continued tenant at will.

EJECTMENT for lands in Cambridgeshire. The declaration was of Easter term, 1836. On the trial before TINDAL, C. J., at the last Cambridge assizes, (July 25th), it appeared that the lands were partly copyhold and partly freehold; that the lessors of the plaintiff were devisees in trust of all the premises under the will of William Thompson; and that the defendant was the eldest son of James Thompson, deceased, who was the eldest son of William Thompson. The will was proved; and it appeared that the copyhold land was part of the manor

of Ely Barton, which is a manor belonging to the see of Ely; that the lessors of the plaintiff had, after the death of William Thompson, sold it to Susannah Thompson, who had been admitted on the 22d of April, 1835; and that she had afterwards made a surrender of it to the lessors of the plaintiff, to be void on her payment of 45*l.* and interest upon a day named. The lessors of the plaintiff were admitted in pursuance of this surrender. This admission was produced, and purported to be made on 19th July, 1836, at the Special Court Baron of the Right Reverend Joseph, Lord Bishop of Ely, Lord of the manor of Ely Barton, in the county of Cambridge. It appeared, further, that James Thompson, *the son and heir of the devisor, William Thompson, and father of the [*533] defendant, had occupied all the premises sought to be recovered for more than twenty years before his, James's death, which took place in February, 1831. William Thompson died in September, 1833. Upon James's death, his widow continued in possession of the lands for some time; when the defendant took possession, which he has ever since held. It was admitted that William Thompson was absolute owner of all the premises, unless the occupation above-mentioned barred him. The jury found expressly that James Thompson held and occupied the lands for more than twenty years before, and at the time of, his death, but that the possession was not adverse to William Thompson; and the plaintiff had a verdict for all the premises.

Gunning now moved¹ for a rule to show cause, why a nonsuit should not be entered, or a new trial had. With respect to the copyhold property claimed under the surrender from Susannah Thompson, he produced an affidavit, by which it appeared that Dr. Bowyer Edward Sparke, late Bishop of Ely, died in April, 1836; and that Dr. Joseph Allen, his successor (previously Bishop of Bristol), was confirmed on the 17th of August, 1836; and that the restitution of the temporalities to him was dated 19th August, 1836. The Court could not be held, as a court of the Bishop, while the temporalities were in the hands of the Crown, 1 Burn's Eccl. L. 226, Bishops, VI. 3 (ed. 8th); and, consequently, there was no title in the lessors of the plaintiff at the time of the trial. [COLBRIDGE, J. Should you not have taken this point at the trial?] The defendant could not know how the plaintiffs would make out their title, and there- [*534] fore could not be prepared with evidence in support of the objection; which, however, was made in general terms, as it was a matter of notoriety that Dr. Allen was even then sitting in parliament as Bishop of Bristol. Then, with respect to the whole property, the possession not having been adverse, James Thompson in his lifetime, and the defendant since, were tenants at will; so that the title of William Thompson had accrued more than twenty years before the action; stat. 3 & 4 W. 4, c. 27, s. 7. The plaintiff is therefore barred by sect. 2. It will be contended that sect. 15 gives the right of recovering for five years from the passing of the act. But, first, the "acknowledgment" mentioned in that section would be a complete determination of a tenancy at will; and, secondly, a tenancy at will could not be an "adverse" possession. That section therefore does not control the 7th, but provides only that mere lapse of time shall not bar a recovery, till five years after the passing of the act, when the possession has not been adverse; it leaves the legal rights of the parties in other respects as they were before. But the defendant is, even on this supposition, not a trespasser, but still tenant at will; for the devise by the owner of the fee, being an act done off the land without notice to the tenant, is not a determination of the tenancy; Co. Litt. 55 b., Com. Dig. Estates (H. 6); and the action therefore is brought too soon, there having been no notice or demand of possession. (He also moved for a new trial, on the ground that the verdict was against the weight of the evidence.) *Cur. adv. vult.*

In the same term (November 24th),
*Lord DENMAN, C. J., delivered the judgment of the Court. One ground of this motion was, that the verdict was against evidence. As [*535]

¹ Before Lord DENMAN, C. J., PATTERSON, WILLIAMS, and COLBRIDGE, Js.

to this, neither the Lord Chief Justice nor we are dissatisfied with the verdict. Then it was said that improper evidence was admitted. It appeared, on affidavit, that the lessors, who claimed as devisees under the will of William Thompson, had been admitted at a Court held by the steward of the manor, as steward, and in the name, of the present Bishop, before any grant to him of the temporalities. As this was an admission in pursuance of a surrender, or what by statute is equivalent thereto, and not a voluntary grant, we think the lord's title immaterial, and that there is nothing in the objection (see 1 Scriv. Cop. 118, part 1, ch. 3, 3d ed.) It was also contended that, under stat. 3 & 4 W. 4, c. 27, ss. 2 & 7, the possession of twenty years, by James, barred the devisees. But the jury have found that the possession was not adverse to William the testator; and, as the action is brought within five years after the passing of the statute, the proviso of the 15th section saves this right.

Rule refused.

MARTIN v. STRONG, Clerk. November 8.

Words spoken by a subscriber to a charity in answer to inquiries by another subscriber respecting the conduct of a medical man in his attendance upon the objects of the charity, are not, merely on account of those circumstances, a privileged communication.

CASE for slander. The declaration stated that the plaintiff had been retained by Joseph Woollen, a man-midwife at Painswick, in his service and employment *as such man-midwife, and that J. W., but for the committing, [*536] &c., would have retained him in his service, and would have given him a certificate of good and moral conduct at any time when he should have quitted that service; that, before the committing, &c., there was a charitable society at P. for the relief of poor women, inhabitants of P., during their pregnancy; that J. W. was man-midwife to the society, and the plaintiff from time to time attended the patients, as assistant to J. W.; that the defendant, wishing it to be believed that the plaintiff had conducted himself unchastely and immorally towards the patients, in a conversation between the defendant and one Mrs. Hicks, concerning the plaintiff, and his conduct in his attendance, falsely, &c., spoke and published, &c. (with innuendoes as to persons), "I am quite satisfied with his professional skill; but I can assure you the poor women are quite terrified at the thought of having him; and one poor woman said she quite shuddered at his name being mentioned;" and the defendant, being asked by Mrs. H., what the plaintiff had done, falsely, &c., answered, "it is too bad to mention;" by which the defendant meant that the plaintiff had been guilty of improper and immoral conduct in his attendance. Other words to the same effect were charged; and special damage was alleged, that J. W. had refused to retain the plaintiff in his service, and to give him a certificate of his good and moral conduct at his quitting; whereby the defendant was prevented from applying to the Court of Examiners of the Apothecaries' Company to be admitted to an examination for the purpose of obtaining a certificate to practise as an apothecary.

Plea, Not Guilty (with other pleas not material here).

[*537] *On the trial, before LITTLEDALE, J., at the last Gloucestershire Assizes, it appeared that a meeting of the subscribers to the institution had been held for the purpose of determining whether Mr. Woollen should continue to be the sole accoucheur to the objects of the charity; that the defendant, who was a subscriber, was chairman; and that, either after or before he had left the chair, Mrs. Hicks, a subscriber, questioned the defendant as to some complaints which had been made, during the meeting, against the plaintiff with respect to his attendance upon the charity. The defendant answered, that he did not object to the plaintiff's professional character. Mrs. H. then asked what the objection was; to which the defendant replied, that it was too bad to name, and that he could not tell her. Mrs. H. then said, "I insist upon it: being one of the members of the society, I have a right to know." Upon which the conver-

sation took place, substantially as set out in the declaration. The learned Judge told the jury that, supposing all which passed during the meeting to be in the nature of a privileged communication, the meeting was not necessarily over when the defendant left the chair: and he desired them to consider, whether the conversation was fairly a part of the proceedings of the meeting. The jury found for the plaintiff, damages 100*l*.

Sir *W. W. Follett*, in this term,¹ moved for a new trial, on the ground of misdirection, and of the verdict being against evidence; and he insisted that a communication made, *bonâ fide*, by one member of the charity to another, [*538] in answer to inquiries made by the latter on matters relating to the charity, was privileged, although not made during a formal meeting; and that the jury should have been asked whether there were any circumstances rebutting the presumption in favor of privilege. He cited *Toogood v. Spyring*, 1 Cr. Mee. & R. 181; S. C. 4 Tyrwh. 582; *Wright v. Woodgate*, 2 Cr. Mee. & R. 573; S. C. Tyrwh. & Gr. 12; *M'Dougall v. Claridge*, 1 Camp. 267; *Bromage v. Prosser*, 4 B. & C. 247. [Lord DENMAN, C. J. You set up a very large claim of privilege; there may be a thousand subscribers to a London charity.]

Cur. adv. vult.

On this day, Lord DENMAN, C. J., after adverting to another objection to the learned Judge's charge (not mentioned above), and stating that it was founded on a misapprehension of what his Lordship had said to the jury, added, It is also said that the parties had a right to enter into discussion simply as subscribers to the charity. We do not accede to that: such a claim of privilege is too large.

Rule refused.

¹ Nov. 4th. Before Lord DENMAN, C. J., PATTESON, WILLIAMS, and COLERIDGE, J.

*The KING *v.* JOULE. Nov. 8.

[*539]

A defendant, applying to remove an indictment from sessions by certiorari, on account of the probability that difficult points of law will arise, must state in his affidavit specific grounds on which legal difficulties will occur; it is not sufficient to show that the obstruction complained of by the indictment consists of buildings of great value, which have stood thirty or forty years.

THIS was an indictment for obstructing a common King's highway. The bill was found at the last quarter sessions for Salford.

WIGHTMAN for the defendant now moved for a certiorari, on an affidavit in which it was stated that the place in question had been long used by the defendant as a yard to his brewery, and that there was erected over part of it a building of the defendant, which had been built for thirty or forty years, and the enjoyment of which was very important to him; that, on the trial, the question would be whether the alleged highway were such; that the indictment was preferred at the instance of commissioners of police, acting for the township of Salford, and the surveyors of the highways, all residing in the neighborhood of the place where the trial would be had, and of the alleged obstruction; that the deponent believed that their influence would prejudice the case if it were tried at the quarter sessions; and that he "is advised and believes that it will be proper, as well on account of the value of the object of the indictment, as of the questions of matter of fact and points of law which may arise, to have the same indictment tried by a special jury." WIGHTMAN now urged that the affidavit showed grounds for the removal, especially as it suggested that there would be points of law to be determined. [WILLIAMS, J. What points do you suggest as likely to arise?] It is not necessary to specify them on such an application; but it is clear that a question of non-user may, and probably must, [*540] arise. [PATTESON, J. It will be a mere question of fact, highway or not.] That will probably raise difficult questions, whether the public rights (if

any) have been affected by non-user. This is practically a trial of ejectment for property of great value.

PATTESON, J.¹ You must show specific grounds upon which legal difficulties will arise. The practice of allowing removals has perhaps been too lax.

WILLIAMS and COLERIDGE, Js., concurred.

Rule refused.

¹ Lord DENMAN, C. J. was absent.

DOE on the Demise of STILWELL v. MILLERSH. Nov. 8.

A surrender of copyhold lands in the manor of F. was proved to have been taken by S., who stated that he held the office of clerk of the Castle of F., which was in the manor, by patent from the lord; that there was a custom for him to take surrenders; that the steward also took them, and that he, S., had a concurrent jurisdiction with the steward. The patent contained no authority to that effect. Held, evidence for a jury that S. was entitled by custom to take the surrender.

EJECTMENT for copyhold premises in Surrey. On the trial before Lord ABINGER, C. B., at the last Guildford assizes, it became necessary for the plaintiff to prove that a surrender had been taken of the premises at the copyhold court of the manor of Farnham, in which manor the premises were situate. It appeared that the surrender was taken by a person named Shotter, who described himself as clerk of the Castle of Farnham, which is within the manor, and said [*541] that he derived his authority from the Bishop of Winchester, *the lord of the manor. He produced a patent, dated 1796, but which did not authorize him to take surrenders. He added, that there was a custom for him to take surrenders; that the steward of the manor also took them, but that the witness had a concurrent jurisdiction; and that the admittances were taken by the steward, who kept them, and from time to time sent the witness a copy of them. It was objected that this was not evidence of a valid surrender; but the Lord Chief BARON said that, with a custom, such a surrender was sufficient; and the plaintiff had a verdict.

Wordsworth now moved for a rule to show cause why there should not be a new trial. The surrender was not formally taken. It does not appear that Shotter was an officer of the Court, or even a member of it. The law recognises such surrenders only as are taken by the lord, or his steward, or the deputy-steward. These, with the tenants, constitute the whole Court. [Lord DENMAN, C. J. They might be taken by two copyholders.] For that there must be a custom; and so there must for the taking a surrender by any one except the lord, or his steward, or deputy-steward. Here, the assertion of Shotter, that there was a custom for him to take them, could import only that he himself had been in the habit of taking them, which is the very practice, the legality of which is in question. The cases are collected in 1 Scriven on Copyholds, 153, Part I. ch. 4 (ed. 3d). There is no authority for holding such a custom good; and the custom in point of fact is not established by legal proof.

*Lord DENMAN, C. J. Here is a person holding an office connected [*542] with the manor, who states that there is a custom for him to take surrenders. I know no rule of law contrary to such a custom; and there was evidence for the jury of its existence.

PATTESON, J. He is a sort of deputy-steward for this purpose.

WILLIAMS and COLERIDGE, Js., concurred.

Rule refused.

[*543] *GILBART and Another v. DALE. November 8.

In an action by the consignor of goods against the proprietor of a general booking-office for the transmission of parcels by coach, &c., charging negligence, whereby consignor lost his goods, it is not sufficient to prove that they never reached their destination or were accounted for. The office-keeper's duty is to deliver to a carrier; and some evidence must be given, showing specifically a breach of that duty.

A tradesman having made up goods by order, delivered them at a booking-office, with the customer's address, and booked them, to be forwarded to him, not specifying any particular conveyance, and no particular mode of transmission having been pointed out by the customer. Quære, whether the consignor could maintain an action against the office-keeper for a negligent loss of the goods while under his charge?

ASSUMPSIT. The declaration stated that defendant, before and at the time of the making of his promise, &c., was possessed of a certain booking-office, for the booking and receiving and taking care of boxes and parcels, in order that the same might be forwarded to the several persons to whom the same might respectively be directed; and defendant being so possessed, &c., the plaintiffs heretofore, to wit, 5th June, 1833, at the special instance and request of defendant, delivered to said defendant, so being possessed, &c., a certain box of said plaintiffs of great value, to wit, &c., and containing divers goods and chattels, to wit, &c., of said plaintiffs, of great value, to wit, &c., to be by him, the said defendant, taken care of, in order that the same might be forwarded to a certain person to whom the same was then directed, to wit, to one Thomas Jeffries, Esquire, Cott Moor, near Pembridge, South Wales; and, in consideration thereof, and of certain reward to said defendant in that behalf, then paid by said plaintiffs to said defendant, he, the said defendant, being so possessed of the said booking-office as aforesaid, undertook, &c., to take care of the said box, and of the goods and chattels therein, in order that the same might be forwarded to the person to whom the same was then directed, to wit, to, &c.; and although said defendant, as such possessor of the said booking-office as aforesaid, then had and received the said box, and said goods and *chattels therein for [*544] the purpose aforesaid, yet defendant, not regarding his duty in that [*544] behalf, nor his said promise, &c., but contriving, &c., hath not taken care of the said box, or of the goods and chattels therein, in order that the same might be forwarded as aforesaid; but, on the contrary, defendant, being so possessed of the said booking office as aforesaid, so carelessly and negligently behaved and conducted himself with respect to the said box, and the goods and chattels therein, that, by and through the mere carelessness, negligence, and improper conduct of defendant in this behalf, the said box and goods were lost to the plaintiffs, &c. Pleas. 1. Non assumpsit. 2. That defendant did take care of the box and goods, and that the same were not by the carelessness, &c., of defendant lost to plaintiffs in manner and form, &c.: conclusion to the country.

On the trial before Lord DENMAN, C. J., at the sittings in Middlesex after last Trinity term, it appeared that the defendant was the proprietor of a general booking-office (at the Gloucester Coffee-house, Piccadilly); and that the plaintiffs, who were tailors, left at the defendant's office, and paid twopence for booking, a box of clothes made by them for a customer, and addressed to him as stated in the declaration. No direction was given as to any particular conveyance; and it did not appear that any desire had been expressed on the subject by the consignee. The box never reached its destination or was accounted for. Upon this evidence it was objected: first, that the action ought to have been brought by the consignee (*Dutton v. Solomonson*, 3 B. & P. 582, notes to *Wilbraham v. Snow*, 2 Wms. Saund. 47 k, note (1), and note [u], 5th ed.); secondly, that *it appeared to have been the defendant's duty not to carry, but to deliver [*545] to a carrier, and that the non-arrival of the goods at their destination did not prove a breach of that duty; *Newborn v. Just*, 2 Car. & P. 76; *Upston v. Stark*, 2 Car. & P. 598. The Lord Chief Justice directed a nonsuit on the points taken, and refused the plaintiffs' counsel leave to move to enter a verdict.

Platt now moved for a new trial. First, under the new rules of pleading, the property in the goods was not put in issue by the plea of non assumpsit. [COLERIDGE, J. Is not the delivery of a box "of the plaintiffs" one of "the matters of fact from which the contract or promise alleged may be implied by law?" Reg. Gen. Hil. 4 W. 4; Pleadings in particular Actions, I. Assumpsit, 1, 5 B. & Ad. vii. PATTESON, J. If the defence is, that the contract was not

a contract with the plaintiffs, that is clearly raised by the plea of non assumpsit. Lord DENMAN, C. J. If that defence is proved, the contract was not made *modo ac formá* as alleged.] Secondly, the property was in the plaintiffs originally, and was not out of them, according to the authorities cited on the trial, until there had been a delivery to a carrier. Here they were merely deposited for the purpose of being so delivered. There had been no such acceptance of them by the consignee, as would have been required by stat. 29 Car. 2, c. 3, s. 17; *Hanson v. Armitage*, 5 B. & Ald. 557. In *Davis v. James*, 5 Burr. 2680, [*546] and *Moore v. Wilson*,¹ the carrier's contract was held *to be with the consignor. [Lord DENMAN, C. J. No doubt that may be so, under some circumstances. In *Moore v. Wilson*, 1 T. R. 659, a contract with the consignor must have been proved.] Thirdly, the plaintiffs made a sufficient *prima facie* case against the defendant by proving that the box never arrived. In the case of a carrier that would have been clear; *Griffiths v. Lee*, 1 Car. & P. 110: and it cannot be said, here, that the plaintiffs ought to have sued the carrier; for it was not within their knowledge who the carrier was, if the goods were intrusted to one.

PATTESON, J. It is unnecessary to give any opinion on the point as to the consignor's title to sue, because the nonsuit was clearly right on the second ground of objection. Was there any evidence to sustain the charge of negligence against this defendant? Let us look at the contract. The defendant was not a carrier, but keeper of a booking-office. His contract was, to take care of the box, that it might be forwarded, that is, that it might be delivered to some carrier, to be conveyed to its destination. To show a breach of that undertaking by the defendant, it should have been proved by direct evidence that the box was taken away while in the booking-office, and lost, or that it was never delivered to any carrier. No such evidence was given. All the proof was, that it did not arrive at its destination: but, in this case, non-delivery to the consignee was not sufficient. The decision in *Griffiths v. Lee*, 1 Car. & P. 110, is correct, as applied to the case of a carrier, but not to that of a book-keeper. The [*547] default to be *proved against him was, non-delivery of the goods to a carrier.

WILLIAMS, J. I am of the same opinion. A carrier must discharge himself of his contract by delivering to the consignee. Here the contract was, to deliver them to a carrier; and the evidence leaves it undecided, whether the goods were lost in the defendant's hands, or were delivered to a carrier and lost by him. There is, therefore, no sufficient proof of negligence in the defendant.

COLERIDGE, J. In the case of a carrier, the law presumes that he will do his duty; and a plaintiff, who charges him with the breach of it, must give some evidence of non-performance. The fact, that the goods have not reached the consignee, is such evidence against the carrier, and calls upon him to discharge himself by other proof. So in the case of the keeper of a booking-office; to call on him for an answer to such a charge as the present, some evidence must be given of the non-performance of his undertaking: but that is not done by merely showing non-delivery of the goods to the consignee. Suppose goods were left with a carrier to be taken by him to York, and from thence forwarded to Edinburgh, would it be sufficient, in an action against him for negligence, to show that the goods did not reach Edinburgh?

Lord DENMAN, C. J., concurred.

Rule refused.*

¹ 1 T. R. 659. See the remarks on these cases in *Dawes v. Peck*, 8 T. R. 330. Long on *Sales of Personal Property*, ch. vii. p. 168. And see the cases collected in a note to *Coggs v. Bernard*, in *Smith's Leading Cases*, 103.

* See *Syms v. Chaplin*, p. 634, post. That case, so far as it bears upon the present, was decided before it, November 2d.

*LILLY v. HAYS. November 8.

[*548]

A debtor of plaintiff transmitted a sum of money to defendant, who admitted having received it, and being afterwards informed that it was meant to be paid to the plaintiff, said that he would so pay it. These statements were communicated to plaintiff by defendant's authority.

Held, that on his failing to pay, plaintiff might sue him for money had and received, and that defendant could not allege a want of consideration moving from plaintiff to himself.

ASSUMPSIT for money had and received, and on an account stated: plea, non assumpsit. On the trial before Lord DENMAN, C. J., at the sittings in London after last Trinity term, it appeared that the plaintiff had lent 100*l.* to a Mr. Wood on his acceptance. Wood also owed money to the defendant. The bill was at two months; dated June 15th, 1833. When it became due, Wood was in Scotland. Some days after the maturity of the bill, the defendant said to a witness, that he had received 100*l.* from Wood, but did not know exactly what bill it was to take up. The witness deposed to another conversation at which he was present, between defendant and plaintiff, when defendant said that he had received some money from Wood, but Wood owed him 40 or 50*l.* Another witness, named Browning, stated that, having received a letter from Wood about the end of August, 1833, he called on the defendant and said to him, "I have heard from Mr. Wood with regard to the bill, about what you before spoke of to me." (He explained this as referring to an occasion on which the defendant had told Browning that he had received a 100*l.* bill, and asked him what he should do with it, saying that he had had no specific directions, that Wood owed him money, but it could not be for that, as it would not be due for some months.) Browning further stated, in continuation of his evidence as to the conversation in August, 1833, that he had then told defendant that Wood said the 100*l.* *was for Lilly (the plaintiff); upon which defendant said it should be immediately paid. The defendant's counsel objected that there was no proof of the defendant having authorized either of the witnesses to communicate the above statements to the plaintiff; and that nothing had been shown upon which the plaintiff could ground a promise by the defendant to pay him the 100*l.* The Lord Chief Justice reserved leave to move to enter a nonsuit; and he left it to the jury, whether or not the defendant had authorized a statement to the plaintiff that he had received 100*l.* to his use. The jury found for the plaintiff, damages 100*l.*

Kelly now moved for a rule to show cause why a nonsuit should not be entered, or a new trial had. There was no consideration, moving from the plaintiff to the defendant, for a promise by the latter to pay 100*l.* as received to the plaintiff's use. The rule to be collected from *Williams v. Everett*, 14 East, 582, and other cases, is, that an action for money had and received does not lie where money has been sent to the defendant with a direction to pay it to the plaintiff, unless something further has been done, before the commencement of an action, to constitute a privity between the defendant and the plaintiff. Here no distinct proof was given that the defendant had authorized any one to tell the plaintiff that he had received the money on his account, and would pay it to him. Wood might have recalled the 100*l.* at any time while it remained unpaid: the defendant held it to his use.¹ The doctrine that *in assumpsit, the consideration for the promise must move from the plaintiff, is illustrated in 1 Selw. Ni. Pr. 52, Assumpsit I. (Ed. 9); where *Bourne v. Mason*, 1 Vent. 6, and *Crow v. Rogers*, 1 Stra. 592, are cited, in which cases it was held that no foundation was laid for a promise, the consideration moving from a third person; and that was the ground of decision in *Price v.*

¹ See *Stephens v. Badcock*, 3 B. & Ad. 354; *Baron v. Husband*, 4 B. & Ad. 611; *Howell v. Batt*, 5 B. & Ald. 504.

Easton, 4 B. & Ad. 433. So, here, the only consideration shown is, that the defendant received 100*l.* from Wood.

PARTESON, J. It appears in this case that the defendant had stated, in effect, that he held the 100*l.* to the plaintiff's use; and had allowed him to be told so. The only question is upon the alleged want of a consideration moving from the plaintiff. It is true that the rule of law requires such a consideration in all cases, though, in an action for money had and received, a direct consideration moving from the plaintiff is seldom shown. But, suppose that a debtor sent money to a general agent for the creditor, would there be any doubt that, as soon as the agent received it, he would be accountable to the creditor for it, as money had and received to his use? Would it be an answer, that there was no consideration moving from the creditor to the agent? Or is it not a consideration, if the money is sent to a general agent for the creditor, and received by him, he informing the creditor of it? That is the case here. The money was sent by Wood to the defendant; he admitted holding it for the plaintiff's use, and said he would pay it to him. There is a consideration moving here, through the instrumentality of Wood, the original debtor, to the defendant, as agent for the plaintiff.

[*551] *WILLIAMS, J. I am of the same opinion. The defendant here admits the receipt of the money on the plaintiff's account, and is adopted by him as his agent.

COLERIDGE, J. The facts here show that the defendant was the agent of the plaintiff; that agency supplies the consideration. To constitute an agency there must have been an agreement, either express, or to be inferred from what has been said on one side and adopted on the other.

LORD DENMAN, C. J. I am of the same opinion. I thought that the defendant had made himself the plaintiff's banker as to this 100*l.*

Rule refused.

PARRY v. DEERE. November 8.

By the same agreement close A. was demised at a rent of 200*l.* a year, and close B. at the same rent which was paid by the tenant then in possession, not otherwise describing the amount. The agreement was produced in evidence, with an ad valorem stamp on the annual sum made up of 200*l.*, and of the rent paid by the above-mentioned tenant, the amount of which was proved by witnesses.

Held, that the document was rightly stamped, and properly admitted in evidence.

ASSUMPSIT for use and occupation of a messuage and land, and of certain other land. Pleas, the general issue and a set-off. On the trial before LITTLEDALE, J., at the last Summer assizes for Berkshire, it appeared that the premises in question were demised by a written agreement, which was as follows:—"Mrs. Parry agrees to let to Mr. John R. Deere, Donnington Priory, with twenty-five acres of land thereto belonging, as lately occupied by Admiral Bertie, with all rights and appurtenances to the house and lands and premises belonging, from [*552] the 25th day of March instant, for the term of fourteen years, at the rent of 200*l.* for the first ten years of the said term, and at the rent of 210*l.* for the remainder of the said term, to be paid half-yearly." (Then came a clause not material, and after it the words following.) "Mrs. Parry also agrees to let to Mr. Deere the two fields now occupied by Mr. Slocock and Mr. Holloway, from Michaelmas next, being the end of their present current year therein, at the same rent she now actually receives of them for the same, and for the like term as Mrs. Parry agrees to let him the house and premises before-mentioned." Slocock and Holloway were called, and proved that, at the time of the agreement, they rented the fields in question, respectively, at 33*l.* and 61*l.* a year. The agreement bore an ad valorem stamp of 3*l.*, and no other (see *Blount v. Pearman*, 1 New Ca. 408). *Ludlow*, Serjt., for the defendant, con-

tended that the stamp was insufficient. The learned Judge reserved the point, and the plaintiff had a verdict.

Ludlow, Serjt., moved in this term¹ for a rule to show cause why a nonsuit should not be entered. The stamp was insufficient, being an ad valorem stamp in respect of a rent made up of the amount specified in the agreement, and also of an amount not stated there, but to be ascertained by evidence. The stamp act, 55 G. 3, c. 184, schedule, part I., title Lease, imposes, for a "lease or tack of any lands, hereditaments," &c., "at a yearly rent, without any sum of money by way of fine, premium, or grassum, paid for the same, where the yearly rent" "shall amount to 200*l.* and not amount *to 400*l.*," a duty of 3*l.*; and [*553] for a "lease, or tack of any kind, not otherwise charged in this schedule, [1*l.* 15*s.*." Stamp duty is imposed in respect of the consideration appearing on the face of the instrument of demise, not of any consideration which may be shown by parol; *Duck v. Braddyll*, M'Clel. 217. Here it appears on the agreement that part of the premises was demised at a rent of 200*l.* and afterwards 210*l.*; but another part was demised at no stated rent. The instrument, therefore, so far as regarded that portion, was a lease "not otherwise charged" in the schedule, and liable to a duty of 1*l.* 15*s.* That duty would have been chargeable on a demise of the fields only, drawn in the present form; and parol evidence could not have been admitted to bring the instrument under an ad valorem duty. The case here is in effect the same. [PATTESON, J. Then, if premises had been demised by lease at 1000*l.* a year, and, before the expiration of the term, a new agreement were drawn for a demise upon the same terms as before, but fixing the rent only by reference to the former instrument, you must contend that a stamp of 1*l.* 15*s.* would be sufficient.] The difference to the revenue in such a case is not to be considered. The agreement, not having the proper stamps, was as if the terms had been written on an unstamped paper.

Cur. adv. vult.

Lord DENMAN, C. J., now delivered judgment as follows:—In this case an agreement was put in, for the payment of rent, partly rendered certain by the instrument itself, and partly to be ascertained by reference to *the rent [*554] paid by tenants then in possession; and my brother *Ludlow* contended that, in respect of this latter rent, the demise came under the description in 55 G. 3, c. 184, schedule, part I., of a "lease" "not otherwise charged in this schedule." We have no doubt that the instrument did not come within that class, and that the stamp was proper. There will therefore be no rule.

Rule refused.

¹ November 2d. Before Lord DENMAN, C. J., PATTESON, WILLIAMS, and COLERIDGE, J.

The KING v. HIGGINS. Nov. 9.

A party indicted at sessions for obstructing a highway obtained a certiorari, but, without informing the prosecutor that he had done so, gave notice of trial at a subsequent session. The prosecutor attended with his witnesses, and, on the last day of the sessions, before the case was called on, the defendant lodged his certiorari. This Court, under all the circumstances, quashed the certiorari, and ordered a procedendo. But, Held, that this Court had no power to give the prosecutor his costs of attending at sessions after the issuing of the certiorari.

A RULE was obtained in Michaelmas term, 1835, calling on the defendant to show cause why the certiorari issued in this case should not be quashed and a procedendo awarded, and why the defendant should not pay the prosecutor the costs incurred by him in this prosecution at the last quarter sessions for the county of Hereford.

The indictment, for obstructing a highway, was preferred, and a bill found, at the Herefordshire quarter sessions, October, 1834. At the next sessions the defendant pleaded not guilty, and entered into recognisances to try. The certiorari was granted by a Judge, in March, 1835, on affidavit by the defendant's

attorney, stating, as grounds, that certain points of law would arise on the trial; that the indictment was preferred vindictively; that it would probably be requisite to have a view taken by a special jury; that deponent apprehended a disadvantage from the practice at the *Hereford sessions of trying the traverse last, when no magistrates remained but those who felt interested in the cases, and on which occasions an undue influence had been exercised in favor of a party active in the present prosecution; and, lastly, that a speedy removal of the indictment was desirable, as the next assizes would fall nearly at the same time with the sessions.

By the affidavits (sworn in November, 1835), in support of the above application to quash the certiorari, it appeared that the defendant gave no notice of trial for the April or Midsummer sessions, 1835, but that his recognisances were respited at each sessions; and that, on the last occasion, his attorney was told by the prosecutor that, if defendant did not try at the ensuing sessions, a motion would be made to estreat his recognisances. That the defendant gave notice of trial for the October sessions, and in consequence the prosecutor attended there with his witnesses two days, and instructed counsel, the traverse being entered for trial. That on the last day of the sessions, nearly at the close of the business, the certiorari was delivered into Court on behalf of the defendant. That the prosecutor had never had any notice of the certiorari having been obtained, nor been served with any countermand of the notice of trial. Other statements were added, respecting the merits of the prosecution, and answering the allegations formerly made as to the supposed use of influence at the sessions.

The defendant's attorney made affidavit in answer, that at the April sessions, 1835, the prosecution stood over by consent of the attorneys for the prosecutor and defendant. That in May the certiorari was resealed, and made returnable November 2d. That, according to *the deponent's belief, neither the [*556] prosecutor nor his witnesses attended at the June sessions for the purpose of trying the traverse, and that deponent was not threatened with an estreat of the defendant's recognisances if he did not try in October. That deponent delayed taking any step at the time of the June sessions, understanding that new rules were about to be promulgated at those sessions, which would obviate his objection to a trial there. That the new rules (fixing the trial of traverses at an earlier period of the sessions) were made, and, upon the faith of them, he gave notice of trial for the October sessions; that he entered the traverse and attended with his witnesses; but that, notwithstanding the new rules, the traverse was deferred till the close of the sessions, when the deponent, apprehending, as before, for reasons which he stated, that he could not have a fair trial, or sufficient assistance of counsel, produced and lodged his certiorari. That the indictment was removed into this Court, where the defendant appeared and pleaded Not Guilty, and issue was joined and notice of trial given for the next assizes, before the affidavits were sworn, or any motion made for the purpose of quashing the certiorari. There was also a detailed statement upon the merits.

Talfourd, Serjt., and *Kelly* now showed cause, and contended, first, that the delay of the defendant in making use of the certiorari, and his manner of using it ultimately, were justified by the facts stated on affidavit. Secondly, that the application here for costs of the proceedings in another court was unprecedented, and the authority of this Court to give them questionable, though it had jurisdiction over the costs subsequent to removal.

[*557] **Maule* and *Greaves*, contra. On the first point, the grounds of excuse stated are insufficient. Secondly, the costs now applied for are those to which the prosecutor was subjected after the granting of the certiorari, and while the defendant had it in his pocket. This Court became seised of the cause by the issue of the certiorari, and might, from thenceforth, grant any costs occasioned by an abuse of the writ. In *Stacey v. Evans*, 13 Price, 449, which was a case of removal by certiorari from the Great Sessions of Caermarthenshire,

under circumstances like the present, the Court of Exchequer, upon superseding the certiorari, granted the costs of the day in the Court of Great Sessions. In *Rex v. Bartrum*, 8 East, 269, Lord ELLENBOROUGH lays it down generally, as "the established practice of the Court, that if the prosecutor give notice of trial to the defendant, and do not try his indictment, nor countermand the notice in time, he must pay the costs of the trial as in other cases: for otherwise defendants might be harassed, and oppressed with unnecessary expense." The payment of costs is enforced by the general authority of the Court. In *Rex et Regina v. Allen and Hazard*, Comb. 225, HOLT, C. J., said (upon an information for perjury), that "if the prosecutor give notice of trial" "the first assizes, and does not proceed, the defendant must have costs. If the person indicted gives notice, the prosecutor shall have costs." [PATTESON, J. Those cases refer to costs of proceedings in this Court.] The only question is, when the certiorari attaches. From that time, at all events, this Court has jurisdiction over the costs. The sessions are, in point of law, only one *day; and therefore [558] the production of the certiorari may (with reference to the question of [558] costs) be carried back to the commencement of the sessions; and then, according to any view of the subject, the costs incurred at sessions would be within the jurisdiction of this Court. [Lord DENMAN, C. J., referred to *Rex v. Passman*, 1 A. & E. 603.] There the prosecutor, who produced the certiorari, was not the party who had given the notice of trial; and no attempt had been made to set aside the certiorari, which, as appears by the judgment of the Lord Chief Justice, would have put the case on a different footing. *Jones v. Davies*, 1 B. & C. 143, there cited, is a good authority in the present case. The costs at sessions might be taxed by the officer of that Court, see *Franklin v. Featherstonhaugh*, 1 A. & E. 475. (They also contended that, by stat. 13 G. 3, c. 78, s. 24, no certiorari lay.)

Lord DENMAN, C. J. It appears to me that the circumstances of this case entitle the prosecutor to a rule for quashing the certiorari, and for a procedendo, because they show that justice was not the object in suing out the certiorari. But, as to the other point, I cannot find that we have any power here to award costs of proceedings in another court. *Stacey v. Evans*, 13 Price, 449, appears to have been decided, as to this point, on the authority of *Jones v. Davies*, 1 B. & C. 143; and both decisions are overruled by *Rex v. Passman*, 1 A. & E. 603. We cannot, therefore, grant the costs.

PATTESON, WILLIAMS, and COLERIDGE, Js., concurred.

Rule absolute for a procedendo.

*The KING v. The Lord of the Manor of HEXHAM, and his Steward. [559]
Nov. 9.

Where two adverse parties claim title, as devisees, to the same copyhold tenement, the steward may admit both, and proper grounds being shown, this Court will require him by mandamus so to do.

A RULE nisi was obtained, in a former term, for a mandamus calling upon Thomas Wentworth Beaumont Esq., the lord of the manor of Hexham, and James Losh, Esq., his steward of the said manor, to admit Richard Errington to certain copyhold premises within and parcel of the said manor, as the right heir of Elizabeth Armstrong deceased, the late tenant thereof, according to the custom of the said manor.

By the affidavits for and against the rule, the following facts appeared. Elizabeth Armstrong, being seised of the premises in fee, according to the custom of the manor, surrendered to the use of her will, which will she afterwards made (April 3d, 1770), and died. The material devisees were, to trustees (who were appointed executors) for a term of ninety-nine years, to cease when the trusts should have been discharged; and, from and after the determination of such

term, to Thomas Scott for life; remainder to trustees to preserve, &c.; remainder to the first and every other the son and sons of the body of T. S. successively in tail male; remainder to William Scott for life; remainder to trustees to preserve, &c.; remainder to the first and other sons of the body of W. S. successively in tail male, in the same manner as to the sons of Thomas Scott; remainders over (which failed); remainder to the right heirs of the testatrix for ever. William Scott (who afterwards took the name of *Ord, in obedience to the will), [*560] became seised by virtue of the devise to him, and was admitted tenant. He surrendered to the use of his will, which will he made (dated December 24th, 1824), and thereby devised the premises in question to his wife Elizabeth for her life, remainder to his nieces, Barbara Poole and Elizabeth Poole, in fee, as tenants in common. He outlived his wife, and died, November 5th, 1832, without issue, leaving his said nieces him surviving. The nieces thereupon claimed title to the premises, as devisees in fee of William Ord. The present applicant, Richard Errington, alleged that, on the death of William Ord without issue, he became entitled as the right heir of Elizabeth Armstrong, and that the devise by Ord to his nieces could not operate, for that he took only a life estate under Elizabeth Armstrong's will.

At a court holden for the manor, June 20th, 1835, Richard Errington and Barbara and Elizabeth Poole made their respective claims to admittance, whereupon a jury of the homage was sworn, and Errington adduced evidence of his being the heir of Elizabeth Armstrong. The nieces put in the will of W. Ord, and proved the execution. The steward in his affidavit, made in answer to the present rule, stated that the proof offered by Errington was not, in his opinion, conclusive; that it appeared by the court-rolls that W. Ord was not admitted as tenant for life merely, but pursuant to such limitations, and with such remainders over, as were contained in Elizabeth Armstrong's will (which was annexed to the affidavits in support of the rule), and that, at the time of the admittance of Barbara and Elizabeth Poole as after-mentioned, W. Ord was the [*561] last tenant of the *premises in question on the court-rolls of the manor. He also stated that Errington offered no evidence of his being the customary heir of W. Ord, the last tenant; and that the deponent's only reasons, save as before set forth, for refusing to admit Errington, were, that, at the time of his application to be admitted, there was a surrender on the rolls to the use of W. Ord's will; that W. Ord had devised the premises as before-mentioned; and that Barbara and Elizabeth Poole, as his devisees, were, at the time of the said application, entitled, and by their attorney claimed, to be admitted according to the custom of the manor, in preference to the said R. Errington. He further stated that lands in the manor descended as in free and common socage, and that such lands were not devisable without surrender to the uses of the will (except for the benefit of certain near relations and of creditors), until the passing of stat. 55 G. 3, c. 192; and that, in the case of a regular devise by such will, the devisee was admitted.

Errington stated in his affidavit that the steward, at the above court of June 20th, on refusing to admit him, observed that he was in a condition to prosecute his claim at law without admission, which the devisees were not, and, therefore, it was the steward's duty to admit them; but he said that he would direct the jury to find by their presentment, whether Errington had proved himself to be one of the heirs of Elizabeth Armstrong, or not. The jury afterwards found that Errington was proved to be her heir. The admittance of Barbara and Elizabeth Poole was postponed (in order that they might produce the probate of William Ord's will), and they were admitted, October 14th, 1835.

[*562] *Bayley now showed cause. It cannot be contended, after the cases of *Rex v. The Master, &c., of the Brewers' Company*, 3 B. & C. 172, and *Rex v. Wilson*, 10 B. & C. 80, that a party being the heir to copyhold premises may not have a mandamus granted to admit him. But here the party does not claim as the heir of the last tenant on the rolls; and it is questioned by

the steward, whether he actually be the heir of the party under whom he claims. William Ord was the last tenant on the rolls; and it appears that he was not admitted in the mere character of a tenant for life. His devisees have been admitted; and the steward deposes that it was consistent with the custom of the manor to admit them, and not Richard Errington.

W. H. Watson, contra. Although the devisees of Ord have been admitted, Errington is entitled to be admitted also, because he claims as devisee of Elizabeth Armstrong, and cannot enforce or defend his right without admittance. It is true that he is her heir, and he has been so found by the homage; but he makes title as devisee, claiming under a tenant who has surrendered to the use of her will and has devised, ultimately, to her own right heirs. [Lord DENMAN, C. J. Have you any clear authority for saying that the steward may admit two parties laying claim in different rights to the same copyhold?] It is necessary that he should, because the claimant, in a case like the present, cannot sue or defend without admittance. The admittance will not decide anything conclusively: it will only give a *prima facie* right, and an opportunity to litigate the title. [BAYLEY. The rule is, that where a party may take as devisee or as heir, he takes as heir.]

*Lord DENMAN, C. J. This rule must be made absolute. I should have liked to see some case in which two claimants had been admitted under [*563] circumstances like the present; but I think it follows, from the nature of the thing, that the steward must have power to grant such admittance, because otherwise, by admitting one party, he must exclude the other.

COLERIDGE, J.,¹ concurred.

Rule absolute.

¹ PATTESON and WILLIAMS, Ja., had left the Court.

The KING v. The Trustees of the NORWICH and WATTON Road. Nov. 9.

The trustees of a turnpike road, under a local act, claiming to take certain premises on paying compensation to the parties interested, served a notice on a party, containing an offer of a sum as compensation for his undivided third part in a term in the premises, with a warning that, in default of his acceptance, a jury would be summoned to assess compensation. They afterwards served him with a second notice, directed to him and several other parties interested in the premises, that, in pursuance of the local act and stat. 3 G. 4, c. 126, a jury would be sworn to assess the sums to be paid to the parties for their respective interests. Notices similar to the first were served on the other parties named in the second notice. The jury were summoned, and sworn to assess the sums to be paid to the parties for their respective estates, but found only the gross value of the premises; and the inquisition stated that the jury found that sum to be the value to be paid to the parties for their estates, "according to their respective proportions therein," without apportioning it. It appeared by affidavit that some of the parties were bare trustees.

1. Held, that the inquisition might be brought up by certiorari, being a proceeding under the local act and stat. 3 G. 4, c. 126, s. 85; sect. 145 of that act, which takes away certiorari, being repealed by stat. 4 G. 4, c. 95, s. 86; and stat. 4 G. 4, c. 95, s. 87, taking away certiorari in cases only of proceedings under stat. 4 G. 4, c. 95.
2. That the inquisition was bad for not apportioning the value among the parties interested.
3. That the objection to the inquisition might be taken before any order was made to pay the money; and the Court ordered it to be brought up by certiorari, though no order had been made.
4. The inquisition did not set out that the several parties had been served with notices to treat, but the fact appeared by affidavit. Semble, that for this defect also the inquisition was bad, as not showing a foundation for the jurisdiction.

AUSTIN had obtained a rule, in Michaelmas term, 1835, calling upon the trustees acting in execution of stat. 3 & 4 W. 4, c. xv. (local and personal, *public), "for more effectually repairing the road from the city of [*564] Norwich to the windmill in the town of Watton in the county of Nor- folk, and for making a new branch of road to communicate therewith," and of

off and money paid into Court more than covered the money out of pocket. The counsel for the plaintiff objected to evidence being given of such a contract; but the learned Judge received it, and the defendant had a verdict. His Lordship then gave leave to the plaintiff to move to enter a verdict for the taxed costs above the 28l. 2s. 8d.

John Jervis now moved accordingly. First, by the rules Hil. 4 W. 4, Pleadings in particular Actions, II. 3, 5 B. & Ad. viii., the plea of *nunquam indebitatus* in debt has the same effect as *non assumpsit* in *assumpsit*; that is, by the same rules, I. *Assumpsit* 1, 5 B. & Ad. vii., it "operates only as a denial in fact of the express contract or promise alleged, or of the matters of fact from which the contract or promise alleged may be implied by law." It may be inferred from *Edmunds v. Harris*, 2 A. & E. 414, that the defendant, under such a plea, could not avoid the original and direct liability charged in the declaration, by showing a separate contract to receive payment to a particular extent only. [Lord DENMAN, C. J. That case is overruled.]¹ At any rate the payment of money into Court admits the contract as laid. Now the contract laid is for work done in the character of an attorney, on the defendant's retainer; and the right to recover fees is alleged. This is inconsistent with the contract set up by the defendant. [PATTESON, J. For work done as an attorney the plaintiff might declare simply as for work and labor.] In that [*531] *case the present argument could not be urged: but here the plaintiff does not simply so declare; and from the retainer, which is admitted, and the character of the plaintiff, the law raises a right to certain legal fees, which can only be avoided by an express inconsistent agreement; such agreement should be pleaded.

Lord DENMAN, C. J. The issue is as to the amount of the debt: that raises the question, what the contract is. If it be other than that laid in the declaration, why may not the defendant show this?

PATTESON, J. The fallacy lies in assuming that work done in the character of attorney cannot be done upon a contract such as that set up by the defendant.

WILLIAMS and COLERIDGE, Js., concurred.

Rule refused.

¹ See *Hayselden v. Staff*, *antè*, p. 153, and the cases there cited.

[*532] *DOE on the joint demise of BURGESS and HARRISON v. THOMPSON. Nov. 5.

Copyhold property, in a manor belonging to the see of Ely, was surrendered to B., who was admitted on this surrender, at a court purporting to be a court of J. Bishop of Ely, lord of the manor. At the time of the admission, no grant of the temporalities had been made to J. since the death of the preceding bishop; nor had J. been confirmed. Held, that the admission was nevertheless good, the lord's title being immaterial, since the admission was not a voluntary act, but in pursuance of a surrender.

W. being owner in fee of certain lands, I. occupied them for twenty years, and until his own death, which was before W.'s death. After I.'s death, his widow, and afterwards the defendant, who was eldest son of I., held on, till and after the death of W., and until ejectment was brought by W.'s devisee, within five years of the passing of stat. 3 & 4 W. 4, c. 27. The jury found that the possession was not adverse to W.: Held, that the lessor of the plaintiff was not barred by sects. 2 and 7, but had five years from the passing of the statute, under sect. 15; and that the defendant could not resist the action on the ground that having had no notice, he still continued tenant at will.

EJECTMENT for lands in Cambridgeshire. The declaration was of Easter term, 1836. On the trial before TINDAL, C. J., at the last Cambridge assizes, (July 25th), it appeared that the lands were partly copyhold and partly freehold; that the lessors of the plaintiff were devisees in trust of all the premises under the will of William Thompson; and that the defendant was the eldest son of James Thompson, deceased, who was the eldest son of William Thompson. The will was proved; and it appeared that the copyhold land was part of the manor

of you respectively, as the value, recompense, and satisfaction, of and for your respective estates, rights, interest, and property, of and in all that," &c. (describing the premises), required and intended to be taken and pulled down and removed by the trustees, pursuant to the first-mentioned act; "and also to inquire into and ascertain and assess the sum and sums of money to be paid by the trustees acting," &c., "to any other person or persons, having any estate, term, or interest in the premises, as the value, recompense, and satisfaction of and for his, her, and their respective term, estate, and interest therein:" the notice then required the parties addressed, "and each and every of you," to appear before the jury, and produce all deeds, &c., relating to the premises.

*Rogerson deposed that he had received no other notice, and that Blyth, Wiseman and Gridley had no beneficial interest in the premises. [*567]

Three trustees signed a warrant, addressed to the Sheriff of the city of Norwich, professing to be in pursuance of the two acts, and commanding them to empanel a jury, to inquire into, ascertain, and assess the sums to be paid by the trustees to Elizabeth Strickland, Rogerson, Blyth, Wiseman, and Gridley, "or some or one of them respectively, as the value, recompense, and satisfaction, of and for their respective estates," &c., and to any other person, &c., as in the notice last mentioned.

The jury met, and were sworn, by the under-sheriff, to inquire into, ascertain, and assess the sum or sums of money to be paid by the trustees to Elizabeth Strickland, Rogerson, Blyth, Wiseman, and Gridley, some or one of them respectively, as the value, &c., of and for their respective estates, &c. Having heard the evidence, and viewed the premises, they stated that they found the value of the land to be 85*l.*: on which the person, who attended on behalf of Mrs. Strickland, inquired whether that sum was given as the value of Mrs. Strickland's interest; to which the foreman answered, that they considered 85*l.* to be the value of the whole. The jury were then asked, whether they included the interest of the corporation of Norwich; to which the foreman replied, that they did not. They were then asked, whether they found that 85*l.* was the whole value of the interest of the lessees in the whole land to be apportioned between E. Strickland and Rogerson; to which the jury assented. No question was put as to the expenses which would be occasioned by repairing the fences on the side of the adjoining road. The following *inquisition was [*568]

"An inquisition taken at," &c., "this 5th day of November," "by virtue of the precept," &c. (of the three trustees who signed), "being three of the trustees appointed by, or by virtue, and acting in execution of, an act," &c. (3 & 4 W. 4, c. xv.), "and in and by a certain other act," &c. (3 G. 4, c. 126), "before the said," &c. (three trustees); "upon the oaths of," &c. (the twelve jurymen), "twelve indifferent," &c., "who, being duly summoned, and returned and sworn to inquire into, and ascertain and assess the sum or sums of money to be paid by the trustees acting," &c., to Elizabeth Strickland, of, &c., Thomas William Rogerson, of, &c., Henry Etheridge Blyth, of, &c., Thomas Thurlow Wiseman, of, &c., and Henry Gridley, of, &c., "or some or one of them respectively, as the value, recompense, and satisfaction of and for their respective estates, rights, interest, and property, of and in all that," (describing the premises), all which, &c., "are required and intended to be taken," &c., "by the said trustees, pursuant to the powers and for the purposes of the said first-mentioned act, and also to inquire into and ascertain and assess the sum or sums of money to be paid by the said trustees acting in execution of the said first-mentioned act, to any other person or persons having any estate, term, or interest in the premises, as the value, recompense, and satisfaction for his, her, or their respective term, estate, or interest therein, and also to do and determine all such other matters and things relating to the premises as could or might be lawfully done or determined under or by virtue of the said acts of parliament, or either of them, upon their oaths find, after *view had and evidence heard, that the sum of 85*l.* is the value, recompense, and satisfaction," [*569]

to be paid to the said," &c. (naming the five parties), "of and for their estates, rights, interests, and property, of and in the said," &c., "according to their respective proportion therein. In witness," &c.

By the affidavit of the clerk to the trustees, in opposition to the rule, it appeared that Elizabeth Strickland was entitled to two-third parts of the term, of which Rogerson was beneficially interested in one-third part; and that notices, similar to the first notice served on Rogerson (except as to names), had been severally served on Elizabeth Strickland, Blyth, Wiseman, and Gridley; that no evidence was given before the jury of any damage sustained by the lessees; that the jury was summoned for the purpose of fixing the value of the estate and interest of the parties entitled as leaseholders, and not of the remainder in fee, the corporation having made an arrangement with the trustees for their estate and interest, and having subscribed towards the road; that no order had been made for the payment of the sum found by the jury.

Kelly and Palmer now showed cause. First, no certiorari is grantable. By sect. 145 of stat. 3 G. 4, c. 126, "no proceeding to be had or taken in pursuance of this act, shall be quashed or vacated for want of form, or removed by certiorari, or any other writ or process whatsoever, into any of his Majesty's Courts of Record at Westminster." The same section, in the earlier part, gives an appeal to the next quarter sessions (except as is there mentioned), to any person who shall think himself aggrieved by anything done in pursuance [*570] of this act. It is true that sect. 86 of stat. 4 G. 4, c. 95, repeals both that appeal clause of the former act, and the clause taking away the certiorari. But sect. 87 of stat. 4 G. 4, c. 95, re-enacts the appeal clause, and extends it to any person thinking himself "aggrieved by any order, judgment, or determination made, or by any matter or thing done by any justice or justices of the peace, or by any trustees or commissioners of any turnpike road in pursuance of this act, or the said recited act, or any local act for making, repairing, or maintaining any turnpike road (except where the order, judgment, or determination of any such justice," &c., "are hereby declared to be final and conclusive," &c., with other exceptions not material); and, by the same section, "no proceeding to be had or taken in pursuance of this act shall be quashed," &c., "or removed by certiorari, precisely as in the former act. The parties therefore, might have appealed; and, consequently, the certiorari cannot go. [COLEBRIDGE, J. By stat. 3 G. 4, c. 126, s. 85, the inquisition is final and conclusive; does not that bring the case within the exception in stat. 4 G. 4, c. 95, s. 87?] That seems to mean final and conclusive as to amount, not as to form. But if it mean final and conclusive for all purposes, those words of themselves take away the certiorari. Besides, the exception extends only to orders, &c., "hereby declared to be final and conclusive;" that is, so declared by stat. 4 G. 4, c. 95. Now it is the former statute only which declares the inquisition to be final and conclusive. [PATERSON, J. The certiorari is taken away, by stat. 4 G. 4, c. 95, s. 87, in cases only of proceedings "in pursuance of this act." The inquisition is taken, not under this latter act, but

[*571] under the local act, and stat. 3 G. 4, c. 126, s. 85.] So far as stat. 3 G. 4, c. 126, is not repealed by stat. 4 G. 4, c. 95, it is recognised by it, and the two may be considered as incorporated; so that what is done under the former is done also under the sanction of the latter. But, further, the certiorari is manifestly intended to be taken away, by the latter act, in all cases where the appeal is given; now, the appeal is expressly given in the case of any matter or thing done in pursuance of either act, or any local act.

Secondly, supposing the certiorari not to be taken away, it will be objected

¹ By stat. 4 G. 4, c. 95, s. 88, all the powers, &c., matters and things whatsoever, contained in stat. 3 G. 4, c. 126, so far as "not expressly altered or repealed by this act," shall be in force with respect to this act, as fully as if repeated in the body thereof; "and the said recited act and this act shall, as to all matters and things whatsoever (except as aforesaid), be considered as one act."

that the inquisition does not set out the notice to treat. There is no enactment requiring this. It is, no doubt, a general rule that, where an act is done by an inferior jurisdiction, the proceedings, on their face, should show everything necessary to the authority. But, here, the inquisition is merely interlocutory; the trustees (by st. 3 G. 4, c. 126, s. 85) are afterwards to order the payment of the money; and that is the essential and operative part of the proceeding. The words of st. 3 G. 4, c. 126, s. 85, are, "such verdict or inquisition and judgment, order and determination thereon, shall be final, binding, and conclusive," &c. The order may, hereafter, if it be necessary in point of form, set out the notice. The affidavits show that in fact the notice has been given; a fact which did not appear in *Rex v. Bagshaw*, 7 T. R. 363.

*Thirdly, the application is premature. The inquisition effects [572] nothing till the order be made: then, if at all, the proceedings are to be removed; but the Court will not grant a certiorari to remove interlocutory proceedings at every step. In *Rex v. Bagshaw*, 7 T. R. 363, a certiorari was granted, because no notice (in compliance with certain local acts) appeared to have been given: but there the trustees had made the order in pursuance of the inquisition; and the certiorari removed the whole proceedings.

Fourthly, it will be objected that the inquisition does not apportion the compensation among the different parties. As between the lessees and the trustees, the only question was the value of the property, and nothing else was discussed; and the jury have found the value. They had no means of deciding upon the respective interests of the parties claiming under the indenture of 1832; neither was such an inquiry within their jurisdiction. The reversioners, the corporation of Norwich, have given up their claim to compensation, on account of the advantage derived by the city from the road.

B. Andrews and Austin, contra. First, the certiorari is not taken away. Sect. 145 of st. 3 G. 4, c. 126, is repealed by st. 4 G. 4, c. 95, s. 86. The only question then is, whether the enactment as to the certiorari in sect. 87 of the latter statute be applicable here. But that enactment is expressly confined to proceedings in pursuance of that act: this proceeding is in pursuance of the former act and of the local act. It is said, however, that the appeal to the quarter sessions is preserved by *the earlier part of st. 4 G. 4, c. 95, s. 87; and [573] that the certiorari is intended to be taken away whenever there is such an appeal. But there is no appeal; for the last-cited section excepts from appeal cases where the order, &c., are final and conclusive, which proceedings under sect. 80 of st. 3 G. 4, c. 126, are declared to be. [PATTERSON, J. But the exception in st. 4 G. 4, c. 95, s. 87, is only where the order, &c., are "hereby" declared to be final.] Independently of this express exception, the verdict, &c., being declared final by st. 3 G. 4, c. 126, s. 85, are, by those words, protected from appeal under both statutes. Again, the clause in st. 4 G. 4, c. 95, s. 87, taking away the certiorari, being expressly confined to proceedings under that act, can operate here only on the supposition that the directions in st. 3 G. 4, c. 126, s. 85, are incorporated in st. 4 G. 4, c. 95; and, on that supposition, the proceedings became final within the latter act, and therefore are within the exception in the appeal clause of that act. Again, the appeal is given in cases only of orders, judgments, or determinations by justices, trustees, or commissioners: this is a finding by a jury. Where an appeal is given to the sessions, that Court decides summarily, and awards costs: but they cannot have been intended to do so on a question of the value of premises; especially as the costs here, by st. 3 G. 4, c. 126, s. 87, are to be paid by the trustees or the owners, according as the sum assessed by the jury (without any provision as to the sessions) shall exceed, or not, the offer made by the trustees. The sessions could give only the costs of the appeal.

Secondly, the inquisition must show that the proceeding is warranted, which is not done here. On this *point, *Rex v. Bagshaw*, 7 T. R. 363, is [574] conclusive. In that case the inquisition was quashed, not merely the

order. So in *Rex v. Wilson*, 3 A. & E. 817, 887, where an inquisition following a defective conviction for forcible entry was defended on the ground that it might be taken as a proceeding by itself, the Court said that, if so taken, it was bad for not showing on what authority it was founded. Yet there the inquisition was only preparatory to a writ of restitution. Further, since the costs depend on the sum found by the inquisition, the inquisition should show to what parties notice to treat was given, in order that it may appear who becomes liable. So in *Rex v. Mayor, &c., of Liverpool*, 4 Burr. 2244, an inquisition was quashed for not showing the notice, which was the foundation of the jurisdiction. [COLERIDGE, J. Had they gone on to the order there?] There was a judgment, which was brought up, and quashed, together with the inquisition and verdict; but Lord MANSFIELD said that the notice "ought to have appeared upon the inquisition." In *Rex v. Sheppard*, 3 B. & Ald. 414, an order for stopping up a highway, under st. 55 G. 3, c. 68 s. 2, was quashed, because it did not show, on its face, that it was made at a special session. The form in Burn's Justice recites the notice to treat; see 3 Burn's J. p. 296 (28th edit., by Chitty); Highways, Turnpike, s. xxi. Forms, No. 76.

Thirdly, it is said that this application is premature, the inquisition being inoperative without the order to pay. But the inquisition is the judgment. The order must follow the inquisition, and is, in fact, merely the obedience of [*575] the trustees to the award in the inquisition. *It is an order on their own officer, or on themselves. At the utmost it is a mere minute. It does not appear that it must necessarily be in writing. The words of st. 3 G. 4, c. 126, s. 85, are "verdict or inquisition and judgment, order and determination thereon," where "verdict," "inquisition," and "judgment," are synonymous, as "order" and "determination" are. If the inquisition were, as suggested, merely an interlocutory proceeding, it might, supposing it bad, be neglected as invalid, and another inquisition might be taken: but that will not be contended for; it is clearly final till quashed. The applicants are aggrieved by the inquisition, as a party is by a rate, though it has not been put in force.

Fourthly, the inquisition is not final. First, no compensation is made to the reversioners. Secondly, the compensation is not apportioned among the lessees, though a notice was given to each. The affidavits show the several interests; and the jury were sworn to assess the sum to be paid to each lessee, respectively, for the respective estate of each, and to any other person having interest; yet they merely award a gross sum to be paid to the four lessees "according to their respective proportions." Separate offers were made to each: some may thus become liable to pay the costs upon the inquisition, others to receive. In some events, under sections 87 and 141 of st. 3 G. 4, c. 126, the costs are to be levied by distress; but how is the warrant to be framed, if the respective liabilities be not apparent on the inquisition? Thirdly, the damages incidental to the future repair of the fences of the premises, on each side of the road, [*576] should be found; *Rex v. The Commissioners of Llandilo Roads*, 2 T. R. 232; but, here, only a satisfaction for the property taken is awarded.

Lord DENMAN, C. J. The first objection is that the inquisition does not contain such a notice as is requisite to give a jurisdiction under the act. Into that question I need not enter fully. *Rex v. Bagshaw*, 7 T. R. 368, shows that on all the proceedings sufficient must appear to give validity. Whether the inquisition be, as is contended, merely interlocutory, so that this formal defect in it may be ultimately supplied, I will not consider; for, even if that be so, there still is a conclusive objection. Here are several parties having several interests, and a jury is empannelled to assess the value of, and recompense and satisfaction for, their respective interests. But they find only one general sum. How can the order apply this sum, so as to give effect to the act? That, therefore, is a decisive objection. Then the question is, whether we can entertain this objection, or whether the certiorari is taken away. By sec. 87 of st. 4 G. 4, c. 95, "no proceeding to be had or taken in pursuance of this act shall be

quashed or vacated for want of form, or removed by certiorari." But how is the inquisition a proceeding had in pursuance of st. 4 G. 4, c. 95? It is said to be so, inasmuch as the act recognises st. 3 G. 4, c. 126, under which the proceedings are had, and that thus the earlier act, so far as it is not repealed, is incorporated in the later, and what is done under the earlier may be understood to take place under the sanction of the later. But each act has a distinct operation on various points; and, to bring the proceeding within st. 4 G. 4, c. 95, *s. 87, it must be a proceeding expressly pointed out by that act, and not merely taken under another act recognised by it. But, even [577] supposing st. 3 G. 4, c. 126, to be made part of st. 4 G. 4, c. 95, the 145th section of the former act gives the appeal only where a party thinks himself aggrieved by anything done by a justice. And the appeal clause of sect. 87 of st. 4 G. 4, c. 95, applies only to things done by justices, or trustees or commissioners. Now this is an act done by a jury; and it therefore is not the subject of appeal. At any rate, the later act, if it adopt the provision of the former, does not at the same time enlarge it so as to take away the restriction. The inquisition, therefore, being faulty in an essential part, in which the order, if ever made, must follow the inquisition, cannot be allowed to stand.

PATTESON, J. As to the question, whether the certiorari be taken away, stat. 4 G. 4, c. 95, s. 87, is not applicable to this proceeding, which, as conceded, is under stat. 3 G. 4, c. 126, and neither entirely nor partially under stat. 4 G. 4, c. 95; and the clause as to the certiorari, in sect. 87 of stat. 4 G. 4, c. 95, is expressly confined to proceedings "had or taken in pursuance of this act." Thus far the plain words of the legislature. But then it is said, that this 87th section of stat. 4 G. 4, c. 95, gives an appeal against things done "in pursuance of this act, or the said recited act, or any local act" for turnpike roads, and that the certiorari must be taken away co-extensively with the grant of the right of appeal. If the legislature meant this, they have not said it. In the first place they speak merely of "this act," in the next, of "the said recited act," and "any local act" also. They must therefore mean different things in the *two places. And Mr. Andrews argued conclusively that, [578] if the words "in pursuance of this act," in the clause taking away the certiorari, were applied to the recited act, and local act, by way of incorporation, then "hereby," in the clause of exception as to the right of appeal, would have an equally extensive meaning, so that the appeal would not be given. No doubt the exception is absurdly worded; but I think the most reasonable construction is, to confine the clause taking away the certiorari to proceedings under stat. 4 G. 4, c. 95: and then this proceeding, being under stat. 3 G. 4, c. 126, is not within the clause, and the certiorari is not taken away. Then it is said that the inquisition, even if bad, is still not a final proceeding, and that therefore the application is premature. Certainly stat. 3 G. 4, c. 126, s. 85, says, "after the said jury shall have inquired of and assessed such damage and recompense, they the said trustees or commissioners shall thereupon order the sum or sums of money so assessed by the said jury, to be paid to the said owners or other persons interested, according to the verdict or inquisition of such jury; and such verdict or inquisition and judgment, order and determination thereon, shall be final, binding, and conclusive." Then the question is, whether, by the way in which the words are here coupled, the whole is made a single proceeding, and the order is necessary to complete the proceeding before we can deal with the inquisition at all. I think that is not so. The trustees have no discretion: they are directed to make an order for the payment of the sum found by the jury. The making the order is merely ministerial; it is not a judgment, nor in the nature of a judgment. The inquisition therefore is binding. Now several objections are made to it. It does not apportion the compensation, *though the parties have separate interests, and have had separate notices served upon them. The finding a gross sum creates a fatal objection. [579] Whether the notice ought to appear on the inquisition is a point on which I

desire not to be concluded: but my impression is, that it should appear, not as the finding of the jury, but in the nature of a caption.

WILLIAMS, J. The only difficulty I had was in determining whether this application be premature, that is, whether any further step be necessary to make the proceedings complete. No case was cited in which a certiorari had been granted before the proceedings were complete. But, supposing the order made, it could not depart from the inquisition. Making the order is therefore purely a ministerial act; and no opportunity would be afforded for amending the inquisition. Therefore, I think we are to consider the inquisition; and I have no doubt it is defective for the reason given. It strikes me, too, that the foundation of the order should appear on the face of the inquisition. I know no exception to that rule. Here, if the proper preliminary steps had not been taken, the jury had no rightful office. On the other point, I shall only add that the assessment of the compensation in one gross sum creates a conclusive objection. As to the question whether the certiorari be taken away, it cannot be so except by clear words; and that is not the case here.

COLERIDGE, J. As to the first question, and I think the most important one, whether the certiorari be taken away, I always thought express words necessary to give an appeal to an inferior Court, and to take away a certiorari. Rex [*580] *v. Terret*, 2 T. R. 735, furnishes an instance. The proceeding now in question is clearly under stat. 3 G. 4, c. 126. By sect. 145 of that act, the certiorari is taken away; and that section is repealed by stat. 4 G. 4, c. 95, s. 86. Then, is the certiorari again taken away by sect. 87 of stat. 4 G. 4, c. 95? That clause takes it away only in the case of proceedings "in pursuance of this act." A great deal of discussion has been gone into on the question, whether there be a right of appeal to the sessions. If there be, it is a powerful argument in favor of the probability of the certiorari being taken away; but it is not conclusive. There may be an appeal, and yet a certiorari; or there may be no appeal, and no certiorari. Then, the certiorari not being taken away, can the objections to the inquisition be taken at this stage? Without laying down a general rule, we may say that, whenever there has occurred a defect such as can never be remedied, the party interested may object as soon as the irremediable step is taken. Whenever a party interested in the regularity of these proceedings sees that he cannot get his compensation from the trustees, he may come forward with the objection. Thus the main question is, must not this defect, if it exist, continue to the end of the proceedings? It clearly must: if the compensation be not properly awarded by the inquisition, it never can be properly awarded. The next question then is, whether the inquisition be defective or not. Now, when we see for what the jury was empannelled, and that serious questions may arise respecting costs and other matters, as to which it does not appear what is to be done, we cannot fail to perceive that the proceeding is defective. Suppose, instead of the parties [*581] **being* entitled, as those who received this notice, in separate shares of the same estate, some of them were reversioners, the form of empannelling the jury would be the same; yet, according to the argument against the rule, a jury might award a gross sum, and leave all the parties interested to settle amongst themselves how it was to be divided. The defect is, therefore, a substantial one, and incapable of being remedied; and the applicants are entitled to relief at this stage.

B. Andrews then suggested that the notices ought to be brought up, as well as the inquisition.

Per Curiam. The rule must be for bringing up the inquisition.

Rule absolute accordingly.

The KING v. The Trustees of the WREXHAM, RUTHIN, and DENBIGH Turnpike Roads. Nov. 10.

Sect. 48 of the general turnpike act, 4 G. 4, c. 95, empowering commissioners of turnpike roads to remove their clerks, &c., must be taken in conjunction with sect. 39, which requires certain notices to be given when it is intended to revoke any order of the commissioners.

And, therefore, where commissioners had discharged a clerk by a resolution made without such notices, a mandamus was granted to restore him. Although, at a former meeting, the commissioners had ordered proper notices to be given of a meeting for the purpose of such discharge, and the notice had not been given, nor the meeting held, owing to the misconduct, as was alleged, of the clerk himself.

IN last Hilary term, *J. Jervis* obtained a rule nisi for a mandamus calling upon the commissioners under several acts of parliament for repairing and amending the roads from Wrexham to Denbigh, &c.,¹ to restore Edward Jones to the office of clerk to the said commissioners. Jones had been appointed clerk by a resolution *of the commissioners at a meeting held April 21st, [*582] 1819. At a meeting of the commissioners, May 5th, 1835, it was ordered that the clerk and treasurer should bring in all their accounts and demands on the trust on the 8th of August then next, and that due notice* of a meeting on that day should be given, for the purpose of rescinding the appointments of clerk and treasurer, and of electing others in their stead. By the default (as the commissioners alleged) of Jones, no notice of such meeting was ever given, nor was the meeting of May 5th adjourned to August 8th. On the 6th of July, 1835, some of the commissioners met and passed a resolution that Jones should be continued in office for the ensuing year.* That meeting was adjourned to August 3d, when a further adjournment was made, to October 5th. In consequence of the adjournment to August 3d, as Jones alleged, no notice was given of a meeting on August 8th. On the 8th of August several of the commissioners, who were not acquainted with the proceedings subsequent to May 5th, met, in consequence of the order then made; but, learning what had been done since, they took no further step. On the 2d of November, 1835, another meeting was held, and it was then ordered that Jones should be *discharged. [*583] No notice had ever been given of the intention to make such order.

Alexander now showed cause. First, if it was an irregularity that Jones should have been dismissed at a meeting the purpose of which had not been announced, this was occasioned by the misconduct of Jones himself, and he cannot now allege it against the order of the commissioners. [Lord DENMAN, C. J. If they had held their meeting on the 8th of August, and discharged Jones, or given notice of a further meeting for that purpose, and he had then contended that the proceedings were irregular, the present argument might have had weight; but nothing was done on that day.] Secondly, turnpike commissioners may discharge a clerk without any notice of a meeting for the purpose. Sect. 43 of stat. 4 G. 4, c. 95, gives a general power to appoint and remove clerks, without restriction as to notice; and this clause is wholly independent of s. 39.

Sir *J. Campbell*, Attorney-General (with whom was *J. Jervis*), contra, was stopped by the Court.

¹ 32 G. 2, c. 55, 20 G. 3, c. 97, 41 G. 3, c. 93 (local and personal, public), 3 G. 4, c. xliii. (local and personal, public).

² By the general turnpike act, 4 G. 4, c. 95, s. 39, "no order or determination at any meeting of the said trustees or commissioners, once made, agreed upon, or entered into shall be revoked or altered at any subsequent meeting, unless notice of the intention to make such revocation or alteration shall have been given" by three or more trustees or commissioners, in writing to their clerk, at a previous meeting, and entered in the book of proceedings of such meeting, and published as by this section is directed; "nor unless such revocation or alteration shall be agreed to be made by a greater number of trustees or commissioners than concurred in the making of any such order or determination."

³ All the names signed to the resolutions of this meeting were different from those subscribed to the resolution of May 5th.

LORD DENMAN, C. J. We think that the commissioners might have held their meeting on the 8th of August; and, at all events, have given notice of a future meeting for the purpose of dismissing their clerk. And it is correct that such notice should be given before the officer is removed.

PATTESON and WILLIAMS, *Ja.*, concurred.

COLERIDGE, J. It is clear that sects. 39 and 43 of stat. 4 G. 4, c. 95, must be taken together. Rule absolute.

[*584] *The KING v. The Minister and Churchwardens of STOKE DAMEREL.
Nov. 10.

Quære, whether a quo warranto lies for the office of sexton?

Semble, per LORD DENMAN, C. J., that, if the right of electing a sexton be in the inhabitants of a parish, and a mandamus to hold a meeting for such election be grantable, the writ may be properly directed to the churchwardens, and not to the inhabitants in general.

Where a requisition had been directed to the churchwardens to call a meeting for such election, which they declined to do, on the ground that the minister had refused his consent, alleging the right of election to be in himself; semble, per LORD DENMAN, C. J., on motion for a mandamus to hold such election, that the demand and refusal were sufficient to warrant an application for a mandamus to the minister and churchwardens.

A mandamus was moved for as above, on affidavits making a *prima facie* case of right in the inhabitants to elect, but affidavits were filed in answer stating facts to show that the right was in the rector: Held, that a mandamus ought not to go, the evidence not being decisive in favor of the applicants, and there being another mode of trying the right, viz., by withholding the sexton's fees, or by submitting to the payment and bringing an action against him for the amount.

ERLE, in last Hilary term, obtained a rule nisi for a mandamus calling upon the minister and churchwardens of Stoke Damerel, in the county of Devon, to convene a vestry meeting within that parish, for the purpose of electing a proper person to fill the office of sexton of the said parish.

The office which is profitable and for life, became vacant, about October, 1835, by the death of John Garland, the last sexton, who had held it fifty years. On his decease, John Symons was appointed sexton by the senior curate, who claimed to make such appointment, as minister, the rector being absent, the living under sequestration, and curates having been nominated by the bishop. The appointment was afterwards confirmed by the rector. Certain parishioners, being of opinion that the right of electing a sexton was, by ancient usage, in the rate payers of the parish, sent a requisition to the churchwardens, in January, 1836, after the appointment of Symons, calling upon them to convene a vestry meeting for the purpose of electing a sexton. The churchwardens submitted the requisition to the senior curate, who stated the right to be in the minister, in the absence of any legal custom to the contrary, and *there-

[*585] fore refused to allow a vestry to be called in the church for the proposed election. The churchwardens, consequently, declined to comply with the requisition, alleging the above refusal as a reason. The affidavits in support of the rule stated, as a matter of notoriety, that the right of election was in the parishioners; several persons deposed, from their own recollection, that Garland had been chosen by the parishioners, and not by the rector; and similar statements were made, upon hearsay, as to one Weston, Garland's predecessor. Affidavits were filed in opposition to the rule, contradicting the above statements as to the right, and alleging that both Garland and Weston had been elected by the rector and not by the parishioners. It was also stated that the parish books from 1740 to 1800, in which vestry meetings were entered, made no mention of any meeting for the election of a sexton, or of any appointment to that office, although, during that period, there had been four elections of sextons, not including the last. Subjoined to the last-mentioned affidavits was a notice from the rector,

dated in October, 1835, mentioning Garland's death, asserting the rector's sole right to appoint a sexton, and warning all persons not to interfere with it; and it appeared that this notice, as well as the refusal of the senior curate, had been communicated to the parties making the requisition, when the churchwardens declined to call a meeting.

Sir *W. W. Follett*, with whom was *Crowder*, now showed cause. In the first place, the office is full, and therefore a mandamus cannot be the proper course. [Lord DENMAN, C. J. Is this an office for which a quo warranto would lie?] The claim to it is treated by the *applicants as a matter of public concern. If this were a corporate office, there could be no doubt that, the [*586] office being full, a quo warranto, and not a mandamus, would be the proper remedy. [Lord DENMAN, C. J. In that case, if the office were full by an appointment clearly made without any authority whatever, a mandamus might go; though, generally, the plenary would be an objection to the proceeding by mandamus.] *Rex v. The Mayor of Colchester*, 2 T. R. 259, shows the rule adopted on that subject. A mandamus is not necessary here. A parishioner may try the validity of the appointment by refusing to pay the fees. And, further, this application is for a mandamus to the minister and churchwardens to call a vestry for the purpose of an election; the requisition being made in the first instance to the churchwardens. No precedent has been found of the granting of such an application. In an Anonymous case in *Strange*, 2 Stra. 686, a mandamus was moved for, to the churchwardens of St. Botolph, Bishopsgate, commanding them to call a vestry in Easter week, for the election of churchwardens; "but the Court refused it, saying, there was no instance of such a mandamus, and they could not take notice who had a right to call the vestry, and consequently did not know to whom it should be directed." In *Rex v. The Churchwardens of St. Peter's Thetford*, 5 T. R. 364, a motion was made for a mandamus calling upon churchwardens to make a rate for repairs of a parish church; but this application also was refused, the Court saying that the matter was of ecclesiastical jurisdiction. [COLERIDGE, J. Who do you say has the power of convening the vestry here?] Sir John Nicholl, in *Dawe v. Williams*, 2 Add. Ecc. Rep. 139, says that "vestries, *for church matters, regularly [*587] are to be called 'by the churchwardens with the consent of the minister.'" But, in fact, there is nothing here to show who would be proper persons to convene a vestry for the purpose then-contemplated. [PATTERSON, J., referred to *Rex v. Wix*, 2 B. & Ad. 197.] In that case the mandamus (to elect churchwardens) went to the inhabitants generally. No application has been made here to the minister of the parish, nor have the churchwardens been called upon to act in concurrence with him. The only requisition has been to the churchwardens apart. [Lord DENMAN, C. J. Is not it sufficient if the churchwardens have refused, and the parties applying have learnt from them that the minister will not consent?] The meeting, perhaps, could not be regularly held without the minister's consent; but it is not shown that such meeting ought to be called by the minister and churchwardens, as proposed.

The office has been filled by the rector; and no person has proved that the right of appointment is in any one else.

Erle and *Wightman*, contra, were then called upon to support the rule; the Court intimating that they felt no doubt of there having been a sufficient refusal to ground the application.

As to the right of electing, the affidavits on the other side have not proved that it is in the minister. [Lord DENMAN, C. J. It lies on you to prove that it is in the parishioners.] The statements in support of the rule prove this sufficiently. (They then went into the matter of the affidavits.) There being, then, *a fair ground laid for this application, it should be shown on the [*588] other side that there is some other mode of trying the question than by mandamus. *Rex v. Ramsden*, 3 A. & E. 456, and the authorities collected in 2 Selw. N. P. Quo Warranto, I. II., pp. 1166, 1170, 9th ed., prove that a quo

warranto information would not lie. As to the suggested course of refusing the fees, it will be in the power of the officer to delay that remedy by forbearing to demand them of the adverse parties till the witnesses who speak to transactions of very remote date are all dead. A mandamus has been issued to churchwardens to restore a sexton, *Ile's Case*, 1 Ventr. 153; there is no difference in principle between such a mandamus and a mandamus to call a meeting for the purpose of electing. The Court will of itself take notice who are the proper parties to convene the meeting; and *Dawe v. Williams*, 2 Add. Eco. Rep. 130, and *Rex v. The Churchwardens of St. Margaret and St. John*, 4 M. & S. 250, show that, in this respect, the present application is not erroneous.

Lord DENMAN, C. J. Some difficulties have been raised in this case, which are now removed. I think that there have been a sufficient demand and refusal to justify this application; and that, where the parishioners, or a considerable portion of them, wish a vestry to be called, it is reasonable that a mandamus, if grantable, should be directed to the churchwardens, and not to the inhabitants in general. Then, is this a case in which a mandamus ought to go? With respect to the custom alleged in support of the rule, that the parishioners [*589] should elect, there is some evidence, though not strong, that at the last election such a custom was acted upon. But on this occasion, the office is full by appointment of that person who, in the ordinary course, would have the power of appointing. The inhabitants who make the present application think the proceeding void. I own that, unless there were a very strong case to show that it was so, and unless there were no other remedy, I think a mandamus ought not to go. In my opinion there is another remedy. Any person may dispute the right to the office by refusing to pay the fees, or by bringing an action against the officer if he takes them. We cannot look at any supposed consideration which may render it politic for him to forego his fees; nor can we assume that he will hold the office without regard to the emoluments. I think therefore that a mandamus ought not to be granted, inasmuch as there is another remedy, and as we ought not to sanction a supposed custom interfering with rights usually enjoyed, unless we had more cogent evidence than that now before us.

PATTESON, J. I am of the same opinion. I cannot at present find any reported case in which a mandamus has been granted to elect, where the office was already filled by a void election; but I am sure, from my recollection, that the practice is so, if the Court is satisfied of the election being void.¹ In *Rex v. The Corporation of Bedford*, 1 East, 79, where the corporation had elected a Mayor who would not attend to be sworn in, because *he had not qualified, the Court [*590] ultimately granted a mandamus to proceed to a new election; that, however, was after much doubt, and the office was expressly avoided by stat. 13 Car. 2, c. 1, s. 12. But I am confident that, if the question cannot be tried by a quo warranto, the course is to grant a mandamus for a new election, where the Court is satisfied that the first election is void. Where there is any other mode of trying the right, a mandamus ought not to go. Here, *prima facie*, the appointment is right, being made by the rector, who, by the general law, is the proper person to make it. Strong evidence would be necessary to disprove his authority. There is, on the other hand, a custom alleged for the parishioners to elect; and some evidence, not conclusive, but amounting to a *prima facie* case, has been given, to show that the last election was by them. The office, however, is now full by the rector's appointment. If there were no other remedy, I should say that a mandamus ought to go; but there is such a remedy, by refusing the fees, or bringing an action for money had and received if they are taken. It cannot be supposed that the sexton will go on for five or six years refusing his fees, to prevent a trial of the right; at least the probability of it is not one which we can enter into. The rule must therefore be discharged.

¹ It seems to have been so understood, in *Rex v. The Churchwardens of St. Pancras*, 1 A. & E. 80; and see there the judgments of PARKER, J., p. 100, and of PATTERSON, J., p. 102.

WILLIAMS, J. The evidence in support of the rule is not sufficient to warrant us in granting a mandamus, there being another remedy. We must suppose that the sexton will endeavor to recover his fees. His forbearing to do so until the evidence against his title shall be extinguished, is a contingency which we cannot take into consideration.

*COLERIDGE, J. I will assume, for the purpose of this decision, that a mandamus would lie in this present case, and that a quo warranto [*591] would not; it is unnecessary to decide either point. Still I think that no mandamus ought to go. Here is an appointment by a person in whom, *prima facie*, the right is to appoint. The affidavits in support of the rule do indeed bring that right into question in some degree, but the balance is rather in its favor; and I should expect to see the balance very strongly the other way before I granted a mandamus, if there were another remedy; and here there is another. That the sexton should refuse his fees, as has been suggested, is a state of things which we cannot take into our contemplation. If the parishioners think that the right is in them, it is probable that something will soon occur to raise the question.
Rule discharged.

HART v. MARSH, Clerk. Nov. 10.

The consistory court of Hereford, upon articles exhibited against a beneficed clerk, pronounced sentence, declaring that the said articles were for the most part sufficiently and fully proved, and suspended him for three years. After sentence, a rule for a prohibition was obtained, on the suggestion that some of the articles contained charges cognizable in courts of common law; but it was not denied that others were of ecclesiastical cognizance:

Held that, after this sentence, it must be presumed that the ecclesiastical court had proceeded upon such matters as were within its cognizance; and the rule was discharged.

R. V. RICHARDS obtained a rule, in last Hilary term, calling upon the plaintiff, and Charles Taylor, D.D., the vicar general and official principal of the Consistory Court of Hereford, and Sir Herbert Jenner, LL. D., official principal of the Arches Court of Canterbury, to show cause why a writ of prohibition should not issue to the Consistory Court of Hereford, and to the Arches Court of Canterbury, to prohibit the *said Courts from further proceeding in [*592] the suit between the parties.

The suit, in the Consistory Court, was promoted by Robert Hart against the Rev. G. W. Marsh, the rector of a parish in the diocese of Hereford, of which Hart was a parishioner and churchwarden. In the introduction to the articles, the articles, charges, interrogatories, &c., were stated to be "touching and concerning the lawful correction and reformation of your manners and excesses, and more especially for incontinence, profane swearing, and cursing," &c., stating the general charges which are set out in the articles following, but without particulars of the offences. The contents of the articles, so far as it is material to extract them, were as follows:—

1. That by the ecclesiastical laws, customs, and constitutions of the church of England, all clerks and ministers in holy orders are particularly enjoined and required to be grave, decent, reverend, and orderly in their general deportment and behavior in every respect, and to abstain from fornication or incontinence, profaneness, drunkenness, lewdness, assaultings, quarrellings, fightings, profligacy, or any other excess whatsoever, and from being guilty of any indecency themselves, or encouraging the same in others; and, furthermore, they are enjoined and required to abstain from resorting to any taverns or alehouses, and not to give themselves to any base or servile labor, nor to drinking or riot; not to be absent from their benefices without supplying curates that are sufficient and licensed preachers; and, also, are enjoined and required to visit the sick, and to instruct and comfort them in their distress, and not to forsake their calling and

[*593] use themselves in the *course of their lives as laymen; but that, on the contrary, they are enjoined at all convenient times to hear or read some of the Holy Scriptures, or to occupy themselves with some other honest study or exercise, always doing the things which shall appertain to honesty, and endeavoring to profit the church of God, bearing in mind that they ought to excel all others in purity of life, and to be examples to other people, under pain of deprivation of their ecclesiastical benefices, suspension from the exercise of their clerical functions, or such other ecclesiastical punishment or censure as the exigency of the case and the law thereupon may require and authorize, according to the nature and quality of their offences.

2. That the defendant was in holy orders, and rector of the parish, in the diocese.

4. That the defendant was guilty of incontinence, with a person named in the article, and at times and places specified: and circumstances in corroboration were stated.

6. That the defendant had addicted himself to excessive drinking, and had frequented alehouses for the purpose of drinking, had been guilty of profane cursing and swearing, of quarrelling and fighting, had assaulted and sworn at many of his parishioners, and had made use of much profane language and many oaths.

7. That, at a time and place specified, the defendant was much intoxicated, and then insulted, assaulted and struck R. G., challenged him to fight, and cursed and swore at him. 8, 9, 10, 11. Charges of drunkenness, frequenting alehouses, swearing, fighting, challenging to fight, &c., the times, places, and circumstances being specified.

13. That, "in the years 1819, 1820, and 1821, or in three, two, or one, of [*594] such years, you carried on the *trade and business of a maltster, in," &c., "and that you thereby wilfully gave yourself up to base and servile labor," &c.

14. That, at the same time, "you also carried on the trade or business of a flannel manufacturer, at" &c.; "and that you also bought and sold wool for profit and gain, and thereby exercised yourself in the course of your life as a layman;" &c.

15. That, at the same time, "and for several years previous thereto, you unlawfully occupied a large farm, consisting of 200 acres and upwards, and tilled and cultivated the lands and grounds thereof, without any leave or permission from the Bishop of Hereford for the time being, or any other lawful authority; and that, during the time mentioned in the two next preceding articles, you continued to cultivate the said farm, and to carry on the said two several trades or businesses at one and the same period of time; and you were in the habit of attending fairs, markets, and towns, and other places, for the purpose of buying and selling live and dead stock, goods, wares, and merchandise, in your respective businesses, trades, or characters, of husbandman, maltster, wool-dealer, and flannel manufacturer; thereby forsaking and neglecting your sacred duties of a priest or minister, and using yourself in the course of your life as a layman;" &c.

16. That, "in or about the year 1823, you were arrested and placed in prison; and that you remained there for the space of about six years; and that, by reason of your carrying on the several trades in the first, second, and third last preceding articles, or one of them, mentioned and stated, and of your having exercised yourself in the course of your life as a layman, [*595] and of your having forsaken and neglected your sacred duties of a priest or minister, you were found and declared to be a dealer and chapman, and to have committed an act of bankruptcy, by the commissioners named in a certain commission of bankruptcy," &c. The article further stated that, by reason of such imprisonment and bankruptcy, great inconvenience and injury had been experienced by several of the parishioners, and particularly by the promoter in this cause, Robert Hart, and M. H., and R. H.; and that, by reason of Marsh's unlawfully exercising

the trades aforesaid, he was the less able to attend his spiritual and ministerial duties, and greatly neglected the same, &c.

17. Charged omissions to do duty, and absence from his benefice without leave, and without providing a sufficient curate.

18, and 19. Charged with applying the churchyard to improper and indecent purposes; and, on some occasions, during divine service.

20. Stated that, by reason of the immorality of the defendant's conduct in the preceding articles, he had given great offence to the parishioners, and the congregation had diminished.

21. "That for your said incontinence, profane cursing and swearing, indecent conversation, drunkenness, rioting, and immorality, for your lewd and profligate life and conversation, for the profane usage of the churchyard, for resorting to taverns and alehouses to drink and indulge yourself in loose and idle conversation, for the total omission and neglect of divine service on divers Sundays and Christmas days, for absenting yourself from your benefice without leave of your ordinary for the time being for that purpose first had and *obtained, and [*596] without supplying your benefice with a curate that was a sufficient and licensed preacher, for neglecting to visit the sick, for your giving yourself up to base and servile labor, and forsaking the sacred calling of a minister, and using yourself in the course of your life as a layman, and depasturing cattle and turning out swine into the churchyard," &c., "and for your other vices, immoralities, and excesses, you ought to be canonically punished and corrected," &c.

22. That, by stat. 5 & 6 Ed. 6, c. 4, it was enacted, sect 1, "that, if any person whatsoever, shall at any time after the 1st day of May next coming, by words only, quarrel, chide or brawl in any church or churchyard, that then it shall and may be lawful unto the ordinary of the place where the same offence shall be done, and proved by two lawful witnesses, to suspend every person so offending; that is to say, if he be a layman, *ab ingressu ecclesie*, and if he be a clerk, from the ministration of his office, for so long time as the said ordinary shall by his discretion think meet and convenient," &c.

23. That, at specified times and places, the defendant had taken a part in riot and fighting, and encouraged fights between persons named.

24, 25. That he had cursed, sworn, brawled, &c., in the churchyard (stating particulars as to time, person, &c.), and that he had thereby incurred the penalty of stat. 5 & 6 Ed. 6, c. 4.

28. That all the premises were true, public, &c.; of which legal proof being made to us the Judges aforesaid, and to this Court, we will that you be not only duly corrected, according to the force, &c., of the statute hereinbefore mentioned, and the exigency of the *law, but also that you be duly and canonically punished and corrected according to the exigency, &c.; and also be condemned in the costs, &c. [*597]

These articles were admitted by the consent of the defendant, and entered as admitted with such consent.

The introductory part of the sentence set out that the vicar-general and official principal had heard, &c., a certain cause, &c., against the Rev. G. W. Marsh, clerk, rector, &c., for incontinence, for profane cursing and swearing, &c. (setting out the offences charged, in general terms, but not specifying the circumstances), and for neglect of his ministerial duty, as well by his carrying on of divers trades and businesses at one and the same time for a long period together, as also for unlawfully carrying on and exercising the trades or businesses of a dealer in corn, and buying and selling the same for profit, of a maltster, of a wool-dealer, and also of a flannel manufacturer, and for farming and cultivating a farm consisting, &c., without any leave, &c., and for his attending fairs, markets, and towns, and other places, for the purpose of buying and selling live and dead stock, goods, wares, and merchandise, as otherwise, and for relinquishing and forsaking the sacred calling of a minister, and using himself in the course of his life as a layman, &c.; as in the articles given and admitted in this cause are exhibited, &c. The

adjudication proceeded as follows. "Forasmuch as the heads, positions, articles, charges," &c., "we have found, and it doth evidently appear to us are, for the most part sufficiently and in truth fully proved and founded, we," &c., "pronounce, decree, and declare, that the said articles, &c., "are for the most part [598] sufficiently and fully proved and substantiated: and that the Rev. *G. W. Marsh, clerk, rector of," &c., "be suspended for the space of three years, to commence, &c., "from discharging all functions of his clerical office, and the execution thereof; viz. from preaching," &c., "in the said parish church and elsewhere within the diocese of Hereford, and from all profits," &c. The defendant was also condemned in the costs, &c.

The defendant appealed to the Arches Court of Canterbury.

Maule and *Cleasby* now showed cause. After sentence, the Court will not interfere unless the Ecclesiastical Court has manifestly proceeded upon matters not within its cognizance; *Carslake v. Mapledoram*, 2 T. R. 473. Now here the object of the suit, as appears by the first article, and by the sentence, is solely deprivation under the canons. A court of common law cannot enter into the question of deprivation: therefore, it is immaterial whether or not any or all of the articles charge matters of which the ordinary courts of law take cognizance for the purposes of criminal jurisdiction; *Slater v. Smalebrooke*, 1 Sid. 217; *Townsend v. Thorpe*, 2 Ld. Raym. 1507; *Free v. Burgoyne*, 5 B. & C. 400; S. C. on appeal, 2 Bligh. N. S. 65. Further, as to several charges, such as that of incontinence, it will be allowed that the Ecclesiastical Court has exclusive jurisdiction: and, therefore, even if that Court could proceed only on these, yet, as the sentence is not professedly grounded on all, this Court after sentence will pre-
[599] sume that those charges only were proceeded *on which are within the jurisdiction. Objections will be made to the articles charging the defendant with trading. It is true that, by stat. 21 H. 8, c. 13, s. 5, penalties are imposed on spiritual persons for trading in corn or any manner of victual or merchandise: that enactment was repealed by stat. 57 G. 3, c. 99, s. 1, which act, however, by sect 3, imposes a penalty on any beneficed spiritual person, who shall "engage in or carry on any trade or dealing for gain or profit, or deal in any goods, wares, or merchandise, by buying and selling," &c. But these statutes do not inflict deprivation; and, therefore, they cannot be construed to take away the jurisdiction of the canon law as to that. Indeed, sect. 83 of the last-mentioned statute enacts that nothing in the act contained shall affect the jurisdiction belonging to any Archbishop or Bishop, by virtue of any statute, canon, usage, or otherwise. Now there is a canonical prohibition, that ecclesiastical persons "shall not give themselves to any base or servile labor." 1 Gibson's Codex, 163, tit. vii. ch. 3 (canons, 1603, lxxv.) And the conclusion of the 13th article is, "that you thereby wilfully gave yourself up to base and servile labor." The preceding part of the article is merely a description of the particular act which brings the rector within the canon. So the fourteenth article concludes, "and thereby exercised yourself in the course of your life as a layman." Now, by canon, "no man being admitted a deacon or minister, shall" "use himself in the course of his life as a layman." 1 Gibson's Codex, 163, tit. vii. ch. 3 (canons, 1603, lxxvi.) The fifteenth article concludes like the fourteenth. So the sixteenth concludes with a charge of inability to attend spiritual and ministerial duties, [600] and *gross neglect of the same. The gist of each article is an offence rendering the rector liable to deprivation by the spiritual Court. [Lord DENMAN, C. J. They are so framed: but they state the act by which the offence is supposed to be committed; so that, "thereby," and what follows, might be struck out.] Whether a particular act be, or be not, an offence within the canon, is peculiarly a question for the Ecclesiastical Court. The first article is in fact a transcript from different canons: and the twenty-first article enumerates the offences in general terms, not specifying the particular act. "If the spiritual

* See *Searle's Case*, and *Searle v. Williams*, Hob. 121, 228 (5th ed.), S. C. Cro. Jac. 430.

Court do not proceed wholly on their own canons, they shall not be at all controlled by the common law (unless they act in derogation from it, as by questioning a matter not triable before them, as the bounds of a parish, or the like); for they shall be presumed to be the best judges of their own laws: and therefore in such case, if a person is aggrieved, his proper remedy is not by prohibition, but by appeal." 3 Burn. Ecc. L. Prohibition, 2 (p. 219, 8th ed.). If any objection be taken to the form of the sentence (which, however, is the usual one), that is matter of practice, and can be discussed only in the spiritual Court. See *Ex parte Smyth*, 3 A. & E. 724, upon appeal. Further, it appears, by affidavit, that the defendant has consented to the articles, and an inquiry has been had on the merits: therefore, he cannot now object to them.

R. V. Richards, contra. The application for prohibition is never too late, if it be *pro defectu jurisdictionis*; *Offley v. Whitehall*, Bunb. 17; *Leman v. Goulty*, 3 T. R. 3. Now the *sentence refers generally to all the charges. [601] Some of these are not of ecclesiastical cognizance, but of that of the common law. Thus the exercise of the trades specified is prohibited by statute, as admitted on the other side. So challenging to fight, as in the ninth article, is an indictable offence. It is said that the object of this proceeding is merely deprivation; but the Ecclesiastical Courts are not warranted in drawing to themselves cognizance of a matter cognizable by the common law, merely by affixing to it the penalty of deprivation. It is admitted that they cannot try the bounds of a parish: could they obtain cognizance of such a question by discharging a beneficed clergyman, who should contest it, with thereby violating some canon, and so subject him to deprivation, and then insist that they are to judge whether it be a violation of the canon or not? Then, if there be want of jurisdiction as to any of the charges, the sentence, which leaves it uncertain on which charges it proceeds, is bad; and no jurisdiction certainly appears.

Lord DENMAN, C. J. Supposing some of the charges to be insufficient, as those of trading as a maltster, and as a flannel manufacturer, still there are several other charges; and the Ecclesiastical Court finds them for the most part proved. To get rid of the sentence of that Court, it is necessary to show that it has adjudged on matters which are in the proper jurisdiction of the Courts of common law. That we cannot find in the present case. It is clear that the Ecclesiastical Court had jurisdiction over some of the matters charged: only it is said that there are also some as to which objections might be taken to the jurisdiction. It is quite consistent *with the sentence that the Ecclesiastical Court may [602] have acquitted on these. To set aside the proceedings after sentence, it should be shown that the Court has clearly exercised a jurisdiction which it did not possess; and that is certainly not made out.

PATTESON, J. It is laid down by several authorities, and not denied now, that, after sentence, unless the want of jurisdiction be manifest, this Court will not interfere. Supposing some of these articles to be founded on charges not within the cognizance of the Ecclesiastical Court, that might have been shown before sentence. By the sentence, the onus is shifted; and the party objecting has to show that the Ecclesiastical Court proceeded on the objectionable articles. There is no affidavit to that effect; so that the matter rests in uncertainty.

COLERIDGE, J., concurred.

Rule discharged with costs.

1 WILLIAMS, J., was absent.

*The KING v. The Churchwardens of the Parish of ST. MICHAEL'S, [603] PEMBROKE. November 10.

Churchwardens, under stat. 59 G. 3, c. 134, s. 40, borrowed 1000*l.* from M., upon the credit of the church-rates, agreeing with M. that the sum should not be called in for twenty years, unless the churchwardens should be desirous of paying off the same at any time before, or as soon as a sufficient sum should be raised by the rates, or other-

wise; and that, in the mean time, M. should receive interest at 5 per cent. Some years after the agreement, and before the expiration of the twenty years, interest being in arrear, and no instalments of principal having been paid, nor any money raised to provide for liquidating the principal, this Court, on the application of M., granted a mandamus, calling on the churchwardens to raise by rates a sum for the payment of the interest due, and to pay the same to M.; and also to raise by a rate a sum equal to the amount of the yearly interest of the 1000*l.*, to be computed from the time of the borrowing, for providing a fund to pay the 1000*l.* But the Court refused to order any payment to be made to M. by way of instalment on the 1000*l.*

At a vestry of the parish of St. Michael, Pembroke, held 15th July, 1830, the churchwardens were authorized to raise and borrow a sum not exceeding 1000*l.* for enlarging and improving the parish church, to be repaid with interest at such times, and in such manner, and by such instalments, as should be settled by the churchwardens, and to be charged on the church-rates. The requisite consents were given. Ann Morgan advanced 1000*l.* to the churchwardens, receiving as security an indenture, dated 20th September, 1830, under the hands and seals of the then churchwardens, the said churchwardens being parties thereto of the first part, and Ann Morgan of the second part. The indenture recited stat. 59 G. 3, c. 134, s. 40; that the patron, ordinary, and [604] incumbent had *consented in writing to the alteration, and that there had been no dissent by persons authorized to dissent; "and whereas the said Ann Morgan has agreed to advance the sum of 1000*l.* on the credit of the said rates, and it has been agreed that the said sum shall not be called in and paid off before the expiration of twenty years from the day of the date of these presents, unless the said churchwardens shall be desirous of paying off the same at any time before, or as soon as a sufficient sum shall be raised by means of the said rates or otherwise, and that in the mean time she the said Ann Morgan shall receive interest for the said sum of 1000*l.* after the rate of five per cent. per annum:" it was then witnessed that, in consideration of the sum of 1000*l.* then acknowledged to be advanced by A. M., the churchwardens charged and made liable the church-rates with the repayment of the principal with interest at five per cent., to be paid every 20th of September, "in the mean time, and until the said principal sum shall be repaid;" and assigned the rates so charged to A. M., her executors, &c., habendum, "from the day of the date thereof until the said sum of 1000*l.* and the interest thereof at the rate aforesaid, shall be [605] fully paid and satisfied:" "with *such powers of raising and collecting for the purpose as the churchwardens possess by act of parliament." On the 16th of January, 1836, there was due to Ann Morgan interest from the 20th of September, 1834; and she had received no instalment of the principal. She had often applied to the churchwardens to raise by the church-rates sufficient money for payment of the interest, and for the yearly and gradual liquidation of the principal, or to raise a fund for the ultimate liquidation of it; but no rate for any of these purposes had been made. On affidavits of these facts

¹ Which enacts, "that when any parish shall be desirous of extending and increasing the accommodation in the parish church, and it shall be found necessary or expedient to that end to take down the existing church and to rebuild the same on the same site, or on a more convenient site, and it shall and may be lawful for the churchwardens of any such parish, with the consent of the vestry, or persons possessing the powers of vestry, and with the consent also of the ordinary, patron, incumbent, and lay improprator, if any such there be, to take down such existing church, and to rebuild the same upon the same or upon a new site; and the said churchwardens are hereby authorized and empowered to borrow and raise, upon the credit of the church-rates, or any rates made under the said recited act or this act, of any such parish, such sum or sums of money as shall be necessary for defraying the expense or any part of the expense of the taking down and rebuilding such church, and to make rates for the payment of the interest of such sum or sums of money so to be borrowed and raised, and for providing a fund, of not less than the amount of the interest of the sum advanced, for the repayment of the principal thereof, or for repaying such principal in such manner, and at such times and in such proportions as shall be agreed upon with the persons advancing any such money."

by Ann Morgan, a rule was obtained in Hilary term last, calling on the churchwardens to show cause why a mandamus should not issue, commanding them to pay to A. M. the instalments of the 1000*l.* which had become due, and also the arrears of interest due thereon, or to raise by a rate a sufficient sum to pay, as well the instalments as the arrears of interest, and to pay the sum so raised to Ann Morgan.

The affidavits in answer stated that part of the interest claimed was satisfied.

Maule now showed cause. No instalments of the principal are payable. By the agreement, the sum is not to be paid for twenty years from the date of the indenture, unless the churchwardens choose, before, or as soon as a sufficient sum is raised, to pay it off. Sect. 40 of stat. 59 G. 3, c. 134, fixes no time for the repayment, but leaves that to the agreement of the parties. It is true that the churchwardens are authorized and empowered to make rates for paying the interest, and for providing a fund of not less than the amount of the interest, for repaying the principal, or for repaying the principal in such manner as the parties *shall agree. That cannot make it compulsory on them to pay [*606] the money, or any part of it, to the lender, who has agreed not to call it in for twenty years. But, if the fund so raised is not to be immediately applied to the repayment of the lender, neither can it be meant that, in a case like this, the churchwardens, besides paying the annual interest, shall be bound to lay by a sum equal to the interest annually. If 5*0l.* were raised and laid by every year till the twenty years expired, this, accumulating with merely simple interest, would, at the end of the time, exceed the principal debt by the amount of the whole interest upon the annual reservations. The word "annual" is not used in the section.

Sir *W. W. Follett*, contra. An annual reservation of a sum equal to the interest will exactly satisfy the debt at the end of the twenty years; and it was probably with a view to this that the parties fixed that period for the final liquidation of the debt. The object of the statute was to distribute the burden of repayment equally over a certain period; and, if the lender had waited till the period had expired, her application for a rate to repay the whole would have been answered by the argument that she ought to have taken care that the funds were raised from time to time, according to the statute. The sum therefore ought to be raised now, and paid: if the lender be debarred from claiming this, by the agreement, she has at least a right to insist that it shall be laid by for her final repayment. But, in fact, the agreement seems merely framed with the view of allowing the parish the full benefit of the statute (which directs that a sum not less than the interest shall *be raised), as to time: so that [*607] now the lender can claim no larger instalment of the principal than a sum equal to the interest, whereas, if there were no specification as to time, she might claim the whole whenever she chose.

Lord DENMAN, C. J. There is no doubt that this rule must go to compel the payment of the interest due. I think also that it must go to compel the raising a sum not less than the interest. The word "annual" is not, indeed, in the section referred to; but it must be supplied, otherwise no sense can be given to the enactment. The lender claims also to have the sum so raised paid to her; I think she is not entitled to that; she can have only the interest which is due; the payment of principal, till the twenty years expire, is, I think, optional with the churchwardens, under the agreement. It is necessary to give to the statute the beneficial effect which it was intended to have, namely, that of making the parish raise portions of the principal from year to year, without any violent charge in the amount of taxation. The mandamus, therefore, must go, to raise the interest now due, and also to raise a sum equal to the aggregate of the interest of the years elapsed.

PATTESON and COLERIDGE,¹ Js., concurred.

Maule then suggested that, if a sum were raised, not less than the interest,

¹ WILLIAMS, J., had left the Court.

in every year henceforward, without including the years elapsed, the sums so raised, with *interest upon them at less than 5 per cent., would make [*608] up the whole principal before the twenty years would expire.

Lord DENMAN, C. J. We cannot tell what may occur in the meanwhile.

Ordered, that a writ of mandamus issue directed to the churchwardens of, &c., commanding them to raise by rate, to be made for that purpose, a sufficient sum of money for payment of the interest now due upon the principal sum of 1000*l.* borrowed by the churchwardens of the said parish from Ann Morgan upon the credit of the church-rates of the said parish, under the provisions of the statute (39 G. 3, c. 134), and of the several other acts subsequently passed in furtherance of the same object; and to pay over the same to the said Ann Morgan: and also commanding the said churchwardens to raise by rate, to be made for that purpose, a sum equal to the amount of the yearly interest upon the said principal sum of 1000*l.*, to be computed from the time of the borrowing of the same, for providing a fund for the repayment of the said principal sum of 1000*l.*

Ex parte ———, Gent, One, &c. Nov. 11.

This case is reported, 4 A. & E. 576, note (a).

[*609]

*The KING v. CHITTY. Nov. 11.

An uncertificated bankrupt is not disqualified from being elected a councillor for a borough, and holding the office, under stat. 5 & 6 W. 4, c. 76, unless he became bankrupt while holding.

AT the election of councillors for the borough of Shaftesbury, in December, 1835 (pursuant to stat. 5 & 6 W. 4, c. 76, ss. 30, 140, and his Majesty's order in council, of 11th September, 1835), Philip Matthew Chitty was declared to be duly elected a councillor, and made and subscribed the declarations required by sect. 50, and thereby accepted the office. In Hilary term last, a rule nisi was obtained for an information in the nature of a quo warranto, calling on him to show by what authority he claimed to be councillor. The affidavit in support of the rule stated that Chitty still continued to hold the office, and that, at the time of election and still, he was an uncertificated bankrupt. The affidavits in answer stated, that he was entered on the burgess roll for the year in respect of a house, was rated to the poor for a house in Shaftesbury, of the annual value of 36*l.*, and had been an inhabitant householder there, for that and the two preceding years, and had, before the last day of August, 1835, paid all rates payable by him in respect of his house, except such as became payable within six calendar months of that day; that there was no borough-rate payable by him under the act, in respect of the premises, before 1st March, 1835, and that Shaftesbury was not divided into wards (ss. 9, 22, 28).

Erle and *Bingham* now showed cause. The defendant is and was duly qualified, unless he be disqualified by [*610] *having been an uncertificated bankrupt at the time of his election. Now sect. 28 enumerates all the disqualifications, and does not specify this. It is true that sect. 52 provides that, if a person holding the office of councillor be declared bankrupt, he shall thereupon immediately become disqualified, and "cease to hold the office:" but that provision does not apply to persons who are bankrupts at the time of their election. The intention of the legislature, in making this distinction, was probably to give the electors an opportunity of determining whether the fact of a party becoming bankrupt made him, in their opinion, unfit for the office of councillor; whereas, in the case of a party elected after his bankruptcy, the determination would have been already manifested. This is analogous to the vacating of seats

in the House of Commons, by the acceptance of certain offices, the holders of which are nevertheless capable of being elected. It is simply an exercise of discretion given to the electors upon the occurrence of a new fact. Sect. 51 subjects parties elected to a fine if they do not accept, with certain exemptions, which do not include bankruptcy. Sect. 53 imposes a penalty upon a party acting without being duly qualified at the time of making the declaration, "or after he shall cease to be qualified according to the provisions of this act, or after he shall become disqualified to hold any such office." This recognises the distinction between the qualification to be elected, and a disqualification subsequently occurring. Upon any other view, "ceasing to be qualified" would comprehend both cases.

Sir J. Campbell, Attorney-General, *contra*. The intention of the legislature clearly was to prevent *uncertificated bankrupts from being councillors at all. If it had been merely intended to give the electors an opportunity of exercising their choice upon knowledge of a fresh fact, the legislature would have allowed the bankrupt to be re-elected immediately, as in the case of members of the House of Commons accepting offices; whereas he cannot, by sect. 52, be re-elected till he has obtained his certificate. So, by the same section, if a councillor take the benefit of any act for the relief of insolvent debtors, or compound with his creditors, he cannot be re-elected till he has paid his debts in full. Independently of the disqualification by sect. 52, the bankrupt is disqualified under sect. 28. The disqualification, in respect of property, is the not either possessing real or personal estates, or both, to a certain amount, or being rated to the poor upon a certain annual value: but an uncertificated bankrupt can have neither real or personal property, nor can he be owner of rateable premises. This is probably the reason why sect. 52, in terms, provides only that an uncertificated bankrupt shall cease to hold office, and not be re-elected till he obtain his certificate; the assumption being that the election of a party so disqualified is impossible under sect. 28. The Court, however, is not now called upon to give a binding decision on the subject, but to grant the rule, so that the question may be discussed on a return.

Lord DENMAN, C. J. I agree that the question ought to be solemnly considered, if it be one of any doubt. But I think the Court would clearly not be justified in raising any inference of an intention to disqualify, where such an intention is not expressed. We are bound by what is said. The act has said what shall be a qualification, *and what a disqualification. It has been [612] ingeniously put that the qualification of being rated can be applied only to a party who is capable of owning property; and that no rateable property can belong to an uncertificated bankrupt. It is enough for us to abide by the words of the act. The party here is rated upon the annual value required, and is not disqualified. There may perhaps be strength in the argument drawn from sect. 52, that, inasmuch as a party becoming bankrupt is not re-eligible till he has obtained his certificate, nor an insolvent or party compounding with his creditors till he has paid in full, the electors were intended not to have any power of electing persons so situated. But, if that were so, it might have been declared in the twenty-eighth section; and it is not declared.

PATTESON, J. I am entirely of the same opinion. The Attorney-General argues that an uncertificated bankrupt is not rateable, and is, therefore, disqualified under sect. 28, because he cannot be the owner of rateable property. I do not see that this follows. It would equally follow that he could not be a burgess under sect. 9. But, under sect. 11, every occupier may claim to be rated: there is no provision that he must be entitled to the premises. Suppose the assignees do not elect to take a term, and the bankrupt does not deliver up, the bankrupt will still be rated. Therefore, without going into minute criticism of the words of sect. 55, I am of opinion that the disqualification to be elected is confined to the cases mentioned in sect. 28, and does not comprehend the present case.

WILLIAMS, J., concurred.

[*613] *COLERIDGE, J. I am of the same opinion. We are not at liberty to intend a disqualification, where the clauses of the act specify what is to be a disqualification.

Rule discharged.

The KING *v.* ANDREW WHITE. Nov. 11.

The Court will grant a quo warranto information, at the instance of a private relator, against a member of a corporation, on grounds affecting his individual title, although it be suggested that the same objections apply to the title of every member, and therefore that the application is, in effect, against the whole corporate body.

A RULE was obtained in Hilary term last, calling upon Andrew White to show cause why a quo warranto information should not be exhibited against him, to show by what authority he claimed to be mayor of the borough of Sunderland, in the county of Durham, on the grounds, first, that George Stephenson, who made out the lists, was not the town clerk of the said borough, nor a person performing duties similar to those of town clerk, stat. 5 & 6 W. 4, c. 76, ss. 15, 16: secondly, that the election of councillors of the said borough was held before Richard Spoor, who was not mayor or chief officer of the said borough.

The affidavits in support of the rule stated that Stephenson had acted as town clerk, in receiving and distributing the Burgess lists, previously to the election of councillors in December, 1835; that on that election Spoor acted as chief officer of the borough; that the councillors then elected chose aldermen on the following 31st of December; that the said councillors and aldermen, and among them the said Spoor, did, on January 1st, 1836, elect Andrew White, one of the above-mentioned councillors, mayor for the year ensuing; and that he had since acted as mayor; that, at the time of the passing of the Municipal Corporation Act, 5 & 6 W. 4, *c. 76, there was no body corporate within the [*614] town of Sunderland, for the regulation or governing of the town or any part thereof; nor was there any reputation of the existence of any such corporation; nor was there any mayor or other person having or claiming, or reputed to have, any authority or power in the municipal regulation or government of the town; and that there was at no time any person filling, or reputed to fill the office of town clerk therein, or whose duties in the borough were similar to those of town clerk; that charters were granted to the town in the twelfth century, and in 1634, but that (as the deponents believed) no municipal officers were elected under the latter, and that, at all events, for a hundred years past, there had been no municipal officers in the town, nor any municipal corporation, in fact or by reputation; that the only office filled by Stephenson was that of clerk to the county magistrates acting as justices in the town; and that Spoor, before the said election of councillors, never filled, or pretended to fill, any office for the municipal or public or other regulation or government of the town; that there was in the town a body assuming to be a body in the nature of a private corporation, under the style and name of the freemen and stallingers of Sunderland, of whom Spoor was one; but that they never interfered, nor was it their corporate duty to interfere, in the rule or government of the town, nor did they exercise or claim any corporate or other powers over the inhabitants; and reference was made to the proceedings on an application for a quo warranto against them in 1829 (see *Rex v. Ogden*, 10 B. & C. 230), in the course of which Spoor had [*615] made affidavit that they never *interfered, &c. (as above), nor claimed to exercise any corporate or other powers within the town, except over their own members, and with regard to their own affairs.

Affidavits were filed in opposition to the rule, stating that the freemen and stallingers of the Borough of Sunderland were an ancient corporation, having possessions on the town moor, &c., and consisting of twelve superior, and eighteen inferior, freemen; that, before the passing of the Municipal Corporation Act, and before the proceedings brought in question by this rule, there had been no

officers bearing the names of mayor or town clerk, but that "the senior freeman for the time being of the said town" had acted as the chief officer of the corporation of stallingers; that Spoor, as the senior freeman of the said corporation (willing to officiate), had been called upon by the burgesses to act as chief officer of the borough at the first election of mayor, aldermen, and councillors: and that Stephenson, for thirteen years past, had been solicitor to the corporation of stallingers, and had on various occasions, as such solicitor and with reference generally to the affairs of the town, performed duties similar to those of a town clerk.

Sir J. *Campbell*, Attorney-General, and *Wightman*, now showed cause. The objection now taken would affect the title of every member of the corporation. It is, in effect, that no valid corporation exists in Sunderland. Now it was decided, in *Rex v. The Corporation of Carmarthen*, 2 Burr. 869; S. C. 1 W. Bl. 187, that a private relator cannot bring a quo warranto information against a corporation as such: and in *Rex v. Ogden*, 10 B. & C. 250, where such an information was applied for against the corporation of stallingers mentioned in the *present affidavits, Lord TENTERDEN said (referring to the *Carmarthen* case, 2 Burr. 869; S. C. 1 W. Bl. 187), that, "if any number [*616] of individuals claim to be a corporation without any right so to be, that is a usurpation of a franchise; and an information against the whole corporation, as a body, to show by what authority they claim to be a corporation, can be brought only by and in the name of the Attorney-General." And *Rex v. Ogden*, 10 B. & C. 230, shows that a motion against individuals which is virtually a motion against the corporation, falls under the same rule. If the statute 5 & 6 W. 4, c. 76, had never passed, and corporate officers had been elected for Sunderland, the Court would not have allowed a private relator to bring quo warranto on the ground that the charters had never before been acted upon, and that no corporation existed. The statute makes no difference in this respect. The complainant here does not point out any person who could have discharged the functions exercised by Spoor and Stephenson. According to him, if judgment of ouster went against White, there could be no re-election. But the statute 9 Ann. c. 20, s. 4, empowering private relators to proceed in quo warranto, applies only to cases where there is a corporation admitted to exist, which may, after the judgment of the Court, be restored to its proper state by a regular election. Other cases are for the Attorney-General. Then, upon the merits of this election, the affidavits in opposition to the rule furnish a complete answer; or, if the objection on behalf of the relator is, in itself, entitled to attention, it is met by the interpretation clause, 5 & 6 W. 4, c. 76, s. 142. (They also referred to the mention of Sunderland in schedule (A) of the statute. The further arguments on this part of the case are omitted.)

*Sir W. *Follett*, contra. First, there is no ground for assuming [*617] that this application affects the whole corporation of Sunderland; the "mayor, alderman, and commonalty of the borough of Sunderland," being one of the bodies recognised by stat. 5 & 6 W. 4, c. 76, s. 1, and sched. A., and to which continuance is given by sect. 6. It would seem, therefore, that the Attorney-General could not now call in question the existence of a corporation in Sunderland, and consequently that the claim of any individual to be mayor, alderman, or councillor, under the circumstances now presented to the Court, may properly be contested by a private relator. It is not, however, to be conceded that such a relator might not prosecute a quo warranto against any member of this corporation, even though the result of a successful prosecution might be to dissolve the whole body. In *Rex v. the Corporation of Carmarthen*, 2 Burr. 869; S. C. 1 W. Bl. 187, the motion was made, in terms, against the whole corporation; and it was said that there was no instance of a quo warranto information being brought "against any corporation as a corporation:" but motions were afterwards made against the individual members respectively, and rules granted. And it is well known that, in practice, quo warranto informations are often applied for where the prosecution will not lead to any new

election, and even where the success of it will destroy the corporation: though the Court, where that is so, will require a strong case to be made for granting the application. In *Rex v. Ogden*, 10 B. & C. 230, the persons against whom the motion was made did not exercise or claim any public powers, or authorities; [*618] and the application was against a number *of individuals for acting as a corporation; the assumption of which franchise (as Lord TENTERDEN pointed out) can be called in question only by the Attorney-General. In both respects that case differed from the present. (He was then stopped by the Court.)

LORD DENMAN, C. J. I think that *Rex v. Ogden*, 10 B. & C. 230, has been satisfactorily distinguished from the present case. There is great good sense in the rule there laid down; but the question directly brought before the Court was, whether a private relator could file a quo warranto information against parties for acting as a body corporate. In *Rex v. the Corporation of Carmarthen*, 2 Burr. 869; S. C. 1 W. Bl. 187, an attempt was made by a private relator to raise such a question, and the Court held that it could not be done; but they allowed an information to go against the members individually. Then, upon the facts in this case, I think there is doubt enough to make a further consideration of it proper. The rule will therefore be absolute.

PATTESON, J. In *Rex v. Ogden*, 10 B. & C. 230, the information would have called upon the parties to show why they acted as a corporation at all: and, besides, they did not claim to exercise any powers of government or municipal authority over the other inhabitants of the town. That case therefore entirely differs from this. Then is it any answer here, that every member of the corporation may be in the same predicament with the party moved against? I think there is no instance in which the Court has so held, where the objection applied to the party individually.

[*619] *WILLIAMS, J. There have been many instances in which the Court has allowed a quo warranto information, where the consequence might have been the loss of an integral part of the corporation, and where, if that part were lost, the whole was lost.

COLERIDGE, J., concurred.

Rule absolute.

The KING v. BARDELL and Others. November 11.

Stat. 3 & 4 W. 4, c. 43, s. 39, which takes away the power of revoking a submission to arbitration, does not extend to a reference, agreed to on the trial of an indictment; but, where such reference has been made at nisi prius, with a proviso for making the order a rule of Court, either party may, by himself or attorney, still revoke his submission.

The Court, however, will not, upon such revocation, make a rule to restrain the arbitrator from proceeding.

THE defendants were indicted for a conspiracy to obstruct George Shillibeer and another in carrying on their business as owners of omnibuses. The indictment was removed into this Court by certiorari, and the case came on for trial, May 15, 1834, when an order of Court was made (entitled, "The King on the prosecution of George Shillibeer and another, against James Bardell the younger and twelve others,") stating that, by consent of parties, the jurors were discharged from giving a verdict, subject to the award, order, &c., of A. B., Esq., barrister at law, to whom all matters in difference between the prosecutor and the defendants, or any or either of them, were thereby referred, to order and determine what he should think fit to be done by the said parties respecting the matters in dispute, &c.; the costs of the prosecution and defence, and of the reference and award, to be in the arbitrator's discretion: and it was ordered that the Court might be prayed to make the order of reference a rule of this Court. After the lapse of a year and some months (during which proceedings were had among [*620] the *parties themselves for the purpose of arranging their disputes, but no final agreement was come to), a meeting took place before the arbitra-

tor, and a notice was served upon him, subscribed by one of the defendants, and by persons signing as attorneys for the others, stating that the undersigned defendants and their attorneys thereby revoked the authority given to the arbitrator by the order of reference. The arbitrator, considering it doubtful whether he could go on with the reference or not, recommended an application to the Court; and, in Hilary term last, a rule was obtained calling upon the prosecutors and the arbitrator to show cause why the arbitrator should not be restrained from further proceeding in the reference, on the ground that his authority had been revoked; or why the defendants should not be at liberty now to revoke his authority.

Bompas, Serjt., and *Platt*, now showed cause. The question is whether, this being a criminal prosecution, any of the parties had power, notwithstanding stat. 3 & 4 W. 4, c. 42, s. 39, to revoke their submission to arbitration. That section takes away the power to revoke without leave of the Court or a Judge, where an arbitrator is appointed by rule of court, judge's order, or order of *nisi prius*, "in any action;" but it adds, "or by or in pursuance of any submission to reference containing an agreement that such submission shall be made a rule of any of his Majesty's Courts of Record." This order of reference contains such an agreement; for the clause which provides for making the order a rule of Court is (like all the other terms of the reference) consented to by the parties; and such a consent, in an order of this kind, is an agreement, under the sanction of the Court. Besides, even if the parties themselves could have revoked, persons claiming to act as their attorneys could not do it on their behalf, in a criminal prosecution. [*621]

Sir *John Campbell*, Attorney-General, and *Humfrey*, contra. In the case of an indictment, parties have still the same power of revoking a submission to arbitration which they had at common law. Stat. 3 & 4 W. 4, c. 42, s. 39, contemplates two descriptions of cases: the one, where there are proceedings in Court; the other, where the matter is referred out of Court. If it had been intended, in the first class of cases, to include those arising upon indictment, express mention would have been made of them: but the language used is "in any action now brought or which shall be hereafter brought;" and the words which describe the remaining class evidently relate to submissions by bond or other private agreement. Here, the reference was made by order of *nisi prius*, but not in an action; and the case, therefore, falls within neither provision of the statute. [PATTESON, J. Is there any instance in which the Court has interfered to restrain an arbitrator from making an award, after revocation? The award may be a nullity when made; but that is a different point. *Platt*. Search has been made for precedents; but none has been found.]

Lord DENMAN, C. J. I am clearly of opinion that this case of revocation is not within the statute. To take away the power of revocation which parties had at common law, the enactment ought to be very clear. The thirty-ninth section of stat. 3 & 4 W. 4, c. 42, applies to two distinct cases; first, [*622] where the parties consent to a rule of court, judge's order, or order of *nisi prius*, in any action; secondly, where there is a submission containing an agreement for making it a rule of court. This case does not fall within the first branch of the enactment; and the cause which has been relied upon does not constitute an agreement within the second. But, as to the rule before us, we cannot avoid disposing of it; and I think that it must be discharged.

PATTESON, J. I have not the slightest doubt on this subject. The thirty-ninth section is evidently framed to apply to civil actions. The whole act is so. The words, "any submission to reference containing an agreement that such submission shall be made a rule of any of his Majesty's Courts of Record," evidently point to stat. 9 & 10 W. 3, c. 15, and the "submission" there spoken of. In 1 Chitty's Statutes, 38, it is said, in note (b) to stat. 9 & 10 W. 3, c. 15, that "criminal offences which are personal, such as assault," &c., "for which an action of damages would lie," may, it is said, be submitted to arbitration; "and

if an indictment has been preferred in any such case the matter of complaint may still be referred by leave of the Court." But that is at common law, not under the statute. We cannot, however, avoid discharging this rule. It would be a stretch of our authority to restrain the arbitrator.

WILLIAMS, J. Whether or not the legislature intended to include references on indictment in the thirty-ninth section of stat. 3 & 4 W. 4, c. 42, is immaterial; but the proceeding is so rare that it probably was not thought of. The [*623] section clearly refers to cases where there is an *action in Court, or where parties to an action have consented to a clause for making the submission a rule of Court, and such consent has been given, not through the order of nisi prius, but by agreement between themselves.

COLERIDGE, J. The provisions of stat. 3 & 4 W. 4, c. 42, s. 39, are for references of actions at common law, and references under the statute of William 3.

Rule discharged.

DAVID GRIFFITHS and Others *v.* WALTER ANTHONY, and MARGARET, his Wife, Executrix of THOMAS GRIFFITHS. Nov. 11.

An executor having exhibited an inventory in the Ecclesiastical Court, at the instance of legatees, the latter filed exceptions to the inventory, and the executor put in his answer. The Court examined witnesses *vivâ voce* as to the correctness of the inventory, and afterwards decreed that the inventory was false and fraudulent, and ordered it to be amended according to the Judge's minutes. This Court, on motion by the executor, granted a prohibition.

Although the parties had consented to the examination being taken *vivâ voce*, and the executor had, after such examination, applied for leave to amend the inventory.

A RULE nisi had been obtained for a writ of prohibition to the Consistory Court of the Bishop of St. David's, to prohibit that Court from further proceeding in the suit between the above parties, and from awarding and enforcing costs, &c. The circumstances were as follows. Thomas Griffiths, by his will, bequeathed legacies to David Griffiths and the other parties agent in this suit, and left Margaret Griffiths his daughter (now Margaret Anthony) sole executrix. Upon his death, in 1819, Margaret (who soon afterwards married the respondent Walter) proved the will. In 1835 the respondents were cited, at the instance of the above-mentioned legatees, to appear in the Consistory Court and exhibit an inventory. They did so; and the legatees filed exceptions to the inventory alleging it to be fraudulent and imperfect. The respondents exhibited [*624] *their answer; and in December last the cause came on to be heard before the surrogate; whereupon (as was stated in the affidavit upon which the present rule was grounded) "the said Consistory Court proceeded to examine into the truth of the inventory, and of the reply to the said exceptions, by the examination of witnesses; whereby, as appeared to this deponent" (Walter Anthony), "and as he is advised by means of loose and indefinite testimony, it was made to appear, or did appear, to the said Consistory Court, that the said inventory and account, and said answer to the said exceptions, were contradicted." At an adjourned hearing of the cause, witnesses were again examined as to the value of certain emblements which, it was said, belonged to the estate and were subject to the legacies. The affidavit filed on showing cause admitted that examinations were taken *vivâ voce* before the surrogate, but stated that the proctors for both parties had consented to the witnesses being so examined for the sake of despatch.¹ The respondents' proctor applied to the Court for liberty to amend the inventory, but the surrogate proceeded to make a decree, which was, that the inventory was false, imperfect, and fraudulent, and must be amended according to the minutes to be deposited by the judge with the registrar, and that the respondents should pay the costs of the proceedings.

¹ It was suggested on the argument that the consent was not to the examination itself, but only to the examining *vivâ voce*.

Chilton now showed cause. If *Henderson v. French*, 5 M. & S. 406, be considered as an unimpeached authority, and applicable to the present case (this being a suit promoted *by legatees, whereas that was at the instance of [*625] creditors), the rule for a prohibition cannot be resisted. In that case it was held that a consistory court could not hear exceptions to an inventory, the office of the bishop in receiving it being simply ministerial. But the practice in the ecclesiastical courts is to receive such objections, as is shown in 2 Williams on Executors, 646,¹ after noticing the contrary authorities in the King's Bench, of *Henderson v. French*, 5 M. & S. 406; *Hinton v. Parker*, 8 Mod. 168, and *Catchside v. Ovington*.² It may be contended here that, if the Ecclesiastical Court had authority to question the inventory, they still exceeded their jurisdiction by examining witnesses *viva voce*. But that was done by consent, to save time and expense. And, further, if any irregularity took place, the respondents have waived it by applying to amend the inventory.

E. V. Williams, contra, was stopped by the Court.

Lord DENMAN, C. J. *Henderson v. French*, 5 M. & S. 406, is in point; and there is nothing like a waiver of the irregularity. The rule must be absolute.

*PATTESON, WILLIAMS, and COLERIDGE, Js., concurred.

[*626]

Rule absolute.

The KING v. The Justices of MIDDLESEX. Nov. 12.

Under the Highway Act, 13 G. 3, c. 78, s. 19, the justices in special sessions could not, by one and the same order, direct that a highway should be diverted, and that the old way should be stopped. Nor was any alteration made in this respect by st. 55 G. 3, c. 68. (See stat. 5 & 6 W. 4, c. 50, s. 1, and sects. 82 to 91.)

Under stat. 13 G. 2, c. 18, s. 5, a certiorari to remove an order for stopping a highway may be applied for within six calendar months after such order has been confirmed at sessions, though more than six calendar months have elapsed since the order was made.

WIGHTMAN, in last Easter term, obtained a rule nisi for a certiorari to the justices of Middlesex, to remove into this Court an order of four justices for diverting and stopping up part of a certain public footway, and an order of sessions by which the former was confirmed. The first-mentioned order bore date August 3d, 1835, and adjudicated as follows:—"We do hereby order that the said part of the said public footway be diverted and turned through the lands aforesaid; and we do further order that the said part of the said public footway shall be stopped up according to the provisions of the statute in that case," &c.; and it was directed that the Brewers' Company, through whose lands the proposed new footway would pass, should take and accept the part of the old footway so ordered to be diverted, turned, and stopped up, in exchange for the proposed new way. The order of sessions confirming the order of justices was dated October 19th, 1835. The new footway was afterwards certified to be complete, and in good condition and repair, and the certificate was returned to the January sessions, 1836, and ordered to be enrolled.

Sir *J. Campbell*, Attorney-General, and *J. Greenwood*, now showed cause. First, the certiorari has been moved *for too late. Stat. 13 G. 2, c. 18, s. 5, enacts that no certiorari shall be granted "to remove any conviction, [*627]

¹ Part iii. book 2, c. 1, s. 3, 1st ed. In the second edition of Mr. Williams' Treatise, the present case is noticed, and the following observation subjoined (p. 714, note *cc.*): "It must, however, be observed, that in this case it appeared, by the affidavits on which the prohibition was granted, that the Ecclesiastical Court had permitted witnesses to be examined in support of the allegations given in objection to the inventory; which was clearly an excess of jurisdiction: so that in fact, it was not necessary to decide the point which occurred in *Henderson v. French*." See *Telford v. Morison*, 2 Add. Ecc. Rep. 319, cited in the same work, vol. ii. p. 716.

² 8 Barr. 1922. *PATTESON, J.*, referred to *Hooper v. Leach*, 3 Doug. 434, as an analogous case.

judgment, order or other proceedings had or made by or before any justice or justices of the peace," or at sessions, "unless such certiorari be moved or applied for within six calendar months next after" such order, &c., "shall be so had or made." The six months must be reckoned from the time of making the order; parties are not to lie by until it has been confirmed at sessions, and then apply, within six months of the order of sessions, to remove both. *Rex v. Boughey*, 4 T. R. 281, is the authority which comes nearest to this point. Then it will be contended, on the authority of *Rex v. The Justices of Kent*, 10 B. & C. 477, that there ought to have been separate orders for diverting and for stopping. But stat. 55 G. 3, c. 68, s. 2,¹ under which this order of justices was made, enacts in general terms that, in the case there mentioned, it shall be lawful for the justices in special sessions "to divert and turn and to stop up, such footway," &c.; and the form of notice given in the schedule (A.) speaks of "an order" "for turning, diverting and stopping up." The order is not, indeed, acted upon, as to stopping up, till a certificate has been made and enrolled under sect. 4; but there is no direction for making a fresh order at that period. It is enacted that the way shall then "be stopped up:" but stopping, and ordering to be stopped, are not synonymous. The appeal given by sect. 3 is against the order for stopping (diverting is not mentioned, because that, by sect. 2, must be done by consent of the owner; and no one else *is likely to have an interest in appealing); and, if there be no appeal against the order for stopping, or if it be confirmed, the way is to be stopped. It is reasonable that, before the new road is made, the parties making it should be sure of an order for stopping the old. In *Rex v. The Justices of Kent*, 10 B. & C. 477, Lord TENTERDEN seems not to have sufficiently considered the enactments of stat. 55 G. 3, c. 68; and, in adverting to the schedule, he proceeded upon a ground not taken by counsel, and did not notice the words "an order"—"for turning, diverting, and stopping up."

Wightman, contra. The present rule must be made absolute, if the judgment of Lord TENTERDEN in *Rex v. The Justices of Kent*, 10 B. & C. 477, is to be supported. As to the certiorari, *Rex v. Sheppard*, 3 B. & Ald. 414, recognised in *Rex v. The Justices of Kent*, 10 B. & C. 477, shows that it is not taken away in cases under stat. 55 G. 3, c. 68; and also that it is grantable to remove the order when confirmed at sessions, though more than six months after the original order was made. Then as to the other point. Stat. 55 G. 3, c. 68, s. 1, repeals sect. 19 of the old Highway Act, stat. 13 G. 3, c. 78; which provided for the diverting and stopping of footways and other highways; but sect. 2, in effect, re-enacts it, prescribing "such ways and means," and making the powers "subject to such exceptions and conditions in all respects" as were mentioned in the former act with regard to highways to be widened or diverted. These regulations of stat. 13 G. 3, c. 78, were considered as incorporated with the subsequent act in *Rex v. The Justices of Worcestershire*, 2 B. & Ald. 228.

*Then the "ways and means," "exceptions and conditions," referred to [629] in the later act, must be looked for in stat. 13 G. 3, c. 78, sects. 16, 17 (referred to by s. 19), and the forms xvi. and xviii. in the schedule, which clearly prescribe distinct orders for diverting and for stopping. And convenience, as well as the letter of the statute, requires that they should be separate. It is true that stat. 55 G. 3, c. 68, s. 2, empowers the justices "at some special sessions to divert and turn and to stop up such footway," as if the whole were to be done at one session; but the previous statute, in sect. 19, uses precisely the same words; and, by sect. 62 of that act, the special sessions may be adjourned from time to time. The object of stat. 55 G. 3, c. 68, was not to put the public in a less advantageous situation for contesting orders of justices, but, as appears by the recital of sect. 1, to give greater facilities for this purpose. The schedule (A.), which has been relied upon, contains, not the form of an order, but that of

¹ Repealed by the General Highway Act, 5 & 6 W. 4, c. 50, s. 1. But see sects. 82 to 91, and the forms, xviii. and xix., in the schedule.

a notice merely, and its words cannot have a more extensive effect than those of sect. 2 to which it is appended.

LORD DENMAN, C. J. As to the objection, that the certiorari is out of time, there are authorities which sufficiently show that the statute 13 G. 2, c. 18, refers, not to the time of making an order, but to the time at which the sessions act with regard to it. As to the second objection, a good deal of doubt has been raised with respect to the order in question; but, upon the words of the statute 55 G. 3, c. 68, I think no fair doubt remains. Sect. 2 of that act directs that the justices shall "divert and turn" and "stop up" as is there mentioned, "by such ways and means, and subject to such exceptions and conditions in all respects," as are stated in the previous act, 13 G. 3, c. 78, "in regard [*630] to highways to be widened or diverted." Now what are those ways and means? They are to be found in sects. 16 and 19 of the earlier act, and the forms given in the schedule, See *Rex v. The Justices of Cambridgeshire*, 4 A. & E. 111; and in those enactments and forms no provision appears for making the order to divert and the order to stop in the same instrument. The certificate of completion, required by sect. 4 of the later act, is evidently not substituted for a second order, because the same certificate is required, in similar terms, by stat. 13 G. 3, c. 78, s. 19, which clearly contemplates two orders. It must therefore be taken, here, that separate orders are necessary for the diversion and the stopping up. If any doubt remained upon this point, the authority of Lord TENTERDEN, which is of the greatest weight on all occasions, must prevail; and he, in *Rex v. The Justices of Kent*, 10 B. & C. 477, distinctly rested his decision on the ground that the order was not only for making a new road, but also for stopping up the old, and that the statute gave no power to make such an order. On that authority, and these reasons, I am of opinion that the present rule must be absolute.

PATTESON, J. I am of the same opinion. As to the first point, I think that, if an appeal has been heard, and a certiorari is moved for within six months after the order is confirmed on such appeal, it is sufficient. If this were otherwise, the party aggrieved would not have his two remedies; for, if he were obliged to remove the order within six months, he *would often lose the [*631] opportunity of an appeal on the merits, the order being withdrawn from the sessions. There is no direct authority on the point; but in *Rex v. Shepard*, 3 B. & Ald. 414, the objection as to time might have been taken; and the question, whether or not a certiorari lay, was before the Court. With respect to the other question, upon the words of stat. 55 G. 3, c. 68, s. 2, which enables the justices "by order" to divert and turn and to stop up the ways spoken of, I should have thought that a single order was sufficient for both purposes; but the words, "by the same ways and means, and subject to such exceptions and conditions," refer to sects. 16 and 19 of the former Highway Act, the latter of which sections has similar words of reference to sect. 16, and directs, in language like that of stat. 55 G. 3, c. 68, s. 4, that no stoppage of an old highway shall take place till after certificate of the new way being complete. I do not know of any express decision as to the necessity of two orders, for diverting and for stopping up, under the former act: but it is plain, from the forms given in the schedule to that act, that two orders are there contemplated. If there were any doubt upon the point, as arising on the later statute, we have an authority in *Rex v. The Justices of Kent*, 10 B. & C. 477; and I should think it best to follow a former decision unless we were satisfied that it was erroneous.

WILLIAMS, J. With respect to the second point, under the old Highway Act two orders were clearly necessary. Then does stat. 55 G. 3, c. 68, repeal that act, as to the necessity of a second order? If there *were no pre- [*632] vious decision, I do not know how this might be; but the very point has been already determined in *Rex v. The Justices of Kent*, 10 B. & C. 477, and not by Lord TENTERDEN only, but by LITTLEDALE, J., also, who impliedly ac-

cedes to his ground of decision, by saying, "there is another fatal objection to the order, viz. that it does not contain any statement that the justices have viewed the course proposed for the new road." I think we ought to abide by the decision coming to us from such authorities, unless we were perfectly clear that it ought not to be followed; and I cannot say I am satisfied that stat. 55 G. 3, c. 68, dispenses with the two notices required by stat. 13 G. 3, c. 78. That act is referred to in strong terms by the later one, as regulating the mode in which the diversion and stopping of ways shall take place. If the legislature had intended so great an alteration as the introducing of one order to answer the purposes of the two which were required before, I should have expected that a new form would have been given.

COLERIDGE, J. I have no doubt on the first point, though there is no case which expressly decides it. It is taken for granted in *Rex v. The Justices of Sussex*, 1 M. & S. 631, 734, that the six months date from the order of sessions. The certiorari here was in time as far as regarded the order of sessions; and the question is whether that, being removable, drew with it the former order? I think that the limitation of stat. 13 G. 2, c. 18, cannot at any rate apply where the first order is of no effect unless enrolled at the sessions. On [*633] the second point I have had great doubt. Reading the provisions of *55 G. 3, c. 68, only, I should have thought the machinery of the act better if, according to the argument of Mr. Greenwood, the justices were at one and the same time to consider whether or not the old road should be stopped, and to make the order for stopping as well as diverting it. Nobody would object to the order for diverting; and it would be better that the order for stopping should be made *uno flatu* with it, while the attention of those who might be affected was drawn to the subject. And this appears to be contemplated by the section requiring a certificate before the old highway is stopped; for, if there is to be a second order for stopping, I do not see why this preliminary should be required. But we are so tied up, in the interpretation of this statute, by the words, "such ways and means," and "such exceptions and conditions in all respects as in the said recited act is mentioned," that I think we could not depart from that construction which has now been adopted by the Court. We are fettered by the language of the statute; and we have also the opinion pronounced upon the point by Lord TENTERDEN. He may be a little incorrect in saying that there is no form in the schedule, applicable to the making of one order for the two purposes; but still we must pay deference to the opinion of so great a Judge, who, besides, was particularly conversant with this branch of law.

Rule absolute.

[*634]

*SYMS v. CHAPLIN and Others. November 15.

Plaintiff sent a parcel, directed to a person in London, to the postmaster of Bradford to be forwarded to Melksham. The postmaster received 2d. to book the parcel, and sent it by a mail-cart to the King's Arms Inn at Melksham. He was accustomed to take in parcels for the mail-cart. The innkeeper at M. booked the parcel for London, charging 2d. as "booking," for his own trouble, and also charging on the parcel the demand for carriage from Bradford, which he had paid. He forwarded the parcel by a mail-coach, of which the defendants were proprietors, to London. Several coaches used to stop at the King's Arms; the mail pulled up there but did not change horses. The innkeeper had no express authority from the defendants to take in parcels, and used his discretion in sending them by mail or any other coach. No regular booking-office was kept at the King's Arms. The parcel was lost.

Held, first, that, for the purpose of taking in the above parcel, the King's Arms was a receiving-house of the defendants, within stat. 11 G. 4, & 1 W. 4, c. 68. Secondly, that the plaintiff might properly sue the defendants on a contract to carry from Melksham to London.

The defendants pleaded non assumpsit, and that the parcel contained property within the description in stat. 11 G. 4, & 1 W. 4, c. 68, s. 1, above the value of 10l.: that it was not delivered at a receiving-house of the defendants but to their servant; and

Court do not proceed wholly on their own canons, they shall not be at all controlled by the common law (unless they act in derogation from it, as by questioning a matter not triable before them, as the bounds of a parish, or the like); for they shall be presumed to be the best judges of their own laws: and therefore in such case, if a person is aggrieved, his proper remedy is not by prohibition, but by appeal." 3 Burn. Ecc. L. Prohibition, 2 (p. 219, 8th ed.). If any objection be taken to the form of the sentence (which, however, is the usual one), that is matter of practice, and can be discussed only in the spiritual Court. See *Ex parte Smyth*, 8 A. & E. 724, upon appeal. Further, it appears, by affidavit, that the defendant has consented to the articles, and an inquiry has been had on the merits: therefore, he cannot now object to them.

R. V. Richards, contra. The application for prohibition is never too late, if it be *pro defectu jurisdictionis*; *Offley v. Whitehall*, Bunb. 17; *Leman v. Goulty*, 3 T. R. 3. Now the sentence refers generally to all the charges. [601] Some of these are not of ecclesiastical cognizance, but of that of the common law. Thus the exercise of the trades specified is prohibited by statute, as admitted on the other side. So challenging to fight, as in the ninth article, is an indictable offence. It is said that the object of this proceeding is merely deprivation; but the Ecclesiastical Courts are not warranted in drawing to themselves cognizance of a matter cognizable by the common law, merely by affixing to it the penalty of deprivation. It is admitted that they cannot try the bounds of a parish: could they obtain cognizance of such a question by discharging a beneficed clergyman, who should contest it, with thereby violating some canon, and so subject him to deprivation, and then insist that they are to judge whether it be a violation of the canon or not? Then, if there be want of jurisdiction as to any of the charges, the sentence, which leaves it uncertain on which charges it proceeds, is bad; and no jurisdiction certainly appears.

Lord DENMAN, C. J. Supposing some of the charges to be insufficient, as those of trading as a maltster, and as a flannel manufacturer, still there are several other charges; and the Ecclesiastical Court finds them for the most part proved. To get rid of the sentence of that Court, it is necessary to show that it has adjudged on matters which are in the proper jurisdiction of the Courts of common law. That we cannot find in the present case. It is clear that the Ecclesiastical Court had jurisdiction over some of the matters charged: only it is said that there are also some as to which objections might be taken to the jurisdiction. It is quite consistent *with the sentence that the Ecclesiastical Court may [602] have acquitted on these. To set aside the proceedings after sentence, it should be shown that the Court has clearly exercised a jurisdiction which it did not possess; and that is certainly not made out.

PATTESON, J. It is laid down by several authorities, and not denied now, that, after sentence, unless the want of jurisdiction be manifest, this Court will not interfere. Supposing some of these articles to be founded on charges not within the cognizance of the Ecclesiastical Court, that might have been shown before sentence. By the sentence, the onus is shifted; and the party objecting has to show that the Ecclesiastical Court proceeded on the objectionable articles. There is no affidavit to that effect; so that the matter rests in uncertainty.

COLERIDGE, J., concurred.¹

Rule discharged with costs.

¹ WILLIAMS, J., was absent.

*The KING v. The Churchwardens of the Parish of ST. MICHAEL'S, [603] PEMBROKE. November 10.

Churchwardens, under stat. 59 G. 3, c. 184, s. 40, borrowed 1000*l.* from M., upon the credit of the church-rates, agreeing with M. that the sum should not be called in for twenty years, unless the churchwardens should be desirous of paying off the same at any time before, or as soon as a sufficient sum should be raised by the rates, or other-

thereof exceeded 10% ; and that the said certificate was not delivered at any [*637] office, warehouse, or receiving-house *of defendants as such common carriers as aforesaid, but that the same was delivered to and received by a certain then servant of defendants in that behalf ; and that plaintiff did not, nor did any other person on his behalf, at the time when the said certificate was so delivered to and received by the said servant of defendants as aforesaid, declare the value and nature thereof, nor did the plaintiff then, or at any other time, pay to defendants, or to their said servant who so received the said certificate, or to any other person or persons on behalf of defendants, any increased rate of charge over and above the ordinary rate of carriage as a compensation for the greater risk and care to be taken for the safe conveyance of such certificate, or any other increased charge whatsoever ; nor did defendants, or any or either of them, or the said servant who so received the said certificate as aforesaid, or any person on behalf of defendants, then or at any other time accept any engagement to pay the same. Verification.

Replication to the third plea, that defendants of their own wrong, and without the cause by them in their last plea alleged, were guilty of the breach of promise, &c., in manner and form, &c. Conclusion to the country.

On the trial before WILLIAMS, J., at the last summer assizes for Wiltshire, [*638] it appeared that the defendants *were the proprietors of the Bath and Bristol mail. The certificate in question was enclosed in a parcel, addressed to a house in London (but with no special direction as to the coach by which it should go), and was sent to the post-office at Bradford, Wilts, from whence it was forwarded to Melksham. The postmaster of Bradford, Johnson, received it in the post-office ; the servant who brought it paid 2*d.* to book it. No notice was put up at the post-office as to parcels. Johnson was accustomed to receive parcels, and deliver them to the driver of a mail-cart, who carried them to Melksham, six miles distant. The cart was employed by Tucker, the mail contractor at Melksham (who was not one of the present defendants) ; Johnson received the parcels for Tucker, and knew nothing of the defendants. If any person wished to pay carriage to London, he received the money. The driver of the mail-cart, who accounted with Tucker, received the parcel in question with others from Johnson the postmaster, and delivered them at the

bookkeeper, coachman, or other servant, for the purpose of being carried or of accompanying the person of any passenger as aforesaid, the value and nature of such article or articles of property shall have been declared by the person or persons sending or delivering the same, and such increased charge as hereinafter mentioned, or an engagement to pay the same, be accepted by the person receiving such parcel or package.

Sect. 2 enacts, " That when any parcel or package containing any of the articles above specified shall be so delivered, and its value and contents declared as aforesaid, and such value shall exceed the sum of 10*l.*, it shall be lawful for such mail contractors, stage-coach proprietors, and other common carriers to demand and receive an increased rate of charge, to be notified by some notice affixed in legible characters in some public and conspicuous part of the office, warehouse, or other receiving-house where such parcels or packages are received by them for the purpose of conveyance, stating the increased rate of charge required to be paid over and above the ordinary rate of carriage, as a compensation for the greater risk and care to be taken for the safe conveyance of such valuable articles ; and all persons sending or delivering parcels or packages containing such valuable articles as aforesaid at such office shall be bound by such notice, without further proof of the same having come to their knowledge."

Sect. 3 enacts, among other things, that, if " such notice as aforesaid shall not have been affixed, the mail contractor, stage-coach proprietor, or other common carrier as aforesaid shall not have or be entitled to any benefit or advantage under this act, but shall be liable and responsible as at the common law, and be liable to refund the increased rate of charge."

Sect. 5 enacts, " that for the purposes of this act every office, warehouse, or receiving-house which shall be used or appointed by any mail contractor, or stage-coach proprietor, or other such common carrier as aforesaid for the receiving of parcels to be conveyed as aforesaid, shall be deemed and taken to be the receiving-house, warehouse, or office of such mail contractor, stage-coach proprietor, &c."

King's Arms Inn, Melksham. The inkeeper at Melksham, Bird, took in the parcel in question, and delivered it to the coachman of the London mail. The carriage from Bradford to Melksham was charged upon the parcel; the coachman paid Bird the amount, and "charged it on." Bird used to receive parcels to be forwarded by the mails and by other coaches; he booked them and kept 2d. for the booking, as a recompense for the care of the parcels. He had no authority from the mail-coach proprietors to book, nor had he ever been applied to by them to receive parcels. When the carriage from Melksham forward was paid at the King's Arms, he delivered the money to the coachman. There was no regular booking-office; parcels were taken in at the *bar; and there was no notice exhibited as to the rate of charge. Several coaches [*639] used to call at the King's Arms; for two years and a half the mail had been accustomed to pull up there, but not to change horses. No statement was made on the plaintiff's behalf, as to the value of his parcel, either at the Bradford post-office or at the King's Arms.

The defendants' counsel contended that the plaintiff ought to be nonsuited, upon grounds which will appear from the following report. The learned Judge reserved leave to enter a nonsuit, and left the case to the jury, directing their attention particularly to the third plea, and to the question raised by that plea, whether or not the King's Arms was a receiving-house of the defendant: and he told them that, if it was, the third plea was not proved. The jury found a verdict for the plaintiff; damages 25*l*.

Bompas, Serjt., in this term (November 3d) moved for a rule to show cause why a nonsuit should not be entered. First, on the facts proved, the King's Arms was not a receiving-house of the defendants. The postmaster of Bradford received no direction that the parcel should go by any particular coach. He sent it by a mail-cart, the driver of which received a separate payment for the carriage from Bradford to Melksham; and that payment was made by the landlord of the King's Arms, who received the amount again from the coachman to whom he delivered the parcel. Several coaches stop at the King's Arms, and it was in the landlord's discretion to select the coach by which the parcel should go. He receives no payment from the defendants, and has no commission from them to take in packages for them. If the owner himself had left the certificate at *the King's Arms, it would not have been taken in there as at a receiving-house for the defendants. [COLERIDGE, J. If there is an office [*640] at which three or four coaches call, is not it a receiving-house for each?] The defendants here had not in any way appointed the King's Arms as their office. The mail did not even change horses there; it only pulled up. [Lord DENMAN, C. J. The mail stops where the proprietors direct; it is an understood transaction.] That does not make the inn a receiving-house for the mail. [Lord DENMAN, C. J. If the landlord received the parcel generally, the receipt would become a receipt on behalf of the mail, when he put the parcel into the coachman's hand.] If so, there could not have been an extra charge made at the King's Arms on behalf of the defendants, under stat. 11 G. 4, and 1 W. 4, c. 68, s. 1, at the time when the parcel was delivered there, no person being then authorized to make such charge for the defendants; nor was the King's Arms a place at which notice of such charge could be given, under sect. 2; and accordingly the third plea avers that the delivery was, in fact, not made at a receiving-house or office of the defendants, but to their servant, that is, to the coachman at the time when he received it from the landlord.

Secondly, this being an action of contract, and not for a breach of duty, it is material to show a contract between the plaintiff and the defendants. If he contracted, it was with Johnson the Bradford postmaster. Johnson received money for the booking of the parcel at Bradford; he forwarded it to Melksham, and the carriage from Bradford to Melksham was paid by the defendants. The contract declared upon is to carry from Melksham to London. Now, the defendant's contract at Melksham was with Johnson only: it was to pay the

[*641] charges already *incurred by him, and to send the parcel for him to London. If the plaintiff was party to any contract, it was when the parcel was delivered at Bradford, and at that time Johnson clearly was not the agent of the defendants. He was not bound to send the parcel to them, more than to any other person; and if he transmitted it by an improper conveyance, he was liable to the plaintiff for any consequent damage.

Thirdly, it is a condition precedent to the right of recovery against any carrier described in stat. 11 G. 4, & 1 W. 4, c. 68, for the loss of goods there specified, that the value, if above 10*l.*, should in all cases have been declared according to sect. 1. That is an independent enactment, and not affected by the particular provisions of sects. 2 and 3. Sect. 2 has reference entirely to the increased rate of charge demandable in the case there mentioned; and sect. 3 prescribes the terms and conditions to be observed where the increased rate is demanded. The words, "shall not have or be entitled to any benefit" "under this act," refer to the case where the carrier has made the increased charge without performing the conditions. But it is not necessary that that charge should be made, nor, consequently, that the conditions should be fulfilled where the carrier does not make it. He is at all events entitled to the protection of sect. 1, if the article lost be of such a description and value as bring it within that enactment. [COLERIDGE, J. It was so held in *Owen v. Burnett*, 2 Cro. & M. 353; S. C. 4 Tyrwh. 133.] The question here may be, whether this defence is available under the third plea, the jury having found that the parcel was delivered at a receiving-house, which the plea denies. But, upon the true construction of sect 1, *that point is wholly immaterial. [Lord DEN-

[*642] MAN, C. J. It would be difficult to bring the case, as now put, within the third plea. The plea raises a different defence.] Enough was proved to raise this defence; and the plea is applicable if the merely superfluous parts be rejected.

Lord DENMAN, C. J. On the first point, I cannot entertain a doubt. The King's Arms was an inn used by the defendants, had been some time in the habit of taking in parcels which were sent by their coach, and was adopted by them as their receiving-house. I think it came within the third class of places ("office, warehouse, or receiving-house") spoken of in the first two sections of the act, having been adopted as such a place by the defendants. As to the second point, I think that there was a contract between the defendants and the plaintiff. A carrier receiving goods undertakes to carry them to the party whose address is upon them; the fact of their coming to him through a series of agents, does not prevent his being liable to the sender. He cannot throw back the liability upon the earliest agent. The third point is important, and is difficult with regard both to the construction of the act, and the effect to be given to the plea. We will take time to consider of it.

PATTESON, J. It appears that the mail-coach was in the habit of stopping at the King's Arms, but did not change horses there; if it had, the case would have stood more favorably to the defendants, because then it might have been said that the mere adventitious circumstance of the coach occasionally taking in a parcel while changing horses did not make the inn a receiving-house for the mail-coach proprietors. But here it seems that the coach stopped for the express purpose *of taking parcels. The mode of remuneration for what had

[*643] been done previously in respect of the parcel can make no difference. As to the persons contracting, the evidence shows that the postmaster at Bradford did not undertake to convey the parcel to London, but only to forward it to the inn at Melksham; his responsibility would cease there; and it is clear upon the evidence that that was the understanding. On the delivery at Melksham the innkeeper there became the agent; and, if the inn was a receiving-house of the defendants, he was their servant for the purpose of receiving the parcel. On the third point there is some difficulty.

COLERIDGE, J. The plaintiff in this case, wanting to transmit a parcel to

London, sends it to Johnson, the postmaster of Bradford, who receives two pence on account of it, and delivers it to a person by whom it is carried to the inn at Melksham. What is the inference from these facts? That there was a contract between the plaintiff and Johnson, not for sending the parcel to London, but for sending it to Melksham to be forwarded. When that was done, Johnson had performed his duty and earned his reward. Then as to the house at Melksham. It seems that for two years and a half the mail had stopped there to receive parcels. In all common understanding that made it a receiving-house for the mail. We must take it that the coach stopped there by direction of the proprietors. It is said that the inn was not a receiving-house for them, because other coaches stopped there, and the innkeeper had his option of sending the parcel by any, and that, not receiving for one in particular, he could not be the agent of that one. But, construing the facts as reasonable *men, we must say that, as soon as [*644] the innkeeper determined upon the coach by which he would send, he became, for that purpose, the agent of the proprietors. On this part of the case we may dismiss from consideration what occurred up to the delivery of the parcel at the inn. It would have made no difference if the plaintiff had brought it there with his own hands, or sent it by his livery servant.

WILLIAMS, J. The great contest of the trial was, whether or not the inn was a receiving-house of the defendants. I agree with the rest of the Court, that the facts equally dispose of both the first and the second objection. The fifth section of stat. 11 G. 4, & 1 W. 4, c. 68, says that "every office, warehouse, or receiving-house which shall be used or appointed by any mail contractor," &c., for the receiving of parcels, shall be deemed the receiving-house of such contractor, &c. No formal appointment is required. The contract of the defendants began from the place where their coachman received the parcel.

As to the remaining point,

Cur. adv. vult.

Lord DENMAN, C. J., now delivered the judgment of the Court. The question which remained for our consideration in this case was, whether, upon the third plea, the plaintiffs were entitled to recover, and we think they are, the jury having found that the parcel was taken in at a receiving-house of the defendants. Then the question is, whether the defence which was suggested under that plea, can be made available under the general *issue. *Owen v. Burnett*, [*645] 2 Cro. & M. 353; S. C. 4 Tyrwh. 133, which was referred to in moving, was decided before the new rules of pleading. Since the new rules, we think that this defence cannot be admitted on a plea of non assumpsit. No rule, therefore, can be granted. Rule refused.¹

¹ See *Gilbart v. Dale*, ante, p. 548.

Sir JOHN SCOTT LILLIE, Knight, *v.* PRICE. November 15.

In an action for libel, it is not required by the rules of pleading, Hil. 4 W. 4, that the defence of privileged communication should be specially pleaded.

DECLARATION (1836) for libel contained in a letter. Plea, Not Guilty. On the trial before Lord DENMAN, C. J., at the sittings in Middlesex after last Trinity term, the defence was, that the alleged libel was a privileged communication. The defendant's counsel objected that this answer could not be given under the plea of not guilty. The Lord Chief Justice thought otherwise, and left the whole case to the jury, who found for the defendant.

Sir W. W. Follett, in this term,¹ moved for a rule to show cause why a new trial should not be had, on the ground of misdirection. It has never yet been decided that in an action for libel the defence of privileged communication may be set up, under a plea of the general issue. The point was brought before the

¹ November 5th. Before Lord DENMAN, C. J., PATTERSON, WILLIAMS, and COLERIDGE, Js.

Court of Common Pleas, but not decided, in *Smith v. Thomas*, 2 New Ca. 372. [*646] In the rules, Hil. 4 W. 4, Pleadings in *Particular Actions, IV. 1, 5 B. & Ad. ix., it is said that the plea of not guilty, in an action for slander of the plaintiff in his office, profession, or trade, "will operate to the same extent precisely as at present, in denial of speaking the words, of speaking them maliciously, and in the sense imputed, and with reference to the plaintiff's office, profession, or trade: but it will not operate as a denial of the fact of the plaintiff holding the office, or being of the profession or trade alleged." But it cannot be inferred from this that the same plea will let in the defence of privileged communication, which involves matter not properly determinable by a jury. The mere plea of not guilty does not give the plaintiff any notice of such a defence, In *Stancliffe v. Hardwick*, 2 Cro. M. & R. 1; S. C. 5 Tyr. 551, where a question of the same kind arose as to the admissibility of evidence, in an action of trover, to justify the conversion, it was held that, to let in such a defence, the plea ought to have been special. Cases bearing some analogy to the present have arisen in actions of assumpsit, as *Barnett v. Glossop*, 1 New. Ca. 633; and where the defence was the want of a written contract to satisfy the statute of frauds, it has been held, since the new rules, that that must be specially pleaded.* [Lord DENMAN, C. J. In the instance of an action of slander, mentioned in the rule of pleading just cited, it is said that the plea of not guilty will operate as before, in denial of having spoken the words maliciously.]

Cur. adv. vult.

[*647] *Lord DENMAN, C. J., now said—We have consulted the other Judges on this point, and are of opinion that the defence of privileged communication, as it goes to the very root of the matter of complaint, need not be specially pleaded.

Rule refused.*

¹ The slander in the present case was not charged as affecting the plaintiff in any particular capacity.

² But see *Johnson v. Dodgson*, 2 M. & W. 653.

³ See *Cotton v. Browne*, 3 A. & E. 312, where it was held that probable cause ought not to be specially pleaded to a declaration (since the new rules) for maliciously indicting. See also *Delegat v. Highley*, 3 New Ca. 950; and *Drummond v. Pigon*, 2 New Ca. 114, there cited.

CANE v. CHAPMAN. Nov. 15.

By the Harwich paving act, the commissioners "may sue or be sued for or concerning anything which shall be done by virtue or in pursuance of this act, in the name of their clerk," and are empowered to raise money by rates. Any person may advance money to them, for the purposes of the act, in purchase of annuities, which shall be payable and paid by the commissioners out of the money arising from the rates. The act prescribes the form of the grant; which purports that, by virtue of the act, five of the commissioners, in consideration of the sum advanced to them by the party, grant to him an annuity out of the rates to arise by virtue of the act.

A declaration, in case, against the clerk, stated that the plaintiff advanced a sum to the commissioners for the purchase of an annuity; whereupon, by a grant made according to the form of the statute, five commissioners, by virtue of the act, in consideration of the advance, granted to the plaintiff an annuity out of the rates; that a quarterly payment of the annuity became due; that the commissioners then held in their hands, out of the rates, money more than enough to satisfy it; whereupon it became their duty to pay it; and that they had not paid it. It did not appear by the pleadings that there were any annuitants besides plaintiff.

Held, that case was maintainable against the clerk, for this breach of duty by the commissioners.

Although the act provided (in a distinct section from that giving the power to sue as above mentioned) that no suit should be commenced "for anything done in pursuance" of the act till certain notice was given, or after six months "next after the fact committed."

Held, also, that, on general demurrer, the declaration was not bad for want of an averment that the money was advanced for the purposes of the act.

Nor for omitting to aver that the commissioners had received money enough to satisfy all annuitants.

Defendant pleaded that it was not the duty of the commissioners to pay, &c. Held bad, on special demurrer, as a traverse of an inference at law.

DECLARATION in case against "Edward Chapman, the clerk of the commissioners appointed for putting in execution an act" (59 G. 3, c. cxviii., local and personal, public, "for paving, cleansing, lighting, *and watching the town of Harwich," "and supplying the same with water;"*) for that, [*648]

'Sect. 1 appoints certain commissioners for carrying the act into execution; and several following sections provide for the future appointment, &c., of commissioners.

Sect. 5 enacts, "That all acts, proceedings, matters, and things in or relative to the execution of this act, may be done and executed by any five or more of the commissioners appointed, or to be appointed by or under this act, except only in cases herein particularly directed to be done and executed by any greater or less number of them."

Sect. 15 enacts, "That the said commissioners may sue or be sued for or concerning anything which shall be done by virtue or in pursuance of this act, in the name of their clerk for the time being."

Sect. 16, and several following sections, enable the commissioners to make rates, to be assessed, allowed, &c., as therein directed.

Sect. 75, in order to enable the commissioners to put this act into immediate execution, enacts, that it shall be lawful for the commissioners "from time to time to borrow and take up at interest any sum or sums of money for the purpose of this act, upon the credit of the said rates, not exceeding the sum of 7000*l.*," and by writing under their hands and seals, at any meeting to be held as before mentioned, "to assign all or any part of the said rates to such person or persons as shall lend or advance any money thereon as a security for the payment of the principal money so to be advanced, with interest for the same; and every such mortgage or assignment shall be in the words, or to the effect following; *videlicet*,

"By virtue of an act of parliament passed in the fifty-ninth year of the reign of his Majesty King George the Third, intituled," &c., "We, five of the commissioners appointed by and under the said act, at a meeting held pursuant thereto, in consideration of the sum of _____, advanced and lent by A. B. upon the credit and for the purposes of the said act, do grant, assign, bargain, and sell unto the said A. B. his executors, administrators, and assigns, such part or proportion of the rates to arise by virtue of the said act as the said sum of _____ doth or shall bear to the whole sum which now is or may at any time be lawfully borrowed or become due, or be charged or raised upon the said rates, to be had and holden from this _____ day of _____, until the said sum of _____, with the interest for the same, at _____ per centum per annum, shall be repaid and satisfied."

Sect. 76 enacts; "That it shall and may be lawful for any person or persons to contribute, advance, and pay to the said commissioners, for the purposes of this act, any sum or sums of money not exceeding in the whole, together with the money to be advanced upon mortgage as aforesaid, the sum of 7000*l.*, for the absolute purchase of one or more annuity or annuities, to be paid and payable during the natural life of the person or the persons so contributing," or of his or their nominees; "which annuity or annuities shall be payable and paid by the said commissioners out of the money to arise by or from the said rates; and the grant of every such annuity shall be in the words or to the effect following (that is to say),

"By virtue of an act," &c. (as in the preceding form), "We, five of the commissioners," &c. (as before), "in consideration of the sum of _____, advanced and paid to us by A. B., do hereby grant unto the said A. B., his executors, administrators, and assigns, one annuity or yearly sum of _____ out of the rates granted and to arise by virtue of the said act, which annuity or yearly sum of _____ shall be paid to the said A. B., his executors, administrators, and assigns, by four equal quarterly payments in every year, during the natural life of _____, at or in the Guildhall of Harwich aforesaid, and the first payment thereof shall be made upon the _____ day of _____ next ensuing the date of these presents. Dated this _____ day of _____."

Sect. 91 provides, that no action shall be commenced against any person "for anything done in pursuance of this act," until fourteen days notice thereof be given to the commissioners' clerk, "or after sufficient satisfaction or tender thereof to the party aggrieved, or after six calendar months next after the fact committed," &c.; and the defendant in every such action, may at his election "plead specially or the general issue, and give this act and the special matter in evidence," "and that the same was done in pursuance and by the authority of this act."

Sect. 92 enacts, "That all moneys which shall be raised by the said commissioners

[*649] whereas, after the passing *of the said act, to wit, 29th November, 1820, the plaintiff contributed, advanced, and paid to the commissioners so appointed a certain sum, not exceeding in the whole, together with all money then or theretofore advanced upon mortgage, as in the act mentioned, the sum of 7000*l.*, that is to say 1850*l.*, for the absolute purchase of an annuity to be paid and payable during *the natural life of the plaintiff; and thereupon, [*650] by a certain grant then made according to the said statute, five of the commissioners appointed, &c., did by virtue of the said act, at a certain meeting held pursuant thereto, in consideration of 1850*l.*, advanced and paid to them by the plaintiff, grant unto the plaintiff, his executors, &c., an annuity or yearly sum of 140*l.* 8*s.*, out of the rates granted and to arise by virtue of the said act, to be paid to the plaintiff, his executors, &c., by four equal quarterly payments in every year during the life of the plaintiff, at or in the Guildhall of Harwich, and that the first payment thereof should be made upon the 1st of March then next ensuing; averment, that, after the making of the said grant, to wit, 1st of December, 1834, a large sum, to wit, 35*l.* 2*s.*, for one quarterly payment of the said annuity, became and was due and payable to the plaintiff, whereof the commissioners had notice, and that, before and at the time at which the last-mentioned quarterly payment became due, the commissioners had received and then held in their hands, out of the rates granted and arising by virtue of the said act, divers large sums of money more than sufficient to pay and satisfy the said quarterly payment; and the commissioners were then requested, at and in the Guildhall, &c., to pay the said quarterly payment or cause the same to be paid to the plaintiff; and it thereupon became the duty of the commissioners to pay the said quarterly payment, or cause the same to be paid, to the plaintiff, at or in the Guildhall, &c.; yet the said commissioners, not regarding their duty in that behalf, did not nor would, when so requested, &c., or at any other [*651] time, pay the said quarterly payment or any *part thereof, or cause the same or any part thereof to be paid, to the plaintiff, at or in the Guildhall, &c., or at any other time, place, &c.; and the same still remains wholly due, &c. There were similar breaches alleged as to quarterly payments becoming due respectively on 1st of March, 1835, and 1st of June, 1835. Damages 500*l.*

Plea. (2d.) That it was not the duty of the commissioners to pay or cause to be paid to plaintiff the said several quarterly payments in the declaration mentioned, in manner and form, &c. Conclusion to the country.

Demurrer, assigning for causes, that the said second plea is multifarious, seeking to put in issue all the matters of fact stated in the declaration which respectively precede the assertion of the liability of the commissioners to pay the respective instalments of the annuity; and, further, that the defendant has attempted to put in issue that which is a mere inference of law resulting from the matter of fact by which the liability of the commissioners is created. Joinder in demurrer.

Cresswell for the plaintiff. The plea either puts in issue all the facts in the declaration from which it is sought to raise the duty as a legal consequence, or it tenders an issue on the legal consequence: in either view it is bad. [The Court then desired him to confine himself to the declaration.]

First, the declaration shows a duty in the commissioners. By sect. 76, the annuities "shall be payable and paid by the said commissioners." Even without this express enactment, sect. 92 would raise the duty: for the act can be carried "into execution" only by their making the payments. The commissioners, by *accepting the office, undertake the duty. This was held, [*652] where a duty was imposed only by charter, in *The Mayor and Burgesses*

under or by virtue of this act, or which shall come to their hands for the purposes thereof, shall be applied from time to time in defraying the costs, charges, and expenses first of obtaining this act, and afterwards of carrying the same into execution, and to and for no other use or purpose whatsoever."

of *Lyme Regis v. Henley*,¹ the acceptance of the charter being considered to be an undertaking of the duty. Then, in consequence of the duty not being performed, the action lies. It is laid down by EYRE, B., in *Sutton v. Johnstone*, 1 T. R. 509, "that every breach of a public duty, working wrong and loss to another, is an injury, and actionable." Here the duty, breach, and loss to the plaintiff are shown. In *Com. Dig. Action upon the Case for Negligence (A. 1)*, it is said, "an action upon the case lies for a negligence in a man's duty, though it be a nonfeasance;" and 1 *Roll. Abr.* 105, *Action sur Case (M.)*, pl. 8, is cited. [COLERIDGE, J. Would not mandamus lie?] A mandamus might perhaps issue to compel the commissioners to raise the money, if it were not raised; for perhaps they could not be sued for not raising it. But here they have received the money; and they are sued for not paying the party who claims. In *Keighley's Case*, 10 *Rep.* 139 a, it was held that, if a party be bound by prescription to repair a sea wall, and neglect to do it, and the Commissioners of Sewers thereupon necessarily charge all who hold lands, &c., with the repair, every person so charged may sue the party neglecting in case. In *Schinotti v. Bumsted*, 6 T. R. 646, the managers and directors of the lottery, under act of parliament, were held liable in case for not *declaring a plaintiff's ticket to be the last drawn, it being so within the act, which would entitle him to 1000*l*. The objection that mandamus would lie might have been made there, if sustainable here. So case was brought in *Lacon v. Hooper*, 6 T. R. 224, against the Commissioners of Customs for neglect of duty, and no objection was made to the form of proceeding, the only question discussed being, whether there had been neglect in fact; and the plaintiff recovered. An action on the case lies for selling goods liable to toll, without paying the toll, though debt would lie; *Sprosley v. Evans*, 1 *Roll. Abr.* 103; *Action sur Case (K.)*, pl. 2; 1 *Vin. Abr.* 598; *Actions [Case. Gist.] (K. c.)*, pl. 2. This last point was also discussed in *Steinson v. Heath*, 3 *Lev.* 400; but no decision is reported. It will be objected that the commissioners ought to have been made defendants, and not the clerk. But this is a suit "concerning" a "thing" "done by virtue or in pursuance of this act;" and therefore it is within sect. 15. It is a nonfeasance of a duty created by the act. The clause would otherwise be almost nugatory. The annuity is granted under the act: all matters relating to the annuity are therefore within the clause. For all such matters the clerk represents the commissioners. If the enactment had been in general terms, that the commissioners should sue and be sued in the name of the clerk, the objection could not have been made; yet such an enactment would, in truth, carry the case no further than the present one; for it would be construed to relate only to actions concerning things to be done under the statute. The question must always be, whether the commissioners *are, so far as the subject-matter of the action goes, to be treated in that character, and not as individuals; where that is so, the clerk is a proper party.

Ogle, contra. The first question, upon the declaration, is, whether the commissioners be liable, so that the action can be supported in any form or against any party. Sect. 75 enables them to borrow money, not upon their own credit, but upon that of the rates, and to assign a proportion of the rates in return. No credit is therefore given to them personally. Then, by sect. 76, they may grant annuities payable out of the rates to persons contributing. And the declaration charges, that they did so grant to the plaintiff. In *Horsley v. Bell*, *Amb.* 770; *S. C.* 1 *Bro. C. C.* 101, note, the commissioners of a river navigation were held to be personally liable to a party who had been engaged by them to perform the work, on the ground that the credit was given to them, not to the undertaking. That reasoning shows that there is no personal liability here; for the statute expressly enacts that the credit shall be given to the rates. *Eaton*

¹ 3 B. & Ad. 77, affirming the judgment of the Court of C. P., *Henley v. the Mayor of Lyme*, 5 *Bing.* 91. The judgment in *K. B.* was affirmed on error in the House of Lords: *The Mayor and Burgesses of Lyme Regis v. Henley*, 1 *New Ca.* 222.

v. Bell, 5 B. & Ald. 34, may appear to show a personal liability in the commissioners. But there the commissioners made themselves personally liable by their drafts: the act of parliament there, which simply directed that persons advancing money should be repaid out of the rates raised under the act, gave no remedy on the drafts, which were not instruments directed to be made by the act, and which, therefore, fell under the general rule applicable to drafts. And, as the commissioners there chose to draw for the sums "on account of the public drainage," they were estopped from saying that they had no public funds. Here there is simply a grant of the annuity under the words of the act. It may be said that the commissioners are concluded from denying, on this demurrer, the receipt of the funds for paying the plaintiff; and that so far the case falls within the principle suggested as explaining *Eaton v. Bell*, 5 B. & Ald. 34. But the averment in the declaration is, that the commissioners have received, not enough for the quarterly payments on the whole sum advanced, but only enough for the quarterly payments to the plaintiff. What right has any one annuitant to claim priority of payment before another? Further, supposing the commissioners liable, and that therefore some action lies, the remedy is on the contract for the annuity, which will make the commissioners liable (if at all) in covenant, supposing the grant under seal, or in assumpsit, supposing it not under seal. It rather seems that the instrument should be under seal; for that is expressly enacted with respect to the assignment of the rate, in sect. 75: and the word "grant" is used in sect. 76. But, whether the annuity instrument be a deed or not, there arises a contract to pay, either special or simple, supposing the commissioners to be liable at all. Case, therefore, cannot be supported. As to the party, an action on the case can be supported only against the parties guilty of the tort. Now all that can, at the utmost, be inferred from sect. 15, is that the clerk may be sued in all cases where the whole body of commissioners would be liable; *Everett v. Cooch*, 7 Taunt. 1. There any five or more trustees under a turnpike act were required to make compensation to a lessee whose term *determined, by the act, on the first meeting of the trustees; and parties aggrieved by anything done by the trustees were to sue the treasurer; and it was held that assumpsit, laying a promise by the trustees to make compensation in consideration of their liability, could not be maintained against the treasurer, because the trustees present when the promise was made could not, by their act, render all liable. So, here, if the grant of the annuity create a liability in the grantors to pay, it can be only a liability in the five acting under sect. 76: at all events, there cannot be a tort on the part of those who were no parties to it. But, further, sect. 15 has no application to a complaint of this kind. The "thing which shall be done by virtue or in pursuance of this act" must be understood in the same sense as the similar words in sect. 91. Now this last section is intelligible only if applied to cases of malfeasance or misfeasance: there can be no six months "after the fact committed" in the case of a nonfeasance. *Umphelby v. M'Lean*, 1 B. & Ald. 42; *Waterhouse v. Keen*, 4 B. & C. 200; *Abdy v. Stevens*, 3 B. & Ad. 299, establish this distinction. And, if the nonfeasance be a thing done, within these two sections, the declaration ought to have averred due notice, and have shown that the action was brought in time, within sect. 91. Further, the declaration ought to have averred that the plaintiff advanced the money for the purposes of the act: otherwise the proceeding is not under the act (sect. 76), and sect. 15 does not apply. With respect to the plea, the defendant had no other method of setting up his defence. The *facts alleged in the declaration are true, except as to the allegation of duty. The duty could not arise unless the money raised were enough to pay all, the plaintiff having no right to priority: the traverse of the duty is, therefore, in fact, a denial that sufficient money to pay all was received. The absence of such facts cannot in general be taken advantage of under "Not Guilty;" *Frankum v. The Earl of Falmouth*, 2 A. & E. 452. Sect. 91, indeed, enables the defendant to prove the special matter under the general

issue: but it also reserves power to plead specially, as in other cases. It is objected that the traverse is multifarious: but it is only a traverse of all the facts together constituting the duty: that is not multifarious; Stephen on Pleading, 290, Ed. 4. As to the remaining objection, that matter of law is traversed here, it is a traverse of law mixed with fact, which may be taken; Com. Dig. Pleader (G. 5).

Cresswell in reply. It is contended that no credit was given to the commissioners, and also that the action ought to have been brought on their implied contract. These arguments are inconsistent. But it is true that no personal credit was given to the commissioners who made the grant. They acted in the name of all. This therefore does not fall within the objection which prevailed in *Everett v. Cooch*, 7 Taunt. 1; and sect. 15 applies, the object of which was, that the parties might not be obliged to find out the names of a fluctuating body. This section cannot be interpreted by sect. 91, the object of which was different, namely, to enable parties to offer compensation for acts done. The objection to the *plaintiff's claiming priority does not arise: the record does not show [658] that any party besides the plaintiff is unpaid or has even advanced money. As to the objection that the plaintiff is not stated to have advanced his money for the purposes of the act, the plea ought to have stated that it was not so advanced: in the absence of this, the Court cannot infer that the commissioners charged an annuity on the rates without power to do so. Or there should have been a special demurrer.

Lord DENMAN, C. J. We have already intimated our opinion that the plea is bad: it tenders an issue upon an inference of law. Then the defendant objects, first to the form of action, secondly to the clerk being made the party. In the first place, the question is, whether the action for nonpayment of this money be "concerning" a "thing" "done by virtue or in pursuance of this act." The argument most strongly urged against it is derived from sect. 91, which speaks of six calendar months "next after the fact committed;"¹ and it is said that, as one clause is correlative to the other, the clerk cannot be sued where there is no fact committed. But the language of the enabling clause is much more extensive than that of the other, which applies only to a case where a person is sued for something actually done. The clerk may be sued where the complaint arises, "for or concerning anything which shall be done by virtue or in pursuance of this act;" and here the charge is created under the act. I do not see how the *commissioners can be personally responsible. The act of the [659] five is the act of all; and the clerk represents them.

Then comes the question, whether case is the proper form of action. I own that I felt much doubt on that point. I should have thought that the word "grant," whether the instrument was under seal or not, implied a contract, and that the proper form would be to sue in contract. But the consideration that the commissioners are not personally liable, and are executing a public trust, shows that they are liable to action for neglect of duty: and it is a neglect of duty not to perform their engagement. These, therefore, which were the two material objections, fail.

PATTESON, J. I am of the same opinion. As to the plea, it is clearly a traverse of an inference of law: it puts in issue, not the facts out of which the duty is to arise, but the mere fact of its arising. I think the clerk is properly made defendant. The action is not brought against him as the real defendant, nor does the act make him so. The action is against the commissioners in the name of the clerk, as in *Wormwell v. Hailstone*, 6 Bing. 668. The question then is, whether the commissioners were here liable as a body. I admit that, if this were a contract binding the five commissioners personally, it might be said that only those five were liable, since the action must be on the contract; and that no action on the case, or in any other form, would lie against all. But, inasmuch as there is nothing here binding them personally in any way, as there

¹ See the observation of Lord ELLENBOROUGH in *Rex v. Taunton St. Mary*, 3 M. & S. 471.

[*660] is merely a grant out of *the rates, and no agreement by them to pay at all events, they are mere instruments to make the grant. Then it becomes the duty of the body at large to pay when they have funds. They may, therefore, be sued in the name of their clerk, provided the words of the clause on that subject are sufficient; and I think that they are, and that we see the intention of the legislature clearly. The words of sect. 15 are "for or concerning anything which shall be done by virtue or in pursuance of this act." Those are different from the words in sect. 91. No doubt the grant of the annuity is a thing done in pursuance of this act; and the plaintiff, being the party to whom the grant is made, sues "concerning" a thing so done. If the words "or concerning" were left out, the remedy might be limited to actions for acts done: and sect. 91 is so limited.

Then, is case the proper form of action? There is no contract: neither assumpsit nor covenant could be brought, for no engagement is entered into by the commissioners who grant the annuity, either as a body corporate, or as individuals. The complaint is therefore for neglect of duty: the commissioners have the money, and have not applied it. It is objected that the plaintiff is not entitled to a priority before other creditors: but it does not appear that there are other creditors.

WILLIAMS, J. I am of the same opinion. The plea obviously attempts to put in issue the law arising out of the facts. The facts might have been traversed. I do not accede to the objection against the action being shaped in case. A mandamus might be proper if there were no funds; but it stands upon the record that there are funds. Then it is said that the remedy should be taken *in contract; but that proceeds upon an assumption not warranted [*661] by the facts or words. By sects. 5 and 76, five commissioners represent the whole body; and, in the grant, they do not personally pledge themselves, but grant the annuity out of the rates. There is, therefore, no contract either by the five or by the whole body. Then how does the liability arise? Upon the allegation that there are funds sufficient to pay the plaintiff; that shows a breach of duty for which case lies. As to the other point, I think the words of sect. 15 sufficiently large. An action for withholding payment when there are funds sufficient is an action "concerning" a thing done by virtue of the act.

COLERIDGE, J. I am quite of the same opinion. Mr. *Ogle's* argument, that the commissioners are not personally liable, does not apply with much weight to the question, whether any action lies at all: for, even if there were a sufficient liability in them to support some action, it would not follow that execution would issue against them personally, as appears from *Wormwell v. Hailstone*, 6 Bing. 668; though, indeed, that case turned on the particular words of the act. But the argument does apply with great weight to the question, whether the clerk is properly made a defendant on this record. For look at the circumstances and situation of the parties. The plaintiff advances money under the act. Then five commissioners grant the annuity in the terms of the act. If there be any personal liability at all, it is in those five, for it is impossible to [*662] say that the whole body *are personally liable. They say they have granted an annuity out of the rates to arise; that is all. Call it a contract, or what you will, what is it more than a receipt of the money by the commissioners acting under the statute, and a setting aside of so much money to arise under the statute? It would be the height of injustice to say that they were personally liable. Then, if they are not personally liable, are they, as a body, properly sued in the name of the clerk? The words of sect. 15 are as strong as they can be; and we are not to restrain them, for the clause is a beneficial one, and tends to obviate difficulties, as, for instance, that arising from the change of commissioners. Surely the purchase of the annuity was something done by virtue of the act. I think, therefore, that this is a case within both the words and the spirit of the act. Then comes a question which is very different; whether case be the proper form of action. Now for what, in

a notice merely, and its words cannot have a more extensive effect than those of sect. 2 to which it is appended.

LORD DENMAN, C. J. As to the objection, that the certiorari is out of time, there are authorities which sufficiently show that the statute 13 G. 2, c. 18, refers, not to the time of making an order, but to the time at which the sessions act with regard to it. As to the second objection, a good deal of doubt has been raised with respect to the order in question; but, upon the words of the statute 55 G. 3, c. 68, I think no fair doubt remains. Sect. 2 of that act directs that the justices shall "divert and turn" and "stop up" as is there mentioned, "by such ways and means, and subject to *such exceptions and conditions in all respects," as are stated in the previous act, 13 G. 3, c. 78, "in regard [*630] to highways to be widened or diverted." Now what are those ways and means? They are to be found in sects. 16 and 19 of the earlier act, and the forms given in the schedule, See *Rex v. The Justices of Cambridgeshire*, 4 A. & E. 111; and in those enactments and forms no provision appears for making the order to divert and the order to stop in the same instrument. The certificate of completion, required by sect. 4 of the later act, is evidently not substituted for a second order, because the same certificate is required, in similar terms, by stat. 13 G. 3, c. 78, s. 19, which clearly contemplates two orders. It must therefore be taken, here, that separate orders are necessary for the diversion and the stopping up. If any doubt remained upon this point, the authority of Lord TENTERDEN, which is of the greatest weight on all occasions, must prevail; and he, in *Rex v. The Justices of Kent*, 10 B. & C. 477, distinctly rested his decision on the ground that the order was not only for making a new road, but also for stopping up the old, and that the statute gave no power to make such an order. On that authority, and these reasons, I am of opinion that the present rule must be absolute.

PATTESON, J. I am of the same opinion. As to the first point, I think that, if an appeal has been heard, and a certiorari is moved for within six months after the order is confirmed on such appeal, it is sufficient. If this were otherwise, the party aggrieved would not have his two remedies; for, if he were obliged to remove the order within six months, he *would often lose the opportunity of an appeal on the merits, the order being withdrawn from [*631] the sessions. There is no direct authority on the point; but in *Rex v. Sheppard*, 3 B. & Ald. 414, the objection as to time might have been taken; and the question, whether or not a certiorari lay, was before the Court. With respect to the other question, upon the words of stat. 55 G. 3, c. 68, s. 2, which enables the justices "by order" to divert and turn and to stop up the ways spoken of, I should have thought that a single order was sufficient for both purposes; but the words, "by the same ways and means, and subject to such exceptions and conditions," refer to sects. 16 and 19 of the former Highway Act, the latter of which sections has similar words of reference to sect. 16, and directs, in language like that of stat. 55 G. 3, c. 68, s. 4, that no stoppage of an old highway shall take place till after certificate of the new way being complete. I do not know of any express decision as to the necessity of two orders, for diverting and for stopping up, under the former act: but it is plain, from the forms given in the schedule to that act, that two orders are there contemplated. If there were any doubt upon the point, as arising on the later statute, we have an authority in *Rex v. The Justices of Kent*, 10 B. & C. 477; and I should think it best to follow a former decision unless we were satisfied that it was erroneous.

WILLIAMS, J. With respect to the second point, under the old Highway Act two orders were clearly necessary. Then does stat. 55 G. 3, c. 68, repeal that act, as to the necessity of a second order? If there *were no previous decision, I do not know how this might be; but the very point has [*632] been already determined in *Rex v. The Justices of Kent*, 10 B. & C. 477, and by Lord TENTERDEN only, but by LITTLEDALE, J., also, who impliedly so-

[*665] out, allot, and award in lieu of and satisfaction *for the open field lands, grounds, and right of common of the estate of the said Jonah Smith, called 'late Daniel Smith's,' consisting of half a yard land," &c.

The commissioners duly made their award, July 2d, 1825, and thereby set out and allotted, and awarded to Jonah Smith, in lieu of the open field lands, grounds, and right of common of his estate called "late Daniel Smith's," consisting of half a yard land, "one plot or parcel of land or ground situate in the hamlet of Chadlington West, at Crooked Oak furlong, containing ten acres and two roods, bounded," &c.¹

The last-mentioned ten acres and two roods were the premises which the plaintiff sought to recover in this action. The whole of the title deeds relating to the property were placed in the hands of Harris's solicitor at the time of the execution of the mortgage deeds in 1824, and had continued in his possession ever since.

The defendant claimed to be a prior mortgagee, and put in an indenture of mortgage of November 21st, 1818,* whereby the said Jonah Smith granted and [*666] *demised for 500 years to defendant, his executors, administrators, and assigns (inter alia), "one plot or parcel of land or ground being one of the allotments in lieu of half a yard land late Daniel's, purchased by the said Jonah Smith of one John Smith, situate in the said hamlet of Codlington West at Crooked Oak furlong, containing ten acres and two roods, &c.; following" (as the case stated) "the words of a description of the allotments which was delivered to him by authority of the commissioners in 1817, afterwards inserted in the award as above set out, and which showed these lands to be the same sought to be recovered in the present action."

The defendant also put in indentures of lease and release of 28th and 29th December, 1826, to which Jonah Smith was party of the first part, and defendant of the second; and which, after reciting the indenture of mortgage of November, 1818, reciting also that doubts had been entertained as to its validity, and whether at the time of its execution Jonah Smith was seized of the fee simple of the hereditaments and premises thereby demised, by reason that the commissioners had not then signed their award; and reciting also that the defendant had therefore requested of Jonah Smith such further assurance as was after mentioned, which Jonah Smith had agreed to give, further witnessed that in pursuance of the said agreement, and in consideration of 5s., the said Jonah Smith did grant, bargain, and sell, and demise, ratify, and confirm unto the defendant, his executors, &c., all the premises before mentioned and described (including those now in question) conveyed by the recited indenture of 1818, for [*667] the residue of the before-mentioned term of 500 years, for securing *the sum of, &c., and interest, as in the recited indenture was mentioned.

The commissioners set out the allotments, and, among other proprietors, put Jonah Smith in possession of this allotment of ten acres and two roods, in 1812, and he remained in possession till his death in 1827, since which, to the present time, his wife and the defendant have been successively in possession.

The sections of the local Inclosure Act, 51 G. 3, c. xxv., principally referred

¹ Another plot or parcel was at the same time allotted to him in lieu of the same property.

² This indenture (which, with the other documents referred to, was to form part of the case) recited that Jonah Smith was seized in fee of the messuages, cottages, lands, and hereditaments after described; and, after some other recitals, it was thereby witnessed that Smith granted, bargained, sold, demised, and confirmed to Saunder, his executors, &c., all those freehold and tithe-free hereditaments and premises after-mentioned, that is to say, all that messuage or tenement, with the barns, &c., situate, &c., and also all those several plots or parcels of land "set out and allotted and awarded, or intended so to be, by the commissioners appointed and acting under and in pursuance of a certain act of parliament," &c., "unto the said Jonah Smith, in lieu of and compensation and satisfaction for his estates, late" &c., consisting, &c., and part of late Daniel Smith's, that is to say, one plot or parcel of land, &c. (describing several parcels, and among them the ten acres and two roods mentioned in the text).

to in the subsequent argument, were the following. After various enactments giving powers to the commissioners, and directing them to make certain allotments:—

Sect. 34, authorizes and requires them to set out, divide, and allot all the residue of the lands to be divided, allotted, and inclosed under the act, “unto and amongst the several proprietors thereof and persons interested therein, in proportion and according to their several and respective lands, grounds, rights of common, and other rights and interest, in, to, and over the same.”

Sect. 43, enacts, “That if any person hath sold, or shall at any time before the execution of the award of the said commissioners, sell his, her, or their interest, right, title, or property in, over, and upon the said open fields, common pasture,” &c., “then and in every such case it shall be lawful for the said commissioners, and they are hereby authorized and required, with the consent in writing of such vendor or vendors respectively, to make an allotment or allotments of the land unto the vendee or purchaser in such sale, or to his or her heirs or assigns, for or in respect of such right, interest, and property so sold as aforesaid; and every such vendee or purchaser, and his or their heirs and assigns *shall and may, from and after the execution of the said award, hold and enjoy the lands so to be allotted to her, him, or them, as [*668] aforesaid, in the same manner to all intents and purposes as the vendor in every such sale might, could, or ought to have held and enjoyed the same in case such sale had not been made.”

Sect. 46, enacts, “That the several lands and grounds so to be allotted and awarded upon the said division and inclosure to the several persons concerned, and the several messuages, lands, tenements, old inclosures, new allotments, and other hereditaments, which shall be exchanged in pursuance of this act or the said recited act, immediately after such allotments and exchanges are made as aforesaid, shall be, remain, and enure to the several persons to whom the same shall be respectively allotted or given in exchange as aforesaid, who shall from thenceforth stand and be seised and possessed thereof to such and the same uses, estates, trusts, and purposes, and subject to such and the same wills, settlements, limitations, powers, remainders, leases (except leases at rack rent) charges and incumbrances, as the several and respective messuages, lands, tenements, old inclosures, or other hereditaments, in lieu of which such allotments or exchanged premises shall be respectively made or taken as aforesaid, are now held under, subject to or liable to be charged with, or affected by, or might or would have been held under, or subject to or liable to have been charged with, or affected by, in case this act had not been made.”

W. J. Alexander for the plaintiff. The deed of November, 1818, did not convey any legal estate to the defendant; it was only an equitable agreement for conveying *allotments which were to be made to the grantor at a future time. But the legal estate in the half yard land, late Daniel [*669] Smith's, passed to the lessor of the plaintiff by the deeds of December, 1824, and, that land being taken by the commissioners under the inclosure act, the allotments in lieu of it became vested in the lessor of the plaintiff upon the making of their award, by virtue of the award, and according to the provisions of the local act, 51 G. 3, c. xxv., sects. 43 and 46, and the general inclosure act of 1 & 2 G. 4, c. 23. In this respect, the Court will give the same effect to sect. 46 of the present inclosure act, as was given to a similar enactment in *Doe dem. Sweeting v. Hellard*, 9 B. & C. 789. The clause, as was said by *BAYLEY* and *LITTLEDALE, J.S.*, in that case, must be construed liberally, so as to carry into effect the manifest intention of the legislature; and it will be held, according to the decision there, that the allotment vested, on the execution of the award, according to the legal interest at that time subsisting. Although the possession of the allotment was given to *Jonah Smith* in 1812, he could have no legal seisin of it till the execution of the award. *Farrer v. Billing*, 2 B. & Ald. 171, shows *his; although neither that case, nor any that has been found, is precisely similar

to the present. *Kingsley v. Young*, 17 Ves. 468, S. C., on appeal, 18 Ves. 207, which may be mentioned on the other side, was brought under the notice of this Court in *Farrer v. Billing*, 2 B. & Ald. 171, and can have no bearing on the present case; for, besides the particular provisions of the local inclosure act, there pointed out, the vendee, Young, who declined fulfilling his contract, on the ground that no legal title could be made to the allotment (the subject of the [*670] contract) till the commissioners should execute their award, had purchased with full notice of all the circumstances. But in *Lowndes v. Bray*, 1 Sugd. Vend. & Pur. 342, 9th ed., "where the estate was sold without any notice that it was recently allotted under an inclosure act, and it appeared that the commissioners had not made their award, and the act contained no clause authorizing a sale before the award;" Lord ELLENBOROUGH held, "that the purchaser was warranted in refusing the title." Sittings after Trin. T. 1810. And in *Cane v. Baldwin*, 1 Stark. N. P. C. 65, where a vendee, under similar circumstances, had paid a deposit, the vendor undertaking to convey the freehold estate, Lord ELLENBOROUGH held that the vendee might recover back his deposit money. [COLERIDGE, J., referred to *Doe dem. Dixon v. Willis*, 5 Bing. 441.] That case is very shortly stated, and does not appear to have undergone much consideration. *Farrer v. Billing*, 2 B. & Ald. 171, was not noticed in it; and it does not appear that the inclosure act, under which the allotment took place, may not have contained a clause giving effect to sales, like that mentioned in *Kingsley v. Young*, 17 Ves. 468; 18 Ves. 207. [COLERIDGE, J. There is another report of *Doe dem. Dixon v. Willis*, in 3 Moore & Payne.†] The case, however, is said to have been disapproved of and overruled by the Master of the Rolls in *Mortlook v. Kentish*, July 26th, 1833 (not reported). The deed of confirmation, executed in 1826, can avail nothing, if the preceding argument be correct.

Cripps, contra. Both parties claim by mortgages antecedent to the award; [*671] and the award vested a title in the defendant, prior in point of time, and preferable, to that of the lessor of the plaintiff. The allotments of *Jonah Smith*, comprehending those now in question, were put into his possession in 1812. In 1817, wishing to mortgage the ten acres two roods set out as part of his allotments, he procured from the commissioners a description of that part, which he then mortgaged in the terms of the description furnished. Under sect. 46 of the local act, he had, from the time when the allotments were made, the same right in them as in the land for which they were substituted, that is an estate of freehold: and that estate he charged with the term of 500 years to the defendant, before executing any mortgage to the lessor of the plaintiff. *Farrer v. Billing*, 2 B. & Ald. 171, does not affect the present case, because the local act there provided that, on sale of an allotment, the vendee might, after execution of the award, hold the allotted land as the vendor might have done if there had been no sale. Here, no restriction appears: and, in the present case, independently of the local act, the defendant's title is protected by stat. 1 & 2 G. 4, c. 23 (passed after the decision in *Farrer v. Billing*, 2 B. & Ald. 171), which, after reciting the inconvenience arising, because the owner of allotments under inclosure acts cannot distrain, &c., before the execution of the awards, by reason of the freehold or legal seisin not being vested in them, enacts, in sects. 1, 2, that every person to whom such allotment is or shall be made, and to whom possession is or shall have been given by order of commissioners, may distrain upon any tenant to whom he may have demised such allotment, sue for any [*672] damage done to it, or bring ejectment for recovering the possession of it, although the award shall not have been executed. A mortgagor in possession is tenant to his mortgagee; the defendant, under the last-mentioned act, might, if his interest was unpaid, have ejected *Smith* the mortgagor; a fortiori the defendant, if he had himself been in possession, might have defended an

† 3 M. & P. 24. Nothing is said there of the terms of the local act; nor does it appear that *Farrer v. Billing* was cited.

ejectment against the mortgagor or a person claiming under him, and may do so now. Whatever effect the award might have, when executed, it would operate upon the defendant's title before that of the lessor of the plaintiff.

W. J. Alexander in reply. Sect. 46 of the local act vests only the lands "to be allotted and awarded;" the mortgagor, therefore, had no legal estate to convey in the allotment now claimed, till the award was made. On the making of the award, that allotment vested in the lessor of the plaintiff, by sect. 46, and by the conveyance to him of the legal estate in the premises for which the allotment was substituted. [COLERIDGE, J. Sect. 43 enacts that the lands to be allotted to vendees, as there directed, shall be held by them in the same manner as the vendors might have held them, "from and after the execution of the said award:" but by sect. 46 the allotments there mentioned are to be, remain, and enure as that section directs, "immediately after such allotments and exchanges are made."] The object in sect. 46 probably was to prevent difficulties which the commissioners might have had in ascertaining the rights of parties at the time of making the award, where those rights were not settled according to sect. 43. The recital in stat. 1 & 2 G. 4, c. 33, s. 1, favors the view taken by the lessor of the plaintiff.

*Lord DENMAN, C. J. The lessor of the plaintiff in this case makes title under a conveyance from Jonah Smith in 1824; the defendant says [*673] that at that time he was already entitled by a conveyance in 1818, and by the local act, 51 G. 3, c. xxv. One clause, sect. 46, of that act, directs that the lands to be allotted and exchanged shall, immediately after such allotments and exchanges are made, be, remain, and enure to the several to whom the same shall be respectively allotted or given in exchange, who shall from thenceforth stand and be seised and possessed thereof to such and the same uses, estates, trusts, and purposes, and subject to such and the same charges and incumbrances, as the lands in lieu of such allotments or exchanged premises shall be respectively made or taken as aforesaid are now held under or subject to, or would have been held under or subject to if this act had not been made. The act passed in 1811; in 1812 this allotment was made to Jonah Smith; and in 1818 he conveyed to the defendant. The whole law of the case is contained in sect. 46 of the local act; it is not affected by the general act, 1 & 2 G. 4, c. 23. And I think that, under the local act, Jonah Smith had power to convey this allotment to the defendant. The defendant therefore has proved his title.

PATTESON, J. ABBOTT, C. J., says, in *Farrer v. Billing*, 2 B. & Ald. 178, "The language of the local act upon which that case" (*Kingsley v. Young*, 17 Ves. 468, 18 Ves. 207) "arose, was different from that of the act under our present consideration. The legislature may certainly, by proper words, give the seisin and legal estate upon the allotment only, and before *execution [*674] of the award. But we think the present act does not contain any words proper for that purpose, or indicative of such an intention." The forty-sixth section of the local act upon which this case turns does contain proper words for such a purpose, and indicative of such an intention. The words "so to be allotted and awarded" mean "to be allotted, and respecting which an award shall afterwards be made;" and then it is said that the premises to be allotted shall be, remain, and enure to the persons mentioned, "immediately after such allotments and exchanges are made as aforesaid;" that is, not when the allotments are marked out and completed by the award, but as soon as they are in fact made. If the enactment stopped at the words "be, remain, and enure to the several persons to whom the same shall be respectively allotted," no legal estate would pass by the allotment, under this clause; but it goes on to say, "who shall from thenceforth stand and be seised and possessed thereof to such and the same uses," &c., as the lands in lieu of which they are made. Jonah Smith was seised in fee of the property in lieu of which the land now in question was allotted. Immediately after the allotment he was seised in fee of that land, and he mortgaged it to the defendant in 1818. I do not rely upon stat.

1 & 2 G. 4, c. 23, because that passed after the deed of 1818 was executed; but I found my opinion on sect. 46 of the local act. Under that section, Smith took a legal estate in the allotment made to him in 1812, which estate he conveyed in 1818; what happened afterwards is immaterial.

WILLIAMS, J. I am of the same opinion. The case turns upon sect. 46 of [*675] the local act; and in that section *the legislature clearly exercises the power of at once giving a vested legal estate in the allotments to be made.

COLERIDGE, J. This is a narrow question on the construction of sect. 46 of the local act. It has been contended that the allotments spoken of in this section mean allotments perfected by execution of an award; but, without referring to cases, I think that, upon a mere view of the language employed in this and other sections of the act (where allotting is spoken of in a distinct sense from that of making an allotment complete by an award), the word "allotments," in sect. 46, must clearly be taken in the popular acceptance. Then, in 1812, the commissioners had made an allotment; and Jonah Smith was put into possession, was seised in fee, and might mortgage to the defendant. The construction of the act being once settled, as we have decided it, *Doe dem. Sweeting v. Hellard*, 9 B. & C. 789, and other cases which have been cited, are as favorable to the defendant as they would have been to the plaintiff on a different interpretation.

Judgment for the defendant.

[*676] *The KING v. The Inhabitants of BILLINGHAY. Dec. 18.

On a case sent from sessions, it was stated: That, on appeal against an order of removal, it appeared that the pauper was bound apprentice to a wheelwright, and served in the appelland parish under the indentures for twenty months; after which the pauper's father bought up the remainder of the time, and the indentures were cancelled, and the pauper afterwards let himself to another wheelwright, under a written agreement signed by the master, the pauper, and his father,—which was set out in the case, and by which the father, on behalf of the pauper should serve the master in his business of a wheelwright, from 8d December, 1827, to 8d March, 1830, the master paying, at the expiration of the term, 5*l*. to the pauper, and in the mean time finding him meat, drink, and lodging; the father finding him clothes, washing, and all other necessities:—that the pauper stated that he served as an apprentice; that the respondents offered evidence of conversations between the parties, before and at the time of signing the instrument, and also of an endorsement thereon, which, however, was not proved to have been on the paper when the instrument was signed; that the sessions rejected the evidence in both instances, and confirmed the order; that the order of sessions was to be quashed, or confirmed, according as this Court should, or should not, be of opinion that the agreement was one of hiring and service: Held,

- 1. That this Court was not concluded by the confirmation of the order at sessions.
- 2. That the agreement was one of hiring and service, and that the service must be understood to have been performed under the agreement.
- 3. That, as evidence, coming under the description of that which was stated to have been tendered, would in some cases be admissible, and in others not, it did not appear that the rejection was necessarily wrong.

This Court quashed the order.

ON appeal against an order of two justices, whereby Robert Lynn was removed from the parish of Asterby, in the parts of Lindsey, in Lincolnshire, to the parish of Billingham, in the parts of Kesteven, in the same county, the sessions confirmed the order, subject to the opinion of this Court on the following case.¹

The pauper was bound apprentice, by indenture, for five years, to Robert Lund of Billingham, wheelwright, and served him at Billingham under the indenture for one year and eight months. The indentures were then cancelled, the pauper's father having bought up the remainder of the time. The pauper afterwards, having first gone upon liking, let himself under a written agreement [*677] to Robert Medley, of North Ranceby, wheelwright. *The agreement was signed by the pauper's father, Robert Medley, and the pauper, and was

¹ It was stated that the case was not drawn by counsel.

in the following words:—"Memorandum, that the undersigned Robert Lynn agrees, on behalf of his son Robert Lynn, that he shall serve Robert Medley, of N. R., in his business of a wheelwright, from this time to 29th of March, 1880, the said Robert Medley paying, at the expiration of the said term, 5*l.* to the said R. L. the younger; Robert Lynn to find his son clothes, washing, and all other necessities; and Robert Medley meat, drink, and lodging." Dated 3d December, 1827. The pauper stated that he served as an apprentice.¹

The respondents proposed to give in evidence conversations between the parties before and at the time of signing the instrument; but the Court rejected the evidence. The respondents also proposed to give in evidence the endorsement on the paper within which the agreement was written; but, as it was not proved that the endorsement was on the paper at the time the agreement was signed, the Court rejected the evidence.

The order confirmed, subject to a case.

If the Court of King's Bench shall be of opinion that the agreement was an agreement of hiring and service, the order of sessions is to be quashed; otherwise, to be confirmed.

Whateley and *Whitehurst*, in support of the order of sessions. First, the contract set out was an imperfect contract of apprenticeship. The sessions must be considered to have so found: and the question was one of fact for them. It must be assumed that they believed *what the pauper said: and his [*678] service in the character of apprentice would be inconsistent with a hiring and service in the character of servant. The pauper had, in the first instance, commenced an apprenticeship: what was done afterwards was apparently for the purpose of enabling him to learn that which he would have learned under the original indentures, had they not been cancelled. At all events, the case shows that the pauper was settled at Billingham, by the service with Lund, unless there was a subsequent settlement gained elsewhere. Now the only proof of service in North Ranceby, even if there be a contract of hiring, is of service in the character of apprentice. But, next, even if the sessions were wrong in assuming this to be an imperfect contract of apprenticeship, the order cannot be quashed, but the case must go back, on account of the rejection of the evidence. The conversation might have explained the transaction, so as to show that the parties really contemplated teaching and learning. Having that view, they might have framed the contract as it now stands for the purpose of evading the stamp laws. Anything not contradictory to the instrument, but explaining its effect by collateral matter, might be shown by parol evidence; *Rex v. Laidon*, 8 T. R. 379; *Rex v. Highnam*, 1 Bott, p. 522, pl. 651 (6th ed.); *Rex v. Northwindingfield*, 1 B. & Ad. 912; *Rex v. Llangunnor*, 2 B. & Ad. 616; *Rex v. Cheadle*, 3 B. & Ad. 838; *Rex v. Scammonden*, 3 T. R. 474. It is common to cross-examine the subscribing witness to an instrument. If, upon any supposition, parol evidence was admissible, the rejection was wrong. Further, the respondents, when the written contract was produced, *had a *prima facie* right to re-[*679] quire that all the writing which appeared upon it should be read: although, if it were proved that the endorsement was made at a time subsequent to that of the execution, such endorsement could not be evidence to vary the contract.

J. T. White, *contra*, was stopped by the Court.

Lord DENMAN, C. J. I cannot see any ground of doubt. We must deal with this case as we find it. The sessions have confirmed the order, subject to our view of the effect of a written document. Whether there be a hiring and service is of course a question of fact: but here it is a fact which depends upon the effect of an instrument in writing; and the sessions may ask for our opinion, whether such an instrument create a contract of hiring or not. I think this does create a contract of hiring; it contains no provision for learning or teaching. Then we cannot take upon ourselves to say that the sessions were certainly

¹ It appears to have been assumed on the argument that the service was for a year, and was performed in North Ranceby.

wrong in rejecting evidence of the conversation which took place at the time of the agreement. They do go into some matters besides the agreement; for they state a preceding agreement, and the pauper's own statement as to the character in which he served. The evidence of conversation may or may not be admissible according to its nature: but it is too much to say that all which took place at the time is necessarily evidence. If the conversation showed a fraud, by a misstatement of the contract in the instrument, it would be evidence. If it appeared that the evidence was tendered under such circumstances, we should have had to say, not what the effect of the contract is, but whether the evidence was properly rejected. [*680] *But, as the case stands, we cannot assume circumstances showing that the rejection was wrong. Nothing, therefore, is shown to have been wrong, except the interpretation which the sessions put upon the contract.

PATTESON, J. The sessions have determined the law and the fact. We, of course, do not decide on the fact; but we are to give our opinion on the instrument which the sessions have sent to us. Whether they were wrong or not in rejecting the evidence offered is, that it consisted of conversations, of some kind, before and at the time of signing the instrument. Some conversations would be admissible: others would not: we can pay no attention to such a statement. As to the rejection of the endorsement, the sessions give their reason; the endorsement could have nothing to do with the instrument. Then we are to look at the instrument itself. On that I am clearly of opinion that the contract was one of hiring and service, and that the sessions were wrong in their construction of it.

WILLIAMS, J. The sessions have left the effect of the contract to us. The rest of the circumstances are either not before us, or disposed of by the case. We cannot assume that the evidence offered by the respondents was such as ought to have been received: some evidence of this kind is so, and some is not. The origin of the cases in which parol evidence has been held admissible was *Rex v. Highnam*, 1 Bott, p. 522, pl. 651 (6th ed.), where the evidence showed an attempt to evade the stamp. But here the case does not show what the evidence was. I cannot admit that all questions may be put, on cross-examination, to a subscribing witness. As to the point which really is before us, I agree that this is a contract of hiring and service. The sessions have thought otherwise, and ask us whether they are right or wrong. I think they are wrong.

COLERIDGE, J. I am as adverse as any one can be to taking away questions of fact from the quarter sessions, or receiving such questions from them. But in cases where they act as judges, if they refer the points, on which they so act, to us, we cannot help reviewing their decision. Here is a written instrument, on which the sessions ask our opinion. It cannot be said that they have found the fact; they find it only on a particular view of the instrument. The question therefore comes before us, whether that view was right; and I think it was not right. It is argued that no service, in the character of servant, appears. That, however, is not so. If the pauper's assertion implies that, we must take the assertion together with the reason for it. He says that he served as apprentice. It does not follow that the sessions adopted his evidence. He did not perform a service which, when the instrument is rightly interpreted, appears to be a service under a contract of hiring. As to the rejection of the evidence, I cannot agree that every endorsement, or all contemporaneous conversation, is admissible in evidence. In the cases cited, the parol evidence either explained the written instrument, or added independent facts, such as a consideration not apparent on the instrument, which was the case of *Rex v. Northwingfield*, 1 B. & Ad. 912. [*682] So in **Rex v. Llangunnor*, 2 B. & Ad. 616, and *Rex v. Cheadle*, 3 B. & Ad. 833, the evidence was not given by way of interpreting the terms of the contract, but to show what the actual consideration was.

Order of sessions quashed.

The KING v. The Inhabitants of BOBBING. *November 16.*

Pauper, upon a vacancy of the offices of parish clerk and sexton of B., was requested by the rector to perform the duty of clerk for a Sunday, which he did; and the rector afterwards said to him, "I shall appoint you my regular clerk and sexton, and to follow me in marriages and funerals." Pauper accordingly entered upon the office. Soon afterwards, two parishioners objected to what the rector had done, who answered that he should persist. The parish were in the habit of paying a salary to the parish clerk and sexton; the overseer refusing to pay the pauper, the rector threatened him with legal proceedings, upon which the salary was paid, and the vestry afterwards increased it. Pauper executed the office, and received the emoluments, residing in B., for several years; Held, that he was well appointed, and gained a settlement in B.

ON appeal against an order of two justices, whereby Henry Smart was removed from the parish of Barming to the parish of Bobbing, both in Kent, the sessions confirmed the order, subject to the opinion of this Court on the following case.

The pauper, being settled in Bobbing, went, about Michaelmas, 1797, to reside in Barming, and continued to reside there until removed by the present order. In 1811, the offices of parish clerk and sexton of Barming became vacant; and Mr. Noble, who was then rector of the parish, sent for the pauper on a Sunday in that year, and requested him to perform the duty of clerk for that day. The pauper did so; and Mr. Noble, on coming out of the desk, said to the pauper, "I shall appoint you my regular clerk and sexton, and to follow me in marriages and funerals." The pauper thereupon, without anything further being said or done, entered upon the execution of the duties of the said offices, and *continued to perform all the duties, and to receive the emoluments, from: [*683] thence until 1833. Soon after the pauper entered upon the offices, two of the principal inhabitants objected to what the rector had done, inasmuch as the pauper was not a settled parishioner of Barming; but the rector said the pauper was the fittest person he could find, and that he should therefore persist in what he had done.

A salary of one shilling per week was attached to the offices, and had been paid by the parish to the person who had previously filled them; and the pauper applied for this at the end of his first year. The overseer, to whom he applied, at first refused payment, assigning as a reason that the pauper was not settled in the parish: but, the rector having threatened to take legal proceedings against the parish officers, the salary was paid to the pauper by the overseer, and continued to be paid by the parish to him for four or five years without any objection on their part. At the end of that period, the pauper applied to the parish for an increase of salary; and, the subject having been taken into consideration at a vestry meeting, it was at such vestry meeting agreed to raise the salary to 1s. 6d. per week; and at this rate the pauper was paid during the remainder of the time he served.

The question for the opinion of this Court was, whether, under the above circumstances, the pauper gained a settlement in Barming.

D. Pollock, in support of the order of sessions. If the pauper was properly appointed parish clerk, the order cannot be supported. In *Rex v. Stogursey*, 1 B. & Ad. 795, the pauper held the office of parish clerk for eleven years; *but, as it did not appear how he came into office, and as the appointment appeared to be in the vicar, this Court held that there was not even [*684] a colorable appointment, so as to give a settlement under stat. 3 & 4 W. & M. c. 11, s. 6, assuming the office to be an annual one within that statute. Here, all that takes place is, that the rector declares his intention to appoint hereafter: the words "shall appoint" cannot constitute a positive act of appointment, especially without a formal notice to the parishioners. [PATTERSON, J. Some parishioners understood it as an appointment, and remonstrated with the rector, — — — — — he should persist. Then the parish pays the salary: and increases it. — — — — — ay that there was not an appointment, and notice of it to the parish?]

Bodkin, against the order, referred to 3 Burn's Eco. Law, 66, 8th ed., Parish Clerk, 3, and to canon 91, there cited as follows: "No parish clerk upon any vacation shall be chosen within the city of London or elsewhere, but by the parson or vicar; or where there is no parson or vicar, by the minister of that place for the time being: which choice shall be signified by the said minister, vicar, or parson, to the parishioners the next Sunday following in the time of divine service." And as to the office of sexton, he referred to *Rex v. Liverpool*, 3 T. R. 118. He was then stopped by the Court.

Lord DENMAN, C. J. *Gattan v. Milwich*, 2 Salk. 536, shows that the office of parish clerk gives a settlement; and that case has not been overruled. And this was a distinct appointment to the office.

[*685] *PATTESON, WILLIAMS, and COLERIDGE, Js., concurred.

Orders quashed.

The KING v. The Inhabitants of HOLBEACH. Nov. 16.

A pauper being removed to a parish as settled there by hiring and service, the parish gave notice of appeal, stating, as the ground (pursuant to stat. 4 & 5 W. 4, c. 76, s. 81), that, the pauper, at his hiring, stipulated to have two days' holidays at Spalding club feast in July; and that he had such holidays during his year of service. On the hearing of the appeal, the pauper (called for the respondents) proved on cross-examination that he, at his hiring, bargained for one day's holiday to go to Holbeach fair, and had it during the year; but that he did not bargain for, or have, any holiday at Spalding club feast. The sessions having found an exceptive hiring, subject to the opinion of this Court whether evidence as to the one day's holiday was admissible, Held, that, under the notice given, such evidence could not be received; and the order founded upon it was quashed.

On appeal against an order of justices, whereby George Hobson was removed from the parish of Holbeach, in the parts of Holland, in Lincolnshire, to the parish of Spalding, in the same parts and county, the sessions quashed the order, subject to the opinion of this Court on a case, the material parts of which were as follows:—

The grounds of removal, as set forth in the examination of the pauper, a copy of which was sent to the appellants with the order for his removal, pursuant to stat 4 & 5 W. 4, c. 76, s. 79, were: That about three years ago he was hired by John Boston, of the said parish of Spalding, farmer, for one year, at 8l. 15s. wages, and served J. B. under that hiring the whole of the same year in Spalding. The notice of appeal stated the grounds thereof (pursuant to section 81 of the said act) as follows:—That, at the time of the pauper contracting to serve J. Boston, as mentioned in the copy of examination, and before the completion of their said bargain, and before any earnest money was paid, the pauper stipulated and agreed with J. Boston "that he should, out of his year's service, be allowed [*686] and have *two days' holidays at Spalding club feast in the month of July; and that the said pauper G. H. was allowed and did take and absent himself from his said master's service during the said two days accordingly; whereby he did not gain any settlement in our said parish of Spalding." The pauper proved the hiring as above stated, and a service in Spalding; but, upon cross-examination for the appellants, he admitted that at the time of hiring he bargained for one day's holiday to go to Holbeach fair, and that he had such holiday in pursuance of the said bargain; but he denied that he made any bargain to have holidays at Spalding club feast; and in fact he had not any such holidays. The respondents contended that, as the holiday for Holbeach fair formed no part of the grounds of appeal, the appellants could not go into it. The sessions, however, being of opinion that it might be gone into, and that the hiring, as proved, was exceptive, quashed the order, subject to the opinion of this Court, whether, by sect. 81 of stat. 4 & 5 W. 4, c. 76, and by the grounds of appeal as above set forth, they were precluded from receiving such evidence; if they were, their order was to be quashed.

Amos, in support of the order of sessions. It must be assumed that there was not, in the opinion of the sessions, any surprise upon the respondents. The sessions may have gone too far in their ruling; but, if they have been satisfied, on the circumstances as they appeared before them, that they ought to arrive at such a conclusion, the case is probably not one in which this Court will review their decision.

*Lord DENMAN, C. J. We must hold the parties strictly to their notice. If anything has been untruly stated by which the respondents [*687] may have been misled, the statute has not been complied with. The objection having been taken must prevail.

PATTESON, WILLIAMS, and COLERIDGE, Js., concurred.

Order of sessions quashed.

Whateley was to have argued against the order of sessions.

The KING v. The Inhabitants of KELVEDON. Nov. 16.

The parish officers of K., intending to remove a pauper to C., sent to the officers of the latter parish a notice of chargeability, the order of removal, and the pauper's examination. The examination stated that the pauper was born at K., where his father then resided; but that the father then, and until his death, belonged to C., as the pauper had heard and believed; and that the pauper had heard him say that he was a certificated man from C. The officers of C. gave notice of appeal on the ground that the pauper's father never was settled in or certificated from C. On the hearing of the appeal, the respondents offered evidence that the pauper's father was settled in C. by apprenticeship.

Held that, under stat. 4 & 5 W. 4, c. 76, s. 79, it was not necessary that more specific information should have been given of the grounds of removal, to render the above evidence admissible.

On appeal against an order of justices removing James Bird from the parish of Kelvedon in Essex, to the parish of Colsterworth, in Lincolnshire, the sessions quashed the order, subject to the opinion of this Court on the following case.

The pauper having, after November 1st, 1834, become chargeable to Kelvedon, an order of magistrates was obtained by the overseers of Kelvedon for his removal to Colsterworth; and, in compliance with stat. 4 & 5 W. 4, c. 76, s. 79, notice in writing of the pauper being so *chargeable, accompanied [*688] by a copy of the order of removal, and by a copy of the examination upon which such order had been made, was sent by the post by the overseers of Kelvedon to the overseers of Colsterworth. The examination was as follows:—

“Essex. The examination of James Bird, who saith,” &c., “I was born at Kelvedon, in the said county, where my father then resided, but belonged to the parish of Colsterworth in Lincolnshire, and continued to belong there until his death as I have heard and believe; and I have also heard him say that he was a certificated man from the said parish of Colsterworth.” “That I have never done any act whereby to gain a settlement in my own right, to the best of my knowledge and belief:” &c.

(Signed)

“JAMES BIRD.”

The above documents were duly received by the overseers of Colsterworth, who gave notice of appeal to the overseers of Kelvedon, and sent with such notice a statement of the grounds of appeal, as directed by stat. 4 & 5 W. 4, c. 76, s. 81; which statement was as follows:—That the father of James Bird never was legally settled in Colsterworth, nor was there ever a certificate granted by Colsterworth owning the said pauper's father to be legally settled there, as in the examination stated: And take notice that at the trial of the appeal we mean to avail ourselves of both or one of the said grounds in support of the said appeal.

The appeal came on for trial at the Essex Easter sessions, 1835; and the respondents proposed to prove a settlement gained by the pauper's father in Col-

sterworth by apprenticeship; but the appellants objected that the respondents could not, under the 81st section of the statute, give evidence of any other grounds of removal *than those set forth in the order of removal and examination; and that the settlement of the pauper's father in Colsterworth by apprenticeship was not stated in either document, as a ground of removal. The Court of Quarter Sessions, upon this, decided against receiving the evidence, and quashed the order of removal.

If this Court should be of opinion that the respondents were not at liberty to give such evidence, the order of sessions was to be confirmed; otherwise to be quashed, and the appeal sent back to be tried.

Sir *W. W. Follett* and *Ryland*, in support of the order of sessions. The question which the appellants came prepared to try was, whether or not the pauper's father resided in Kelvedon under a certificate from Colsterworth. The statement in the examination, that the father belonged to Colsterworth, and the denial, in the notice of appeal, that he was ever settled there, raise no specific question ulterior to that upon the certificate. The respondents could not, upon that statement and denial, consistently with stat. 4 & 5 W. 4, c. 76, sects. 79 and 81 (proviso), go into evidence of a particular kind of settlement, not pointed out by the order of removal and the examination of the pauper. [Lord DENMAN, C. J. What more do you say the respondents could have done for the information of the appellants? COLERIDGE, J. The respondents send the pauper's examination, but they cannot alter its words. It is different with the appellants; they state the grounds of appeal in their own language.] The meaning of the enactment in sect. 79 is, that those who send an examination to parties whom they charge with a pauper should, on taking such examination, have put proper questions, and have obtained particular information of the settlement *which the pauper claims. The late case of *Rex v. The Justices of Cornwall*, ante, 134, mentioned in Archbold's Act for the Amendment of the Poor Laws, &c., p. 124, note (70), 4th ed., may seem to countenance a different practice; but the general mode of statement here insisted upon as sufficient would, if it prevailed, render sect. 79 comparatively useless. [COLERIDGE, J. Suppose the pauper had merely said, in his examination, "my father was settled in Colsterworth;" do you say that no evidence of settlement could have been gone into?] It could not be said, in such a case, that there was an examination. A mere assertion of the pauper, not alleging any ground of knowledge, could not be noticed as a statement.

Knox (with whom was *Turner*) contrâ. The appellants, by sect. 81, are to state their grounds of appeal; but sect. 79 does not throw the same obligation upon the respondents, as to the grounds of removal. (He was then stopped by the Court.)

Lord DENMAN, C. J. The provisions of the act might have been fuller, and might have imposed on the respondents the same duty, as to statement of grounds, which is cast upon the appellants. But this has not been done. The act, by sect. 79, requires only that the removing parish shall send to the parish receiving the pauper a notice of chargeability, with copies of the order of removal and the pauper's examination. If the examination has been properly taken, it will sufficiently show the ground of removal. But this is not the statement of the respondents. The appellants are differently *situated; they [*691] know the grounds of their appeal, and can state them in their own manner. The objection here raised is a criticism on the sufficiency of the examination, not upon anything in the conduct of the respondents. The order of sessions therefore is erroneous.

PATTESON, J. I am of the same opinion. And the appellants have treated these documents as conveying the requisite information.

WILLIAMS, J. We have nothing to do with the question whether the examination was properly conducted or not. The provisions of the act have been so far complied with, that a copy of the examination has been sent, with the order

of removal and notice of chargeability. Then the respondents offer particular evidence of that which is generally alleged in the examination, namely, that the pauper's father belonged to Colsterworth. I think they might give such evidence.

COLERIDGE, J. There is a difference, purposely made, as I imagine, in the language of sects. 79 and 81, as to respondents and as to appellants. Care is taken to prevent appellants from being prejudiced for want of information, by the enactment, in sect. 79, that the pauper shall not be removed until twenty-one days after the notice, or, if there be an appeal, until such appeal shall have been heard, or the time for prosecuting it have expired; and, further, by the provisions of sect. 80, giving appellants access to the pauper for the purpose of examining him as to his settlement; so that, if the statement furnished to them is too general, they may ascertain what is meant. They then draw up their notice, in *their own language, with a full knowledge of the grounds [*692] they mean to rely upon, and may be expected to state them with particularity. Order of sessions quashed. Case to be reheard.

The KING v. The Trustees of GREAT DOVER STREET ROAD. Nov. 16.

Trustees were appointed under a local act for making a road, and they and their successors were empowered to purchase lands, which should be conveyed to and vest in them, and to lay such lands into the intended road, to take tolls thereon, and to apply the receipts towards paying the interest of a sum advanced by certain shareholders, and to the putting the act in execution, and to the repayment of the principal advanced. By a subsequent act their powers were continued; and it was enacted that no person should be eligible as a trustee unless possessed of five shares in the capital stock raised for making the road, and a penalty of 100*l.* was imposed on any person acting without such qualification. The surplus of the tolls (after making certain other payments) was to be applied in paying the shareholders interest, and, ultimately, their principal; and the act was to expire when the principal and interest were paid off, or, if they were not sooner discharged, in thirty-one years.

Stat. 3 G. 4, c. 126 (the provisions of which, except where expressly altered or repealed, extend, by sect. 4, to all turnpike acts made or to be made) enacts, by sect. 66, that no person, acting as trustees of a turnpike road, shall receive any money to his use or benefit out of the tolls, under a penalty of 100*l.* Sect. 51 enacts, that no tolls to be taken by the trustees of any turnpike road, nor any person in respect thereof, shall be rated to the poor.

Held that, although the trustees of the above road were shareholders and owners of the soil as before stated, and notwithstanding the contradiction between the above clauses in the general and local acts (with other alleged inconsistencies), the road was turnpike within the provisions of the general act, and the trustees not liable, in respect of it, to a rate for "land upon which they had made a road, and in respect of which they received toll."

ON appeal by the above trustees,¹ at the Surrey sessions, Easter, 1833, against a certain rate for the relief of the poor of St. Mary, Newington, the sessions confirmed the rate, subject to the opinion of this Court on a special case, which was, in substance, as follows:—

The appellants were rated as the trustees under an act of parliament passed &c., (10 G. 4, c. cxiii., local and personal, public), for "land upon which they have made a road, and in respect of which they receive tolls." By stat. 49 G. 3, c. clxxxvi. (local and personal, public), *for making and maintaining [*693] a road from the borough of Southwark to the Kent Road in Surrey, after reciting that the making and maintaining of a commodious communication from near St. George's Church in the Borough, to near the Bricklayer's Arms public house in the Kent Road, Surrey, would be attended with great advantage to the inhabitants of the Borough and places adjacent, and to the public in general, certain persons were appointed trustees to execute the act; and they and their

¹ For some previous proceedings in this case, see *Rex v. The Justices of Surrey*, page 701, note 1, post.

successors were empowered to receive certain tolls, and were directed to apply the moneys, received under the act, towards payment of the interest of a sum of money advanced by shareholders or subscribers for the purpose of carrying the act into execution, to the putting of the same in execution, and to the repayment of the principal sum advanced. Powers were also given them, for the purpose of making and improving the road, to treat for and purchase houses and land, and to cause the houses to be pulled down, and the ground whereon they stood, and the other ground, &c., so purchased, to be laid into the said road; and powers were given to the owners, &c., of lands or sites of houses, to convey them to the trustees and their successors, which conveyance should immediately vest the said lands, sites, &c., in the said trustees, &c. It was also enacted, that the trustees should annually pay to St. Mary's Newington, the amount of rates payable, at the time of passing the act, in respect of the houses to be pulled down, such payments to cease when enough houses should have been built upon the road, and rated in the respondent parish, to make up an amount of rate equal to that imposed on the houses which should be pulled down. The [*694] act, and the tolls thereby granted, were to continue for *twenty-one years. This act was amended by a statute, 51 G. 3, c. clixv. (local and personal, public), not material to the case.

By stat. 10 G. 4, c. cxviii. (local and personal, public), for continuing certain powers to the said trustees, after reciting the former acts, and reciting also that 34,648*l.* 12*s.* 4*d.* of the subscriptions made in pursuance of those acts had been expended for the purposes therein mentioned, but that the tolls received upon the said road had not been sufficient, after defraying the necessary charges and expenses, to pay the subscribers in any instance more than 3*l.* 15*s.* per cent. interest, &c., so that the trustees had been unable to repay any principal, and that, for the purpose of enabling the trustees to continue paying interest or dividends, &c., it was necessary that the term formerly granted should be further continued, &c., and other powers granted, &c., the recited acts were repealed and certain persons, some of whom were the then trustees under the former acts, and their successors, were appointed trustees for executing this act; but, by sect. 3, no person was to be eligible as such trustees unless (in addition to other property specified) he were possessed of or entitled to five shares at least in the capital stock raised for making the said road, and in actual receipt of the interest and dividends. A penalty of 100*l.* was imposed on any person acting as a trustee without being duly qualified.

The act also empowered the trustees to take certain tolls, but gave power to the quarter sessions to examine the accounts, and to order that the tolls should cease, if it should appear to them that the purposes of the act had been carried [*695] into effect: and (by sect. 48) the tolls were *to be applied, first, in paying the expenses of obtaining the act, in continuing, supporting, &c., the toll-gates, bars, &c., and in paying the salaries of officers and servants; and then the trustees were empowered and directed out of the surplus to pay, until the sums subscribed for making the said road should be returned to the persons entitled thereto, 5*l.* per cent. interest per annum upon all principal sums subscribed; and they were then to apply the residue of the moneys arising from the said tolls in repaying to the several subscribers the moneys respectively subscribed or contributed towards making the said road, by virtue of the shares in the said road belonging to such subscribers respectively, and for no other use or purpose whatsoever. And it was enacted (by sect. 49) that, when and as often as the surplus of the tolls applicable to the repayment of any part of the said sum of 34,648*l.* 12*s.* 4*d.* should amount to 500*l.*, the trustees at their next meeting should decide by lot to which of the subscribers of and towards the said 34,648*l.* 12*s.* 4*d.* the share to be paid off should belong; and (by sect. 86) that, so soon as the 34,648*l.* 12*s.* 4*d.* should be paid off, all the tolls should cease and the toll-gates, &c., be taken down and the materials sold, and the money applied to the purposes of the act, and from and immediately

after such sale the powers granted should cease, and the act become void as if repealed; provided that, in case the said sum should not be wholly repaid, the act should continue in force for thirty-one years, and from thence until the end of the then next session of parliament and no longer.

The trustees under stat. 49 G. 2, c. clxxxvi., obtained conveyances, and took possession of land and buildings, *made the road, and erected toll-bars; [*696] and they and the present trustees have received the tolls. Before the making of the rate in question, new houses were built along the line of road in place of those pulled down, paying rates to St. Mary, Newington, more than equal to those charged upon the former houses. The former trustees repaired the road; but, since the passing of a paving act, 11 G. 4, c. xlv. (local and personal, public), the necessary repairs have been done by the commissioners under that act, who have laid rates, in respect of such repairs, upon the inhabitants of St. Mary, Newington, occupying premises on the line of the road in question.

The total number of shares subscribed for is 492, of which the trustees hold 259. The entire amount of tolls ever received has not been sufficient, after deducting necessary expenses, to pay off any part of the principal sum subscribed, or to keep down the interest at the rate of 5*l.* per cent., but the whole principal is now due, and there was due, at the end of 1832, 159*l.* 16*s.* 1*d.* for arrears of interest at 5*l.* per cent. The case then stated the amount of the annual excess of receipts over the expenditure upon the road from June, 1829, to December, 1831; and the amount of interest or dividends retained by the trustees on their own shares in 1830 and 1831. By the rate in question the trustees were assessed upon the total profits for the year ending December, 1831.

The grounds of appeal were: 1. That the trustees were not liable to be rated at all, not being the beneficial occupiers of any property within the parish. 2. That they were expressly exempted from rates by stat. 3 G. 4, c. 126, and particularly sects. 4 and 51, and *by stat. 4 G. 4, c. 95, and particularly, [*697] sect. 31.¹ Thirdly, that, if rateable, they ought to be rated only upon the average annual amount of interest retained by them in respect of their own shares.

Thesiger and Chambers, in support of the order of sessions, contended, as to the first point, that the appellants were beneficial occupiers, according to *Rex v. The Hull Dock Company*, 5 M. & S. 394, and *Rex v. Barnes*, 1 B. & Ad. 113; and they distinguished the case from *Rex v. Liverpool*, 7 B. & C. 61, and *Rex v. The Trustees of the River Weaver Navigation*, 7 B. & C. 70, note (c), in which cases the persons charged as beneficial occupiers could not receive any profit. As to the second point, the intention of stats. 3 G. 4, c. 126, s. 51, and 4 G. 4, c. 95, s. 31, was to exempt the trustees of turnpike roads which were, properly speaking, public, not *persons who receive the tolls for their [*698] own benefit, and are executing a private trust. The provisions of stat.

¹ The General Turnpike Act, 3 G. 4, c. 126, s. 4, extends the provision of that act to all acts then in force, or thereafter to be passed for making, &c., or maintaining "any turnpike road or roads in that part of Great Britain called England, save and except where any other commencement is particularly directed by this act, and as to such enactments, provisions, matters and things as shall be expressly referred to, and varied, altered, or repealed by any such act or acts as shall be hereafter passed."

Sect. 51 enacts, "that no tolls to be taken at any gate erected or to be erected by the trustees or commissioners of any turnpike road, nor toll-house erected or to be erected for the purpose of collecting the same, nor any person in respect of such tolls or toll-house, shall be rated or assessed towards the payment of any poor's rates, or any other public or parochial levy whatsoever."

Stat. 4 G. 4, c. 95, s. 31, enacts, "that no tolls or penalties for overweight to be taken at any house or weighing machine erected or to be erected, or adjoining to any turnpike road, nor any person whatsoever in respect of such tolls or penalties, or house or building as aforesaid, shall be rated or assessed towards the payment of any poor's rates, or any other public or parochial rate or levy whatsoever."

10 G. 4, c. cxiii., set out in the case, are in several instances irreconcilable with those of stat. 3 G. 4, c. 126. Thus sect. 61 of the latter act would make all the justices of the country joint trustees with the trustees of the road. Stat. 10 G. 4, c. cxiii., s. 3, fixes much lower qualifications as to landed and personal property, for a trustee, than those stated in 3 G. 4, c. 126, s. 62; and it requires that every trustee shall hold five shares in the capital stock of the trust, under a penalty of 100*l.* if he act without that qualification; whereas stat. 3 G. 4, c. 126, s. 65, enacts that no person shall receive any money to his use or benefit out of the tolls, while acting as trustee, under a penalty of 100*l.*; yet the provisions of this latter act are not "expressly altered or repealed" by those of the local act. The only mode of reconciling this apparent inconsistency (and others which occur in the two acts) is to hold that a road under the circumstances stated in this case is not a turnpike road contemplated by the general act. The mere fact that power is given to form a road over certain land, and erect toll-bars, does not make such a road turnpike, or a proper subject of that uniform management which it was intended, by stat. 3 G. 4, c. 126, to establish throughout the kingdom, and which must relate to public roads, properly so called. On a public turnpike road, as *LAWRENCE, J.*, says, in *Rex v. The Proprietors of the Staffordshire and Worcestershire Canal Navigation*, 8 T. R. 350, "the tolls are paid for the benefit of the public, and not for *the use of any individuals."

[*699] *COLERIDGE, J.* When a turnpike road is made with borrowed money, and the lenders receive interest out of the tolls, those tolls are paid for the benefit of individuals.] At all events, trustees and commissioners having themselves an interest in the road stand in a different situation. [*COLERIDGE, J.* Does not a mortgagee, who has lent his money and taken the security of the road, stand in the same situation as a shareholder? Suppose he has taken possession of the toll-houses?] A mortgagee of the tolls is owner of them, but not of the lands and tolls as these trustees are. If indeed he takes the toll-houses, he may be exempt from rate as to them, by the express words of stat. 3 G. 4, c. 126, s. 51. Trustees of a turnpike road generally have no beneficial interest. [*PATTESON, J.* Your argument would almost show that sect. 51 was unnecessary. *COLERIDGE, J.* How are the trustees in this case occupiers more than the trustees of an ordinary turnpike road?] If other trustees have the land vested in them they occupy, but not beneficially. All trustees would be rateable, if they occupied, and also derived a profit. Here they are, and are required to be, shareholders. (The argument on the third point is rendered immaterial by the decision on the second.)

D. Pollock, Barnewall, and Channell, contra, were not heard.

LORD DENMAN, C. J. This case has been ingeniously argued; and extraordinary consequences may be shown to result from the different provisions of the [*700] general and *local acts. But we cannot doubt that this is a turnpike road in the common sense and ordinary legal interpretation. And, if so, the enactment of 3 G. 4, c. 126, s. 51, is express, that no tolls to be taken at any gate erected by the trustees of any turnpike road, nor any person in respect of such tolls, shall be rated to the poor. If any difficulty had arisen as to the construction of this particular enactment, as compared with those of the other statutes, we might have been called upon to look into the question more minutely. But the difficulties suggested regard other provisions, into which we are not at present required to examine. The order of sessions must be quashed.

PATTESON, J. I am of the same opinion. The whole question before us is, whether this be or be not a turnpike road. If it be, the provisions of the general act must be applied, as far as they can. Whether all the provisions of the general act could be enforced consistently with these local acts, we need not now inquire.

WILLIAMS, J., concurred.

COLERIDGE, J. I am of the same opinion. There has been much argument as to the situation of these appellants; other turnpike trustees, as it has been

contended, exercising a mere trusteeship, whereas these have a beneficial occupation. But, if a mortgagee were to bring ejectment and take possession of the toll-house and tolls, it could not be said that he was not a beneficial occupier, and yet he would come within the direct *words of the exempting clause, stat. 3 G. 4, c. 126, s. 51. Order of sessions quashed.¹ [*701]

¹ The following decision took place on a preliminary point in this case.

The KING v. The Justices of SURREY. Jan. 30, 1833.

By a local act it was provided that, if any person should think himself aggrieved by certain assessments, he might appeal to the quarter sessions, first giving notice, and entering into recognisance to prosecute such appeal. By another act, giving powers to certain road-trustees, it was enacted, that they might sue and be sued in the name of any one or more of them; that no action or prosecution so commenced should abate by the death, &c., of such trustee; and that such trustee, in whose name any action or suit should be commenced or prosecuted in pursuance of the act, should be reimbursed his costs thereby incurred, and also the costs of prosecuting any indictment or other proceedings whatsoever, commenced or prosecuted against any person by order of the trustees.

A single trustee gave notice of appeal against a rate, beginning, "I, A. B., one of the trustees, &c., for and on behalf of myself and the others of the said trustees, hereby give you notice, that an appeal will be entered and prosecuted, on behalf of the said trustees, against a certain rate," &c. He also entered into a recognisance (in which no other trustee joined), with the condition, "that the said A. B., or the trustees appointed under a certain act, &c., do appear at the next general quarter sessions, &c., and prosecute an appeal, &c., and abide the order," &c. It did not appear whether A. B. was or was not authorized by the trustees to take these steps, but they had made no disclaimer.

Held, that there was a sufficient notice and recognisance within the first-mentioned statute; and a mandamus issued commanding the sessions to hear the appeal.

A RULE was obtained this term, calling on the above justices to show cause why a mandamus should not issue commanding them to enter continuances upon, and hear, the appeal of the trustees of the Great Dover Street Road against a rate (the same which is mentioned in the above case). The circumstances were as follows.

At a meeting duly held, the trustees resolved to appeal against the rate, and in pursuance of that resolution, Charles Appleby Hopkins, one of the trustees, acting (as their clerk now stated) for himself and the rest of the trustees, gave notice of appeal, beginning as follows:—"I, C. A. Hopkins, one of the trustees acting under and by virtue of an act of parliament, &c., for and on behalf of myself and the others of the said trustees, do hereby give you and every of you notice that, at, &c., an appeal will be entered and prosecuted on behalf of the said trustees against a certain rate, &c., and that the reasons and grounds of the said appeal are, that the said trustees are not liable," &c. He also entered into recognisance with two sureties, conditioned as follows:—"That the said C. A. H., or the trustees appointed under and by virtue of a certain act, &c., do appear at the next general quarter sessions" for the county of Surrey, on, &c., "and then and there prosecute an appeal against a certain rate, &c., whereby the said trustees are rated and assessed in the sum of 1150*l.* in respect of land upon which the said trustees have made a road, and in respect of which tolls are payable, and that he the said C. A. H., or the said trustees, do abide the order thereon, and do pay such costs as shall be awarded by the justices," &c.

*By statute 54 G. 3, c. cxiii. (local and personal, public), repealing a former [*702] act relative to the poor rates of St. Mary, Newington, and granting other powers in lieu thereof, &c., it was enacted, in sect. 82, "That if any person or persons shall think himself, herself, or themselves aggrieved by any such rate," &c., he, she, or they may appeal to the next general or quarter sessions for Surrey which shall happen next after the expiration of fourteen days, &c., first giving ten days' notice, &c., and entering into a recognisance in 20*l.*, with two sufficient securities, conditioned for prosecuting such appeal, and to abide the order thereon, and to pay such costs, &c.

By statute 10 G. 4, c. cxiii. (mentioned in the case above reported) sect. 2, twenty-eight persons and their successors, being duly qualified, and to be elected as was after-mentioned, were appointed the trustees for putting the act in execution; and it was enacted that "all and every the powers, authorities, directions, matters, and things by this act given to or directed to be done by or before the said trustees, may be done and executed by or before any five or more of them," and shall be of the same force as if done by all. Sect. 5 enacted that the trustees should and might "sue and be sued in the name of any one or more of them;" that no action or prosecution to be brought or commenced

by or against them, or any of them, by virtue of the act, in the name of any one or more of them, should abate or be discontinued by the death or removal of such trustee, or by any act of his without the consent of the said trustees, &c.; and that every such trustee in whose name any action or suit should be commenced, prosecuted, or defended in pursuance of the act, should be reimbursed out of the moneys to be raised by virtue of the act, all costs to which he should be put by the event of such proceedings by reason of his being plaintiff or defendant, and also the costs of prosecuting any indictment or indictments, or other proceedings whatsoever, against any person whomsoever by the order of the trustees.

The appeal being called on at the sessions, the recognisance was objected to on the ground after stated; and the Court, thinking the objection valid, refused to proceed with the appeal.

Thesiger and *Tidd Pratt* now showed cause. The condition of the recognisance is, that Hopkins, or the trustees, shall prosecute, and abide the order of sessions. The notice of appeal stated that the trustees would prosecute. Hopkins individually could not, for he was not a person thinking himself aggrieved, within the meaning of stat. 54 G. 3, c. cxlii. s. 82. [DENMAN, C. J. The act does not require that he should be personally aggrieved.] There was nothing to show that Hopkins's appeal was that of the trustees. If he, as an individual trustee, may prosecute an appeal, then each of the others may. If the grievance is that of the whole body of trustees, the respondents are entitled to such a recognisance as will bind the property of that body. The recognisance of this [*703] party cannot. Stat. 10 G. 4, c. cxlii. s. 5, enables the trustees to *sue or be sued in the name of any one or more of them, and speaks of actions or prosecutions to be so brought or commenced; but there is nothing there that extends to an appeal against a rate. And the appellant does not show any authority given him by the trustees to appeal or enter into recognisance. [DENMAN, C. J. Have they disclaimed his act?] It was for him to show that he was empowered. If the trustees are the appellant party, the notice should have been by them: but the notice is not given, nor the recognisance entered into, either by them, or by any apparent authority from them. The recognisance should have been absolute on the part of the trustees, and not in the alternative, as this is. [DENMAN, C. J. Hopkins was a trustee; the recognisance at least bound him; he considered himself authorized to give it on behalf of the rest; and, whether he was so or not, they have not disclaimed what he did.]

D. Pollock, contra. The words of 10 G. 4, c. cxlii. s. 5, are quite sufficient to include "prosecuting" an appeal. [He was then stopped by the Court.]

DENMAN, C. J. The Court are quite satisfied that this technical difficulty cannot prevail against the hearing of an appeal. The mandamus must go.

LITLEDALE, TAUNTON, and PATTERSON, Js., concurred.

Rule absolute.

DOE on the Demise of MUDD v. SUCKERMORE. Nov. 17.

Defendant in ejectment produced a will, and, on one day of the trial (which lasted several days), called an attesting witness, who swore that the attestation was his. On his cross-examination, two signatures to depositions respecting the same will in an ecclesiastical court, and several other signatures, were shown to him (none of these being in evidence for any other purpose of the cause), and he stated that he believed them to be his. On the following day, the plaintiff tendered a witness to prove the attestation not to be genuine. The witness was an inspector at the Bank of England, and had no knowledge of the handwriting of the supposed attesting witness, except from having, previously to the trial and again between the two days, examined the signatures admitted by the attesting witness, which admission he had heard made in Court.

Per Lord DENMAN, C. J., and WILLIAMS, J. Such evidence was receivable.

Per PATTERSON and COLERIDGE, Js. It was not.

EJECTMENT for messuages, &c., in Suffolk. On the trial before VAUGHAN, J., at the Suffolk Spring assizes, 1835, a verdict was found for the defendant. In Easter term, 1835, *Storks*, Serjt., obtained a rule for a new trial on the ground [*704] of an improper rejection of evidence. *On this day, cause was shown by *Kelly* and *Gunning*; and *Storks*, Serjt., and *Byles* were heard in support of the rule. The Court took time to consider; and in Trinity term, 1837 (June 8th), their Lordships, differing in opinion, delivered judgment seriatim. The facts, and the grounds of argument on each side, will sufficiently appear from the judgments delivered.

COLERIDGE, J. This was a motion for a new trial, on the ground that evidence had been improperly rejected by my brother VAUGHAN under the following circumstances. The question in the cause was the due execution of a will; and the three attesting witnesses were called. It was supposed that one of them, Stribling, was deceived in swearing to his own attestation, and that, although he had attested a will for the testator, the document produced was not that will, but a forgery, and that the attestation was in truth a counterfeit. Upon cross-examination, two signatures, purporting to be his, and to have been subscribed to depositions,¹ made by him in proceedings relating to the same will in another Court, and also sixteen or eighteen signatures, apparently his, pasted on a sheet of pasteboard, were shown to him; and he said he believed they were all of his handwriting. At the time he gave this evidence, another witness was in court, and, the cause lasting to the second day, was called. He had never seen Stribling write, nor had any other means of acquiring a knowledge of the character of his handwriting, but from an examination of the signatures so produced: this he had made on the first day, and, from this, he stated that he thought he had *acquired a knowledge of the character of his hand- [*705] writing; and he was asked whether he believed the attestation to the will to be the handwriting of Stribling. This was objected to, and, on argument, determined to be inadmissible; in my opinion, after much consideration, the evidence was properly rejected.

The rule as to proof of handwriting, where the witness has not seen the party write the document in question, may be stated generally thus. Either the witness has seen the party write on some former occasions, or he has corresponded with him, and transactions have taken place between them upon the faith that letters purporting to have been written or signed by him have been so written or signed. On either supposition, the witness is supposed to have received into his mind an impression, not so much of the manner in which the writer has formed the letters in the particular instances, as of the general character of his handwriting; and he is called on to speak as to the writing in question by a reference to the standard so formed in his mind. It is obvious that the weight of this evidence may vary in every conceivable degree; but the principle appears to be sound, both in regard to the test of genuineness, and the acquisition of the means of applying it. The test of genuineness ought to be the resemblance not to the formation of the letters in some other specimen or specimens, but to the general character of writing, which is impressed on it as the involuntary and unconscious result of constitution, habit, or other permanent cause, and is therefore itself permanent. And we best acquire a knowledge of this character, by seeing the individual write at times when his manner of writing is not in question, or by engaging with him in correspondence; *either supposi- [*706] tion giving reason to believe that he writes at the time, not constrainedly, but in his natural manner.

Upon these grounds directly, as I conceive, although not on these alone, our law has not, during a long course of years, permitted handwriting to be proved by the immediate comparison, by a witness, of the paper in dispute with some other specimen proved to have been written by the supposed writer of the first. It is familiar to lawyers that many attempts have been made to introduce this mode of proof, according to the practice of the civil and ecclesiastical laws; and a text writer, to whose opinions I shall always pay the greatest respect, Mr. Starkie I mean, has given this mode of proof the sanction of his authority, as preferable on principle to our own; 2 Starkie on Evidence, 375, Ed. 2. But, after some uncertainty of decision, the attempts have finally failed. Rex v. Cator, 4 Esp. 117, though a Nisi Prius decision, brings this matter very fully under review; and, to the extent at least of what is rejected, has always since been considered as laying down the rule correctly. In my humble judgment that ought not to be departed from. Assuming that no dispute exists as

¹ These depositions were not read in the present cause.

to the genuineness of the standard, or the fairness with which it has been selected, such a comparison leads to no inference as to the general character of the handwriting. The two specimens may be much alike, or very different; yet, in the former case, they may proceed from different hands, in the latter case from the same. But, if the points which I have just supposed to be conceded, be brought into question, other and more serious objections arise to this mode of proof. If the genuineness be disputed, a *collateral issue is raised, and that upon [707] every paper used as a standard; an issue too, in which the proof may be exactly of the same nature as that used in the principal cause, namely, mere comparison; with the additional disadvantages, that the former standard is not produced, and that the opposing party can avail himself of no counter-proof. It is easy to see too, as has been well observed by Mr. Starkie, that this inquiry might lead to an endless series of issues each more unsatisfactory than the preceding. If the fairness with which the standard has been selected be disputed, this again must lead to a collateral inquiry, in which the parties meet on unequal terms if no notice be given (and none is required by our law), and which must tend to distract the jury, if notice be given, and the discussion on the circumstances under which each specimen was written be fully gone into.

It must always be borne in mind, in considering the rule of the English law on this subject, that it has reference to a trial by jury; and that we have no provisions for limiting the standard of comparison, or regulating the manner of conducting the inquiry; both of which, it seems, have been found necessary where such a mode of proof has been admitted. It will be found not at all irrelevant to the present inquiry to observe these provisions in the ecclesiastical and French laws; for they seem, not only to fortify the rule of our law, constituted as our mode of trial now is, but by their apparent inadequacy in many supposable cases, and, in the case of the ecclesiastical law, by the alterations which it has been found expedient to introduce into the practice, to make us satisfied with its present constitution.

[708] *From 1 Oughton's *Ordo Judiciorum*, tit. 225, *De Comparatione Litterarum, &c.*, ad probandum manum testatoris, ss. 1, 2, 3, 10, 11, it appears that, when the handwriting of a testator or other principal party was disputed, and the attesting witnesses were deceased before the suit commenced, or were not called, it was allowable to proceed by the comparison of other instruments. These instruments of comparison were required to be proved by witnesses who saw them written;¹ it was for the Judge to decide whether they were sufficiently proved; and then the comparison was made by sworn comparators whom he appointed, to the number of four or six *é senioribus procuratoribus, et peritioribus in arte scribendi*. The provision, that the witnesses must have seen the party write the documents which were to form the standard of comparison, would in our law make any comparison unnecessary; and the act of comparing here, as in the French law also will appear to be the case, was considered, not so much the function of a witness, as the exercise of skill in a particular art by ministers of the Court accredited by it, and, it should seem, in the absence of conflicting evidence, conclusively deciding the point in question. This mode of viewing the matter does indeed relieve it from some of the inconveniences above pointed out; but it is obviously inapplicable to the trial by jury: and, as the cause might turn entirely on the will or other instrument being signed by the testator or other party alleged, it in effect left its decision, not to the Judge, but to the delegated comparators who proceeded in his absence. Oughton's work was published in 1728, and, I apprehend, is considered to have [709] *faithfully represented the practice then prevailing. I have been at some pains to ascertain what the present practice is, and I find that that whole proceeding which Oughton describes has long been entirely obsolete. But that is not all. In 1818, a case of *Spear v. Bone* came before the delegates, be-

¹ *Testes qui poterint deponere, quod viderunt testatorem subscribentem hujusmodi scriptis, &c., s. 8.*

tween the next of kin and executors in a will. On the face of the will alterations appeared; and a third party, being the sole executor as it originally stood, intervened: and the allegation which he gave in raised the very question of comparison of handwriting; and the admission of this allegation was the matter in discussion before the delegates. I have been favored by Dr. Nicholl with the printed papers of Dr. Arnold, one of the delegates, and his MS. note of the argument. The Court, after a very learned argument and much discussion, directed the allegation to be reformed; and I am enabled to state that the reformation was settled with the full concurrence of the delegate. Dr. Arnold's paper book, which I have, contains the allegation as altered in his own handwriting. In 1816 the cause came on again; and the allegation stands reformed in the printed paper as settled in MS.; and that has ever since been considered the only proper form of pleading. The allegation originally alleged that, upon an accurate examination of the said will by writing-engravers, and others, accustomed accurately to examine the formation of the letters of different handwriting, from their general occupation of making engraving of handwriting, facsimile, and otherwise, and otherwise best able to judge accurately thereof, it manifestly appears that the words and letters of the alteration aforesaid are not of the handwriting of the person who wrote the will, but that the same, though in many respects *very like the writing of the other parts of the will, bears the appearance of having been touched with the pen a second time, as if done by some one endeavoring to copy or imitate the handwriting of another person. It was thus reformed.—That, upon an examination of the said will, it appears that the words and letters of the alteration aforesaid are not of the handwriting of the person who wrote the will, but are in a feigned handwriting; and that the same is well known to persons skilled in handwriting.

From all this it appears that, although comparison of handwriting is still an admitted mode of proof in the ecclesiastical courts, yet they have found it expedient to contract rather than to enlarge the limits of its admissibility, bringing their rule more and more near to that which has hitherto prevailed in the courts of common law; a reason, as it seems to me, of no little weight against our admitting such a head of evidence into our practice.

The ecclesiastical law appears to have made no limitation as to the quality of the instruments which might be made the foundation of the comparison: "*alia scripta, quamvis omnino impertinentia ad causam institutam.*"¹

The French law is more precise. It defines, not only the persons who are to make the comparison, sworn experts, three in number, appointed by the Court or agreed on by the parties, but the writings to be submitted to them. In the Code de Procédure Civile, Part. I. l. 2, tit. 10, s. 200, are found the provisions on this latter point. The writings must either be of a public nature, *such as signatures made before a notary, or judge, &c., or papers written and signed in some public capacity; or, if private papers, they must be admitted in the cause, by the party to whom they are attributed, to be of his own handwriting: a previous admission of them, or previous proof, will not make them admissible. These latter restrictions are evidently framed at once to secure the genuineness of the specimens, and to meet the inconvenience of contradictory testimony as to this point; but they do not tend to the production of writing in the most natural character, and in a great many cases put it in the power of the party to exclude such from the comparison. Pothier, indeed, in his *Traité de la Procédure Civile*, Part. 1, c. 3, sect. 2, art. 1, § 2,² seems to consider private writings or signatures as practically forming no standard of comparison on this last ground. It is obvious in how many cases it would be impossible to produce writings of an individual, answering to the description here given of public writings.

I have been thus (I fear tediously) minute in stating the general rule, and the

¹ 1 Oughton, Ord. Jud. tit. 225, s. 3.

² Œuv. Posth. tom. iii. p. 46 (ed. 1809).

principles on which I conceive it now rests; and I think it unnecessary to cite any authorities in support of it, because no question is now made whether that rule exists, or is well founded; but it is contended that the facts of the present case fall within it. It is not denied that immediate comparison is inadmissible, or that the witness must speak from a knowledge of the general character of the handwriting; but it is asserted that here there was no such comparison; and the evidence tendered was founded on such knowledge. In order to determine this, [*712] it was necessary to *have the rule, and the principle of the rule, distinctly in view; and it was desirable to see whether it rested on a sound foundation. Disregarding extreme cases, from which no inference can be safely drawn, and bearing in mind the mode of trial with reference to which it has been framed, I confess I have no desire to see the rule altered or narrowed; nor am I disposed to take any case out of it on account of a merely colorable difference in the facts, if they still remain within the principle.

Now, in the present case, it must be conceded that the witness had not acquired his knowledge of the character of the handwriting, whatever it was, in either of the ordinary modes. He had studied certain signatures selected by one party, and had acquired an impression of some general character pervading the whole: he had heard it proved that those were written by the witness Stribling; and, from these materials he was to speak. It is asked, how does this differ from the case of knowledge acquired in the course of a correspondence, where the standard rests equally on the assumption that the letters are written by the party whose they purport to be? With respect to the assumption, there will be a fitter place to point out the distinction; but I answer, here, that the two cases differ in that which is essential, in the undesignedness of the one, the fact that the letters are written in the course of business, without reference to their serving as aids for a collateral purpose in some future unknown cause; and in the selection which is made in the other by the party to the cause, who seeks to produce them for a particular purpose. I have, therefore, no reasonable assurance that the witness has the materials for ascertaining the general character of the handwriting, which is the knowledge to be acquired: *and [*713] the facts are in this respect similar in principle to those of *Stranger v. Searle*, 1 Esp. 14, where Lord KENTON would not allow a witness to speak, from the knowledge which he had acquired even by seeing the party write several times previously to the trial, because it was done for the avowed purpose of showing, as he alleged, his true manner of writing. Those were in truth selected specimens, though beyond all doubt genuine; but they could not be safely trusted to as giving the general character of the handwriting.

But this is not all. No fraud is imputed in the present case; but I cannot forget that we are called on to lay down a rule applicable to all civil and criminal cases; and I ought to be careful, therefore, that I do not so lay it down as to open a door to fraud of the most fatal kind. In the present instance, the writer himself admitted the signatures to be his; but that was only one mode of proof: it cannot be contended that the case would have been altered in principle, if a third person had proved them; or, if they had purported to be the signatures of the testator, or of the party in the cause, and so necessarily proved by witnesses other than the supposed writer. If such evidence be good for any, it is good for all, purposes; if it be receivable in confirmation of other testimony, it is receivable alone; if to disprove handwriting, it is equally so to prove it. And a conviction of forgery might pass on the opinion, which a single witness might form, founded solely on the examination of signatures, or a single signature, presented to him the night before by a prosecutor, who need not be called [*714] as a witness on the trial to explain when and where *such specimen had been procured, or from how many selected, the prisoner, on the other hand, being wholly unprepared to enter into this explanation. It is no answer to this to say, that a similar result might follow upon the evidence of a witness who had seen the prisoner write his name but once: that is an extreme case upon

a principle unobjectionable in itself; for no one can deny that the seeing a party write is at least one correct mode of acquiring a knowledge of his handwriting. Here the danger is in the principle itself, that selected specimens may be made the standard from which the witness is to judge.

Furthermore, as the admissibility of this species of proof cannot depend on the fact of the signatures having been proved by the admission of the writer himself, I would ask, what course is to be pursued where the writing which is to form the standard, is itself disputed? Is the counter-evidence to be received at once as to this point; and the opinion of the jury to be taken on the preliminary and collateral issue, before the evidence is heard as to the principal document? Or is that to be gone into after the *prima facie* proof on the collateral issue, and to be received, subject to being entirely displaced by the answer on the other side? Or, lastly, is the judge to decide this question of fact? I believe it impossible to answer these questions without either introducing a most inconvenient novelty in our procedure at *Nisi Prius*, or involving the jury in a complication of issues from which it is too much to expect that they should escape safely.

Again, and connected with this last remark, I have always understood that papers cannot be submitted for the purpose of comparison, even to the jury, except they *be evidence on the issue in course of trial before them. [715] This was decided by this Court in *Doe dem. Perry v. Newton*, ante, 514; 1 Nev. & P. 1, in affirmance of some previous decisions. But in the present case, the documents were not evidence in the principal cause; yet they must have been submitted to the jury, who, before they listened to the evidence of the witness as to the attestation to the will, must have been required to decide in their own minds the collateral issue raised on every signature, whether it were that of Stribling or not. It will be asked, whether, when the witness speaks from knowledge acquired in the course of correspondence, the jury must not also decide in their own minds whether the assumption be a just one, that the letters purporting to be written by the individual were in fact written by him. The answer is that, although, if it were shown to the jury that the witness was mistaken in the supposition he had made, his evidence must undoubtedly fall to the ground, yet the law makes it, in the first instance, a presumption that the letters of a correspondence carried on in the ordinary course of business, where the acts done on the faith of it are ratified by the parties, are written or signed by those whose signatures they purport to bear. And this, in the absence of all design or selection, is a reasonable presumption. The whole, too, depends on the same witness; and no more embarrassment, therefore, is created to the jury than where the witness says he has seen the party write, in which case they must also determine whether they believe that preliminary statement; before they consider the weight of his evidence as to the particular document. This assumption, no *doubt, may sometimes proceed on a mistake, but so [716] may the most direct evidence on handwriting; there is nothing so difficult to put beyond question, as the fact that a particular instrument, which the witness has not seen to be signed, was signed by a particular person. In *Eagleton v. Kingston*, 8 Ves. 473, Lord ELDON states the rule of evidence as to handwriting, when he first came into Westminster Hall, with great minuteness, and limits it even more narrowly than my argument requires. But he mentions a remarkable instance, as regarded himself, of the uncertainty of testimony to this point. A deed was produced at a trial, on which much doubt was thrown as a discreditable transaction. The solicitor was a very respectable man, and was confident in the character of his attesting witnesses. One of them purported to be Lord ELDON himself; and the solicitor, who had referred to his signature to pleadings, had no doubt of its authenticity; yet Lord ELDON had never attested a deed in his life.

In a matter so open to mistake and fraud, and where the consequences are so serious, I have no desire to widen the door of admission. Is there then any

real distinction, either in principle or consequences, between the facts now before us and a direct comparison? If, instead of two days, the trial had lasted one; if, instead of an examination of the signatures on the first day, and out of Court, the witness had only seen them in Court, and immediately before he was shown the will; would not this have been clearly a case of direct comparison, however the question had been framed or the answer worded? And can it [*717] be affirmed that the *alteration last stated would have in any respect differed the character of the evidence? Do they remove any one of the objections which have prevailed to exclude direct comparison from our rule of evidence?

Upon the grounds, therefore, that our rule is a sound one, and well established, both in what it admits and what it rejects, sound in principle, and convenient with reference to the mode of trial to which it is to be applied, and that the present facts are substantially within the latter branch of it, I am of the opinion that the learned Judge rightly rejected the evidence tendered. I could have wished to examine in detail the decisions bearing upon the question, but the importance of the subject, and the difference of opinion which exists in the Court, have induced me (I hope excusably) to examine the principle so much in detail, that I must forbear; and I do so the more readily, because I have no doubt that that part of the argument will be thoroughly illustrated by another member of the Court. I will say this only, that I am not aware of any case, of now recognised authority, which lays down any principle conflicting with those on which I have relied.

I will only add, that I do not feel pressed by the case of ancient writings, in which a direct comparison is admitted. First, I observe that, if that proves anything, it proves more than is now contended for; for direct comparison of modern documents is not now insisted on. But, in truth, as to ancient documents, the necessity of the case, and the difference of circumstances, have introduced a different rule of evidence. You cannot call a witness who has seen the party write, or corresponded with him, nor is there much danger, in resorting to comparison, of an unfair selection of specimens. Further it [*718] is obvious to remark that, in ancient documents, it does often become a pure question of skill, the character of the handwriting varying with the age, and the discrimination of it to be materially assisted by antiquarian studies. This may have naturally assisted in opening the way for the admission of this evidence, even in cases where skill of that particular kind is not necessary.

With real diffidence, therefore, as to the soundness of my judgment, but having formed it with much consideration, I think this rule ought to be discharged.

WILLIAMS, J. This was an action of ejectment, to try the validity of a will; and, upon the trial, one of the subscribing witnesses (A.) to the will was called, to prove the due execution by the testator, and his own attestation. The fact of his attestation being, on behalf of the lessor of the plaintiff, disputed, and, in consequence, the genuineness of his (A.'s) signature brought into question, he was asked, upon cross-examination, whether certain signatures, to the number of twenty (then shown to him), were of his (A.'s) handwriting; and they were by him stated so to be. The cause having been adjourned, these signatures were shown to a second witness (B.), professing to have knowledge and skill in handwriting, who was directed carefully to examine the same: and, upon the day following, B. was called on behalf of the plaintiff, and was asked whether, from such examination, he had acquired a knowledge of the character of A.'s writing; and, in answer, he said he had. And, thereupon, the following question was proposed to him, whether from the knowledge he had (so) acquired, he believed the signature of the attestation in question to be A.'s handwriting.

[*719] Upon *objection, the learned Judge considered the evidence to be inadmissible, and it was rejected accordingly. And, upon a motion for a new trial, the propriety of that decision is brought under our consideration.

And the question (important as it is, being connected with principles and practice regulating the admissibility of evidence) seems mainly to be reduced to this point, whether the knowledge, which the witness professed to have, was acquired by means prohibited by any known and established rule of law. It is quite superfluous to remark that with the admissibility only is our concern. How far the evidence, if received, might have answered the intended object, or fallen short of it, with what observations it might, or ought to, have been accompanied, I think it wholly unnecessary to inquire.

Now, that proof of handwriting is to be submitted to the consideration of the jury, like every other species of proof, I apprehend to be clear. From the highest degree of certainty, carrying with it perfect assurance and conviction, to the lowest degree of probability upon which it is found to be unsafe to act, it may be, and constantly is, so submitted. From continued and habitual inspection, or correspondence, or both, carried on till the trial itself, down to a single instance, or knowledge twenty years old, evidence may be received: I allude of course to the case of *Garrell v. Alexander*, 4 Esp. 37, where the execution of a bail bond was held by Lord KENYON to furnish means of knowledge. The authority of this case is, indeed, questioned by Lord ELDON, upon another point, because the witness would not go so far as to express any belief; but, as to the competency of a *witness founding himself upon a single instance, [720] (and *Burr v. Harper*, Holt N. P. C. 420, is to the same point), we have his (Lord ELDON's) important and prevailing testimony. In the case of *Eagleton v. Kingston*, 8 Ves. 473, he thus expresses himself as to what he considered the rule and course of proceeding in such cases. "You called a witness; and asked whether he had ever seen the party write. If he said he had, whether more or less frequently, if ever, that was enough to introduce the subsequent question, whether he believed the paper to be his handwriting. If he answered that he believed it to be so, that was evidence to go to the jury." "You might call one, who had not seen him write for twenty years; and if he said, he believed it was the writing of the person, that evidence might go to the jury; but to be affected by all the rest of the evidence; as it is the nature of all evidence to be more or less convincing."

The observations above applied to knowledge gained by seeing a party write must, I presume, be admitted to be applicable to knowledge gained from correspondence "acted upon," as the phrase has been, or, in other words, where there has been something to show that it was, really, the writing of the party, whose, on the face of the letter it purports to be. Subject to the qualification of Lord ELDON, which seems to be the criterion and to decide the question in each case, I am aware of no rule attempting to prescribe the quantity of knowledge which is requisite to enable a witness to speak to his belief; what degree of freshness and recency in the correspondence to admit, or what antiquity to exclude, may (as the reason of the thing would induce one to expect) in vain be looked for. To the jury it must go, in *the language of Lord ELDON, from the highest to the lowest. That the evidence, therefore, [721] ought to have been rejected from the slender and inefficient nature of it, would not be contended; indeed the very objection implies the contrary. The question therefore comes, as I stated at the outset, to the means by which the knowledge of the witness was acquired. And the objection is twofold; first, that it was acquired merely by the comparison of writing; and next, that, at all events, it was not acquired by either of the legitimate and recognised modes, already referred to, having seen the party write, or corresponded with him.

As to the first, if the objection is to be understood in the sense in which it has been (2 Stark. on Ev. 374, ed. 2; *Roe dem. Brune v. Rawlings*, 7 East, 282, note (a); *Doe dem. Tilman v. Tarver*, R. & M. 141), from the time of the reversal of *Algernon Sidney's* attainder,¹ which recites that the jury were directed

¹ Stat. 1 W. & M. sess. 1, c. 7 (Private). The recital of this act is as follows:—
"Whereas, *Algernon Sidney, Esq.*, in the term of St. Michael, in the thirty-fifth year of

to believe a certain paper to be the prisoner's, from comparing it with other writings of his, it is to be observed that it does not apply. Whether what was [*722] *done be equivalent, is another question. The witness, not having before compared the disputed signature with those admitted, but having acquired some knowledge by an attentive examination of them (the admitted ones), is first called upon in Court to inspect the questionable signature, and give an opinion from such knowledge, and not from comparison by juxtaposition of the signatures themselves. I beg to be understood as by no means intimating an opinion that the rule, which has obtained with respect to the comparison of handwriting, should be disturbed, because, upon examination, it may appear to depend upon reasons not perfectly satisfactory. It seems to me that the evidence, so far as this objection is concerned, was admissible, because it was not the comparison of handwriting, in the proper and ordinary sense of the term. To reject it, because what was equivalent to a comparison of handwriting took place, would go far, so far as the reason of the thing is concerned, towards disturbing the rule altogether, and letting in a comparison of handwriting as a medium of proof in all cases whatsoever, or excluding, in a great degree, all possibility of proof. What is to be said, where the means of knowledge are derived from a bygone correspondence of considerable standing? What is it but comparing a distant, and (in proportion to the length of time) faint image in the mind with the writing in question? I will only refer to the observations of Mr. Starkie, 2 Stark. Ev. 375, 2d ed., in his learned and valuable work, and those of Mr. Phillipps, 1 Phil. Ev. 472 (8th ed.), on the same subject. In a still earlier work, which the author used to say was more [*723] used by other writers than noticed, I mean a treatise *upon the law of evidence appended to his edition of Pothier by the late Sir W. D. Evans, I find the following remarks, with others to the like effect. "But where, in point of reason, is the objection to proof by comparison of hands, as founded upon an inspection at the trial?" . . . "What is the common evidence of knowledge but an act of comparison; a comparison of the object presented to the sight, with the object imprinted by memory in the mind, with the image and copy of the supposed reality? And when the comparison is made not with this imperfect and fallacious copy, but with an indisputed original, applied with the skill and experience of persons habitually devoted to similar inquiries, it is deemed not only a matter of technical caution, but an essential point of constitutional liberty, to reject the assistance which it may be naturally expected to afford." I would repeat that I doubt the propriety (not to say the right) of this Court, upon plausible objections merely, to disturb long-established practice and usage, in a case, too, of such frequent occurrence; but for the sake of the rule itself, and its security, I would confine it to the case of actual collation and comparison, which, when done in Court and before the jury, is supposed to be attended with inconvenience as to them ("unless a jury could read, they would be unable to judge of the supposed resemblance;" *DALLAS, C. J., in Burr v. Harper, Holt N. P. C. 421*), which furnishes a reason against such comparison altogether.

The recency of the information and acquaintance acquired in this case can thereign of our late sovereign lord King Charles the Second, in the Court of King's Bench at Westminster, by means of an illegal return of jurors, and by denial of his lawful challenges to divers of them, for want of freehold, and without sufficient legal evidence of any treasons committed by him; there being at that time produced a paper found in the closet of the said Algernon, supposed to be his handwriting, which was not proved by the testimony of any one witness, to be written by him; but the jury was directed to believe it by comparing it with other writings of the said Algernon; besides that paper so produced, there was but one witness to prove any matter against the said Algernon; and by a partial and unjust construction of the statute, declaring what was his treason, was most unjustly and wrongfully convicted and attainted, and afterwards executed for high treason," &c. 9 Howell's St. Tr. 996.

¹² Evans's Pothier's Law of Obligations, p. 185, Appendix, Numb. xvi. sec. 6.

surely not operate as a valid *objection. Suppose a person to have seen another sign or write a paper, or to have received one or more letters [*724] from him, but, from length of time, his general recollection was become so faint and indistinct that he should be unable to form an opinion; might he not peruse and study those authentic documents, if in his possession, to improve and refresh his knowledge before he was called upon to give evidence respecting the writing of that person, by whom such paper or letters, as above supposed, were confessedly written? I apprehend he certainly might. Up to the extent of the above observations, if not beyond them, the very point has been decided in the case of *Burr v. Harper*, Holt N. P. C. 420. In truth the reference was made, in that case, not to revive and refresh, but to gain knowledge. And would such perusal be admissible if made a week or a month before the trial, but not so if made an hour before the witness went into Court to give his opinion upon the particular writing in question?

The case of ancient documents, it must of course be admitted, depends upon a ground distinct from our present inquiry, necessity. Some considerations, however, not wholly foreign, perhaps, from our present subject, may be collected from that head of evidence. That an attentive observation of writing assumed to be that of a particular person, to constitute knowledge of his character, so as to enable a person to give evidence of opinion and belief, is allowable, must, I presume, be considered as placed beyond a doubt. In *Brookbard v. Woodley*, note (a) to *Macferson v. Thoytes*, Peake, N. P. C. 20, 21, *YATES, J.*, is said to have decided the contrary; but Lord *HARDWICKE's*, Bull. N. P. 236, authority is expressly in favor *of it, and so are the more recent decisions, without exception. Whether, by studying the assumed hand- [*725] writing, the witness should have acquired a knowledge of the handwriting, and, then, apply himself to the writing to be proved, or whether an actual comparison may be made, and so a foundation of knowledge laid, does not seem equally clear. *HOLROYD, J.*, than whom a more sound and safe authority cannot be quoted, was of the former opinion; *Sparrow v. Farrant*; note (x) in 2 Stark. Ev. 375 (2d ed.), the latter course was pursued by Lord *TENTERDEN* in *Doe dem. Tilman v. Tarver*, Ib. and R. & M. 141, who at the same time quoted a case before *LAWRENCE, J.*, to the same effect. But, whichever course be the correct one, I apprehend it to be clear that no objection can be made from the time at which the information is obtained, upon which the proof is given. In the two last cited cases, it is obvious that the witness was called upon to pronounce an opinion in the midst of the trial, without any preparation before.

I come now to consider, whether the witness in this case had any legitimate means of knowledge to authorize the question, the answer to which was rejected.

It has been said that the specimens selected may have been garbled and fallacious, "calculated to serve the purpose of the party producing them, and, therefore, not exhibiting a fair specimen of the general character of the handwriting." And this, it will be recollected, is the second usual objection to the admissibility of the comparison of handwriting (*DALLAS, C. J.*, in *Burr v. Harper*, Holt N. P. C. 421), the first having been before noticed. I have before endeavored to explain why, in my opinion, the objection arising from such comparison was not applicable, *in fact, to this case. Supposing, how- [*726] ever, for the present purpose, that it is, I cannot perceive how it can be affirmed that this was a partial selection by those who wished to use the papers. The selection was not depending upon their power merely. The whole was subject to the answer of the witness. The papers produced might all have been admitted to be of his handwriting, or one-half, or any other portion of them, or all might have been denied. When the papers were so admitted, was there not then some proof that they were of the witness's handwriting? And, if so, how can the case differ in kind, though it may in amount or degree of proof, from the perusal or reperusal of a couple of letters, written, the one ten, the other five, years before? Why may the witness give an opinion of any person's

handwriting from a study of such letters? Because the writer has, in some manner, authenticated them to be his. Why might the witness have been asked the proposed questions in this instance? Because the witness had sworn that the papers were of his handwriting. In each case, it is from the perusal of papers (and perusal only) that the knowledge is acquired. In each case there is some proof that the papers to be perused, in order to form a judgment, are those of the parties respectively, respecting whose handwriting in the particular case the question and inquiry arise. To which of the two species of proof preference should be given, is a matter upon which opinions may vary, and foreign to the present purpose. The only question, as it seems to me, is, whether in both cases there is not some.

When speaking of the facts necessary to introduce knowledge of handwriting, [*727] not from actual inspection *but from correspondence, I adverted to an expression in frequent use, and which indeed has almost grown into the currency of a proverb upon this subject, that the letter or letters "must have been acted upon." If, however, by this expression, it be meant to imply that any business must be transacted, or, in any sense of the word, act done, the observation is without foundation, for nothing of the sort is necessary. This was expressly decided by HOLROYD, J., to the value and weight of whose opinion I have given my unnecessary, though sincere testimonial. Anything, I presume, from which the identity of the writer is established, may suffice. If then, from such proof, whence a reasonable inference may arise that the letter or signature is by such or such person, an opinion of his handwriting may be given, the question recurs, whether there be not *some* foundation for opinion, where the party has upon his oath declared that the papers perused by the witness were written by himself. That no person has, hitherto, been allowed to speak of his belief of handwriting, except he has acquired his knowledge by one or other of the prevalent methods (having seen the party write, or received writing from him), may doubtless be true; but it is, I fear, but an imperfect solution of the present difficulty. May not the answer be, that the case is new? In truth, has it ever arisen before? If not, we are called upon, as in the various and ever varying combinations of human affairs continually does and must occur, to apply, as well as we can, the principles and analogies having the nearest and most direct affinity to the subject, to this fresh question.

It is hardly necessary for me to observe that the view which I have taken of this case secures me from touching, *at all, upon the authority of the [*728] recent decision of this Court in *Doe dem. Perry v. Newton*, ante, 514; 1 Nev. & P. 1, and of the Exchequer in *Griffiths v. Williams*, 1 C. & J. 47. I quite accede to the propriety of rejecting the evidence tendered in the former case, and of the line of distinction established in the latter. It is still less necessary, after what has been observed,—but, at the hazard of repetition, I am desirous to avoid the possibility of all misconception,—to say that I have, throughout, assumed the rule with respect to the comparison of handwriting to be perfectly fixed and established. Whether, after all that has been said and written against the comparison of handwriting, opinion and belief are not virtually formed, in a great variety of instances, upon comparison, and that not of the most satisfactory kind, is another question. The rule I find absolutely settled; and that is enough for me. If by argument, or upon further consideration, I could have been satisfied that the rule would have been infringed upon by the admission of this evidence, my task would have been easy, and a conclusion speedily arrived at. It is precisely because, as it seems to me, the admission of this evidence would have been according to and in pursuance of the rule, I think the rejection improper.

Whether the objection was worth the making, when the value of the evidence is considered, I will not undertake to say; but the question has arisen and must be disposed of. If it should be thought so, this only resembles another instance, not unconnected with it (*Goodtitle dem. Revett v. Braham*, 4 T. R. 497; *Carey*

v. Pitt, Peake, Add. Ca. 130; **Rex v. Cator*, 4 Esp. 117; *Gurney v. Langlands*, 5 B. & Ald. 330), the opinion of an expert upon the genuineness of handwriting; where the difference of opinion upon the admissibility of the evidence has been much greater than the importance, which, by universal consent, ought to be attributed to it if received.

That the present case is, in its precise circumstances, new, must, I presume, be admitted. Such an occurrence, however, must perhaps, from the nature of things, be deemed unavoidable. The saying of Lord MANSFIELD, in *Lowe v. Jolliffe*, 1 W. Bl. 366, when pressed by some citations from them, that he did not now sit to receive rules of evidence from Siderfin and Keble, may possibly be considered as rather bold; but I have no doubt that it was a true one of Lord KENYON, in deciding a fresh point of evidence, *Keeling v. Ball, Peake, Add. Ca. 89*, that it is "the business of courts of justice to apply the general principles of the law to new cases as they arise."

Upon the whole, with sincere respect for the contrary opinions, I think the evidence was improperly rejected, and that there ought to be a new trial.

PATTESON, J. In this case, one of the attesting witnesses to a will having been called, and having sworn to the publication and his own signature, twenty documents were put into his hand, in cross-examination, all of which he swore to have his signature. None of these documents were used as evidence in the cause, nor could have been, unless with reference to the handwriting of this witness, or, as regards two of them, for the purpose of contradiction, those being the witness's depositions in *the Ecclesiastical Court. The twenty documents had been previously shown to an inspector from the Bank of England, and, after the examination of the witness, were again submitted to the same person. The cause was not concluded on that day; and, the next day, the inspector was placed in the witness-box for the purpose of swearing to his belief that the signature as attesting witness to the will was not the handwriting of the witness who had been examined the day before. He was asked how he acquired a knowledge of the handwriting of the witness, when he stated it to be in the manner above mentioned and none other. The learned Judge rejected his testimony; and the question is whether he was right in so doing.

All evidence of handwriting, except where the witness sees the document written, is in its nature comparison. It is the belief which a witness entertains upon comparing the writing in question with an exemplar in his mind derived from some previous knowledge. That knowledge may have been acquired, either by seeing the party write, in which case it will be stronger or weaker according to the number of times and periods, and other circumstances under which the witness has seen the party write, but it will be sufficient knowledge to admit the evidence of the witness (however little weight may be attached to it in such cases), even if he has seen him write but once, and then merely signing his surname: *Garrells v. Alexander*, 4 Esp. 37; *Powell v. Ford*, 2 Stark. N. P. C. 164; *Lewis v. Sapio*, M. & M. 39: or the knowledge may have been acquired by the witness having seen letters or other documents professing to be the handwriting of *the party, and having afterwards communicated personally with the party upon the contents of those letters or documents, or having otherwise acted upon them by written answers, producing further correspondence, or acquiescence by the party in some matter to which they relate, or by the witness transacting with the party some business to which they relate, or by any other mode of communication between the party and the witness which, in the ordinary course of the transactions of life, induces a reasonable presumption that the letters or documents were the handwriting of the party (*Lord Ferrers v. Shirley*, Fitzg. 195; *Buller's Nisi Prius*, 236; *Carey v. Pitt, Peake, Add. Ca. 130*; *Tharpe v. Gisborne*, 2 C. & P. 21; *Harrington v. Fry*, R. & M. 90), evidence of the identity of the party being of course added aliunde, if the witness be not personally acquainted with him. These are the only modes of acquiring a knowledge of handwriting, which have hitherto, as far as I have been able to

discover, in our law been considered sufficient to entitle a witness to speak as to his belief, in a question of handwriting. In both, the witness acquires his knowledge by his own observation upon facts coming under his own eye, and as to which he does not rely on the information of others; and the knowledge is usually, and especially in the latter mode, acquired incidentally, and, if I may so say, unintentionally, without reference to any particular object, person, or document.

A third mode is now sought to be introduced, namely, by satisfying the witness by some information or evidence that a number of papers are in the handwriting of the party, and then desiring him to study those papers, so as to acquire a knowledge of the handwriting, and fix *an exemplar in his mind, [*732] and afterwards putting into his hand the writing in question, and asking his belief respecting it, or by merely putting certain papers into the witness's hands, without telling him who wrote them, and desiring him to study them, and acquire a knowledge of the handwriting, and afterwards showing him the writing in question, and asking his belief whether they are written by the same person, and calling evidence to prove to the jury that the former are the handwriting of the party, which perhaps may be considered as the same process in effect, expressed in other words.

The very foundation of this mode is the establishment of the fact that the papers, from studying which the witness is to acquire his knowledge, are the handwriting of the party. Now that fact must be established, either by the acknowledgment of the party, or by the information of third persons.

Assuming the witness to be the only person to be satisfied of the fact, it is obvious that the acknowledgment of the party, if the witness be called to affirm the handwriting, would be a most unsafe ground on which to act, and was so considered by Lord KENYON in *Stranger v. Searle*, 1 Esp. 14; and, if the witness be called to disaffirm the handwriting, the acknowledgment of the party, unless he be a party to the suit, ought not to bind the litigants; and, if he be a party to the suit, it may fairly be urged that the case would come within the second mode of acquiring knowledge above suggested, namely, by a direct communication with the party.

The other mode of satisfying the witness, viz. by the information of third [*733] persons, is equally open to objection, *as it must be given behind the back of one or both of the litigant parties, and would obviously be most unsafe and unfair.

The jury, therefore, must be satisfied of the fact. Now that must be by evidence, and will raise a number of collateral issues, foreign to those on the record, and for which one of the litigants must of necessity be wholly unprepared, in addition to the danger of unfair selection by the other litigant who produces the papers. I need hardly advert to the great inconvenience and waste of time which will be incurred by such a wide range of collateral matter, nor to the observation that the proof of the papers in those collateral issues might be by calling a witness who had acquired his knowledge of the handwriting in the very same way from other papers, which would equally require to be proved; and so it is obvious that the same process, as is now attempted, might be repeated ad infinitum, and lead to no conclusion. But, if the proof of the papers in those collateral issues be by calling witnesses who have acquired their knowledge of the handwriting by either of the two modes which I consider to be the only legitimate modes, those witnesses must, from the nature of their evidence, be much more competent to form an opinion as to the handwriting in question in the cause, than the witness whose evidence is proposed to be introduced by such a process. And, after all, when that evidence is introduced, what is it but a comparison of handwriting?

Now a direct comparison of handwriting by a witness has been, with the exception of one or two supposed cases, uniformly rejected; and it is only in very recent times that a jury has been allowed to institute such a direct comparison;

and even that has been confined to a *comparison between documents [734] proved and given in evidence in the cause, being relevant to the issues raised on the record, and which being before the jury, it is hardly possible to prevent a comparison being instituted; *Griffith v. Williams*, 1 C. & J. 47; *Solita v. Yarrow*, 1 Moo. & Rob. 133; *Rex v. Morgan*, Note to *Solita v. Yarrow*, 1 Moo. & Rob. 134; *Allport v. Meek*, 4 Car. & P. 267; *Bromage v. Rice*, 7 C. & P. 548. One authority to the contrary is to be found in *Allesbrook v. Roach*, 1 Esp. 351. But this Court recently, in the case of *Doe dem. Perry v. Newton*, ante, 514, 1 Nev. & P. 1, has expressly determined that documents irrelevant to the issues on the record shall not be received in evidence at the trial, in order to enable a jury to institute such a comparison. Much less can it be permitted to introduce them in order to enable a witness to do so.

I know that it is thought by many persons that direct comparison of handwriting is more satisfactory than I am disposed to consider it. In a work of great merit, *Starkie on Ev.*, vol. ii. p. 375, Ed. 2, there is this passage: "It cannot, however, be denied, that abstractedly, a witness is more likely to form a correct judgment as to the identity of handwriting, by comparing it critically and minutely with a fair and genuine specimen of the party's handwriting, than he would be able to make by comparing what he sees with the faint impression made by having seen the party write but once, and then, perhaps, under circumstances which did not awaken his attention." I agree to that passage in its very words: there the weakest possible degree of knowledge which can arise from seeing a person write is contrasted with *the strongest possible degree [735] which can arise from a direct comparison; and it is assumed that the specimens are fair and satisfactorily proved, which, I will venture to say, they will not be in one case in a hundred. But, generally, I am of opinion that the comparison, even of an admitted fair specimen with a disputed writing, is far from satisfactory. Nothing can be more fanciful than the opinions persons are apt to form from such comparison; some dwelling on the general character, some on the peculiar turn of a particular letter, and other minute circumstances of similitude or discrepancy, which every man in his own experience must know may arise from the different pen or ink, or haste, or deliberation, with which the same person writes at different times. To my mind, I confess, the knowledge of the general character of any person's writing which a witness has acquired incidentally and unintentionally, under no circumstances of bias or suspicion, is far more satisfactory than the most elaborate comparison of even an experienced person, called by one side or the other with a particular object.

I find no express authority that direct comparison of handwriting is admissible in evidence, but many to the contrary. It is indeed said, by *Pemberton, Serjt.*, in *The Trial of the Seven Bishops*, 12 How. St. Tr. 297, that "in every petty cause, where it depends upon the comparison of hands, they use to bring some of the party's handwriting which may be sworn to, to be the party's own hand, and then it is to be compared in Court with what is endeavored to be proved, and upon comparing them together in Court, the jury may look upon it, and see if it be right;" and he *was arguing against any such comparison [736] in a criminal case. If such was the practice, it has long ceased to be so; and the distinction between civil and criminal cases, as to rules of evidence, is no longer recognised. However, on looking to the report of the *Seven Bishops' case*, it is plain that no question of direct comparison arose; the question really was, whether witnesses, who had never seen the parties write, but had seen writings supposed to be theirs, were admissible. The Court constantly said that they were not, and compelled the crown to prove the writing by other evidence; and, accordingly, an admission by all the defendants of their signatures to the alleged libel was proved. So, in *The Trial of Algernon Sidney*, 9 How. St. Tr. 818, no evidence of direct comparison of handwriting was given; and some of the witnesses swore that they had seen him write (page 854). Yet, in the bill for reversing his attainder, it is stated that he was convicted by illegal evidence

of comparison, which, so far as it goes, shows that such comparison was not at that time considered to be legitimate evidence.

Comparison of handwriting has, indeed, been allowed in the proof of very ancient documents, where, from lapse of time, no living person could have any knowledge of the handwriting from his own observation; as in *Roe dem. Brune v. Rawlings*, 7 East, 282, note (a); *Morewood v. Wood*, Note (a) to *Doe lessee of Didsbury v. Thomas*, 14 East, 327; *Taylor v. Cook*, 8 Price, 650; *Doe dem. Tilman v. Tarver*, R. & M. 141. But this has been allowed from absolute necessity, and the impossibility of better evidence being adduced. Direct comparison by a witness was expressly rejected by Lord KENYON in *Stranger v. Searle*, 1 Esp. 14, and by Lord TENTERDEN *in *Clermont v. Tullidge*, [*737] 4 C. & P. 1; and it was conceded in argument at the bar, in the present case, that the uniform practice in the Court for many years has been not to receive such evidence. In the case of *Burr v. Harper*, Holt, N. P. C. 420, Lord Chief Justice DALLAS allowed what I consider to have been comparison of handwriting; and I do not think that decision right; it was never brought under review, because the verdict was against the party in whose favor it was made.

I do not, under these circumstances, feel that I am obliged by authorities to admit of any mode of acquiring a knowledge of handwriting, except the two above suggested, and, for the reasons already stated, I am of opinion that no other mode ought to be introduced, and that the learned Judge was right in rejecting the evidence.

Lord DENMAN, C. J. A person, whose name appears as an attesting witness to a will, is called by the defendant at the trial, and swears that he attested the will and saw the testator execute. The plaintiff's case is that the rule was not genuine, imputing fraud, if not conspiracy, to some of the parties concerned. To this attesting witness he professes not to impute perjury, no participation in the fraud: his theory is, that the witness attested some paper, and believes the will produced to have been that paper; but the defendant says that the witness was herein deceived, that the paper which he signed was not the will, though he thought so, and that the will, produced with his name, was never seen by him [*738] before. In connexion with other facts, *from which he draws this inference, he proves by the same witness many of the genuine signatures of that witness, and then calls a second witness, who, obtaining from these an acquaintance with the character of the attesting witness's handwriting, is to be called upon afterwards to pronounce an opinion, whether the attestation to the will is in the same person's handwriting. That is, he is expected to give in substance the following testimony:—"I have gained a knowledge of the handwriting of A., from examining all the proved signatures, and I am of opinion that the signature to the will is not of the same character of handwriting;" from which, among other things, the jury were required to conclude that the will was not in fact attested by A.

The effect of this evidence is not under consideration. When the witness, with unimpeached character and unimpaired intellect, came to swear positively to facts on which mistake was scarcely possible, and to that handwriting with which no living person could be so conversant as himself, one can hardly imagine any position of the cause in which any matter of opinion could afford a formidable contradiction to his direct proof. In the present case, however, such a state of things doubtless existed; for the learned and able counsel for the defendant took the objection; and we are bound to consider whether, as a matter of strict law, the plaintiff had a right to lay before the jury the evidence that was withheld from them.

In the first place, I think it was contended at the bar that evidence of opinion on this subject was not receivable, though in opposition to a positive statement of fact. And, indeed, however specious at first sight, such an argu- [*739] ment could not be maintained a moment. *There is nothing binding in the most positive assertions of the most knowing witness; they may be

untrue from ill intention or mistake; and, if untrue, the party interested should be allowed to offer evidence that they are so, which may consist of a variety of circumstances, including the character of handwriting. Suppose, *exempli gratia*, a man to have sworn that he saw a party sign and execute a bond; the evidence of all who were best acquainted with that party's writing, that the signature was not, in their opinion, his, would surely be admissible.

Taking it, then, as clear that the undeniable peculiarities of this case do not preclude evidence of opinion as to the handwriting, the only question is, whether the witness called to pronounce one had a sufficient material for forming one, to be admissible for that purpose. And he appears to stand in exactly the same situation as he would have done, if called to speak of the handwriting of a party to the suit, whether for or against the genuineness of the document. He may have been called for the plaintiff to prove the defendant's signature to a bill or bond. He did not see him sign it; nor has he ever seen him write: but this is confessedly immaterial, if he has had other adequate means of obtaining a knowledge of his hand, 2 Starkie on Ev. 372, Ed. 2. Such is the rule, as Mr. Starkie understands it, not in terms warranted by the page of Buller's N. P. (Bul. N. P. 236), cited in his note, but fairly resulting from the practice.

Within what narrower limits can the line be drawn? The letters forming one side of a correspondence do not prove the handwriting, because addressed to a particular *person: that person's evidence may be requisite to show [740] that A. had in some way recognised the letters bearing A.'s signature, and was, therefore, probably the individual who wrote them; but this is quite different from a knowledge of the handwriting, whether they proceeded from A. or any other. The clerk who constantly read the letters, the broker who was ever consulted upon them, is as competent to judge whether another signature is that of the writer of the letters, as the merchant to whom they were addressed. The servant who has habitually carried letters addressed by me to others has an opportunity of obtaining a knowledge of my writing, though he never saw me write, or received a letter from me.

In a *Nisi Prius* case, *Smith v. Sainsbury*, 5 C. & P. 196, it was necessary to prove the handwriting of an attesting witness. The defendant's attorney was sworn, and said that he believed he knew the handwriting, for he had seen the same signature to an affidavit used by the plaintiff's counsel at an earlier stage of the cause. PARK, J., overruled an objection to the evidence, observing, "If it was a mere comparison of handwriting, it would not do. But it is not so, the witness says he took notice of the signature, and, in his mind, formed an opinion which enables him to swear to his belief. I have no doubt that it is evidence."

In ancient documents, knowledge of an officer's handwriting is frequently obtained by an observation of his signature to papers which he would be called upon officially to sign; and a witness speaking from that knowledge, may give an opinion whether any particular writing was made by the same person. The process is *therefore recognised as one which may enable one man to [741] form a competent opinion as to the writing of another.

Pausing here for a moment, I must fairly say that I think the syllogism complete. Opinion is evidence of handwriting, where it is founded on knowledge obtained from inspection of documents proved to be written by the same party. The opinion tendered here was founded on such knowledge. If, however, any rule excluding such evidence had been promulged by competent authority, I should at once have yielded my own views. I find no such rule laid down; nor can I deduce one from the mere circumstance that opinion of handwriting has hitherto been formed on other means of forming one. The consequences of excluding knowledge so obtained may be in the highest degree injurious to the interests of truth. Suppose, for example, that, instead of Lord ELDON (see *Eagleton v. Kingston*, 8 Ves. 476; *antè*, p. 716), some person of very inferior rank had appeared to be the attesting witness; that he was dead at the time of the trial; that conspirators, who forged the deed, had been entirely unacquainted with his

mode of writing. The production of the instrument, and a perjured oath that he in fact attested, would set up the forgery : a clear knowledge of the character of this man's writing would at once defeat the fraud. But the means of obtaining such knowledge might be unattainable from any one who had either seen him write, or held any correspondence with him. From documents satisfactorily proved to have been written by the witness, possibly never heard of till the eve of trial, complete demonstration might be obtained. Similar evidence, proving the genuineness of a disputed attestation, might save the *life of a person accused of forgery. I adopt, therefore, the rule in *Mr. Starkie's* work, which I think as important as it is intelligible.

No single authority cited in opposition to the rule, was applicable to this point, or rather was favorable to the defendant's argument. *Lord Ferrers v. Shirley*, Fitzg. 195, if it proves anything, is against him; for there the Court would have received evidence of a witness's opinion on the handwriting to an attestation, if the papers on which the opinion was founded had been traced to the attesting witness. It was the proof of identity that failed. *Stranger v. Searle*, 1 Esp. 14, was before Lord KENYON in 1793. The defence, to an action brought on the acceptance of a bill, was forgery of the supposed acceptor's name. The usual evidence of belief having been given by the plaintiff, the defendant produced other writings as his, for the purpose of comparing them with the bill sued on. The objection here taken was a preliminary one, that "it did not appear which was the real handwriting of the defendant, those bills, or those upon which the action was brought, both being proved by witnesses; and that it was besides, judging from a comparison of hands." The reporter says, "Lord KENYON ruled, that the witness should not be allowed to decide on such comparison of hands." This ruling appears correct on both grounds; but it does not touch our present argument. For here the other documents were proved genuine by the witness himself; and the inference was not sought to be drawn from comparing the papers, but from enabling another witness to obtain a knowledge of the handwriting from the papers so proved, and then applying it to the paper in dispute. *There was, however, in that case, a direct tender of evidence of opinion so formed; for the defendant's counsel then observed that the witness had seen the defendant write several times; but, on his adding that this was when the defendant had written his name for the purpose of showing to the witness his manner of writing, Lord KENYON rejected the evidence, "as the defendant might write differently from his common mode of writing his name through design." This objection scarcely required the acuteness of that great Judge; but is quite foreign to the present discussion.

In *Allesbrook v. Roach*, 1 Esp. 351 (see, as to this case, *Doe dem. Perry v. Newton*, ante, pp. 517, 518), a similar defence was made. After the usual evidence of belief, and apparently for the purpose of strengthening it, "another witness was called, who had in his possession five bills of the defendant's, which had been proved under his commission, he having been a bankrupt. Upon being shown the bill upon which the action was brought, he said he did not think the acceptance was the defendant's handwriting." This appears precisely similar to the evidence rejected in the present instance. The reporter adds, "upon comparing these bills with the acceptance of the bill in question, they were evidently dissimilar." He does not say by whom the comparison was made; we must take this (I think) to have been done by consent. Then, on the defendant's part, a witness, who had seen defendant write, declared his belief that the acceptance was not his writing. Then the counsel offered to the jury several other bills, admitted to be of the defendant's writing, and desired the jury to compare them; [744] a course which was objected to, but allowed *by Lord KENYON. This case surely does not assist the plaintiff's objection here, since the course there passed unquestioned which was here declared inadmissible: and the opinion of the learned Judge, that the jury might compare writings, does not make out that he would have excluded opinion founded on other documents proved aliunde to be genuine.

The next case in order of time, which never fails to be mentioned when evidence of handwriting is debated (*Goodtitle dem. Revett v. Braham*, 4 T. R. 497), furnishes, however, by no means so valuable an authority as we might expect to find in a trial at bar. The questionable evidence there received was withdrawn by the Court from the attention of the jury. And shortly after, in *Carey v. Pitt*, Peake, Ad. Ca. 130, Lord KENYON expressly pronounced it inadmissible.

Rex v. Cator, 4 Esp. 117, is in its circumstances very near the present case. And, though only a *Nisi Prius* decision, I apprehend that it has always been considered good law. The defendant was tried for a libel said to be written in a feigned hand. A person from the post office, supposed to be skilful in the detection of forgeries, was asked to look at certain writings in the defendant's natural hand, and then at the libel, and give his opinion whether the libel was in the same writing. HATHAM, B., after hearing a very extended argument, rejected the evidence. If this witness had been desired to look at those papers the day before, in order to gain acquaintance with the character of the writing, that case would have been identical with the present. Can this difference between the modes of *questioning the witness make the evidence receivable in one case, and not in the other? I apprehend that it may. [*745]

The distinction is doubtless very subtle; and in practice the two operations of the mind will be likely to run into each other. But there is an essential difference between casting our eye at the same moment on two objects placed before us in order to judge of their resemblance, and acquiring familiarity with a certain character of handwriting in order to judge afterwards whether a document bears that character. Mr. Starkie thinks the former a much more satisfactory method; but I cannot agree with his remark. An ingenious forger might counterfeit every line and angle so correctly that, to a common eye, no discrepancy should betray itself; and yet one who has an intimate knowledge of the individual might detect a striking difference in the general character of the handwriting, as twins may present no observable diversity to a stranger, and yet be distinguished at a glance by their parents. Besides, in taking a witness's opinion on such a point, an appeal seems to be made to his experience and skill, while the mere ocular comparison of two documents in juxtaposition looks like a mechanical proceeding, a mere act of measurement. Whether these reasons may be thought satisfactory or not, there can be no doubt that in former times the law, while it daily acted on opinion derived from knowledge of the character, regarded comparison of hands as extremely dangerous.

The legislature, in stat. 1 W. & M. c. 7 (private), declared accordingly the attainder of Algernon Sidney void as against law, because (see *antè*, p. 721, note 1), the jury were directed to believe the writing his, by comparing it with other writings of *his. Mr. Starkie, 2 Stark. Ev. 374 (2d ed.), seems [*746] to think this recital incorrect, according to our present notion of comparison of hands: and so it certainly is, if the report of the trial in the State Trials is faithful. Whether it is or not, we have no means of deciding. Jefferies is charged with falsifying these reports in some instances; and it is extraordinary that his summing up omits all mention of Sheppard, the first of the three witnesses said to have spoken to the prisoner's writing on the trial.¹ None of the numerous pamphlets, however, impute to the report any misrepresentation in this matter of law. On the other hand, when the act for reversing Sidney's attainder passed, the memory was green of the atrocious trial which produced it, and the foulness of the admitted proceedings rendered all exaggeration or misstatement superfluous. But, at any rate, the act is a legislative declaration, sanctioned, as we must believe, by Somers and the other great lawyers then in office, that comparison of hands, in the sense in which they understood it, was not a legitimate mode of judging of handwriting.

¹ See, however, 9 How. St. Tr. p. 892, where, in the report of Jefferies's summing up, Sheppard's evidence, and the fact that he had seen the prisoner write, are shortly noticed.

discover, in our law been considered sufficient to entitle a witness to speak as to his belief, in a question of handwriting. In both, the witness acquires his knowledge by his own observation upon facts coming under his own eye, and as to which he does not rely on the information of others; and the knowledge is usually, and especially in the latter mode, acquired incidentally, and, if I may so say, unintentionally, without reference to any particular object, person, or document.

A third mode is now sought to be introduced, namely, by satisfying the witness by some information or evidence that a number of papers are in the handwriting of the party, and then desiring him to study those papers, so as to acquire a knowledge of the handwriting, and fix *an exemplar in his mind, [*732] and afterwards putting into his hand the writing in question, and asking his belief respecting it, or by merely putting certain papers into the witness's hands, without telling him who wrote them, and desiring him to study them, and acquire a knowledge of the handwriting, and afterwards showing him the writing in question, and asking his belief whether they are written by the same person, and calling evidence to prove to the jury that the former are the handwriting of the party, which perhaps may be considered as the same process in effect, expressed in other words.

The very foundation of this mode is the establishment of the fact that the papers, from studying which the witness is to acquire his knowledge, are the handwriting of the party. Now that fact must be established, either by the acknowledgment of the party, or by the information of third persons.

Assuming the witness to be the only person to be satisfied of the fact, it is obvious that the acknowledgment of the party, if the witness be called to affirm the handwriting, would be a most unsafe ground on which to act, and was so considered by Lord KENYON in *Stranger v. Searle*, 1 Esp. 14; and, if the witness be called to disaffirm the handwriting, the acknowledgment of the party, unless he be a party to the suit, ought not to bind the litigants; and, if he be a party to the suit, it may fairly be urged that the case would come within the second mode of acquiring knowledge above suggested, namely, by a direct communication with the party.

The other mode of satisfying the witness, viz. by the information of third [*733] persons, is equally open to objection, *as it must be given behind the back of one or both of the litigant parties, and would obviously be most unsafe and unfair.

The jury, therefore, must be satisfied of the fact. Now that must be by evidence, and will raise a number of collateral issues, foreign to those on the record, and for which one of the litigants must of necessity be wholly unprepared, in addition to the danger of unfair selection by the other litigant who produces the papers. I need hardly advert to the great inconvenience and waste of time which will be incurred by such a wide range of collateral matter, nor to the observation that the proof of the papers in those collateral issues might be by calling a witness who had acquired his knowledge of the handwriting in the very same way from other papers, which would equally require to be proved; and so it is obvious that the same process, as is now attempted, might be repeated ad infinitum, and lead to no conclusion. But, if the proof of the papers in those collateral issues be by calling witnesses who have acquired their knowledge of the handwriting by either of the two modes which I consider to be the only legitimate modes, those witnesses must, from the nature of their evidence, be much more competent to form an opinion as to the handwriting in question in the cause, than the witness whose evidence is proposed to be introduced by such a process. And, after all, when that evidence is introduced, what is it but a comparison of handwriting?

Now a direct comparison of handwriting by a witness has been, with the exception of one or two supposed cases, uniformly rejected; and it is only in very recent times that a jury has been allowed to institute such a direct comparison;

does, therefore, seem rather too much to say, that such evidence is in all cases inadmissible, though it certainly ought to be received with great caution, and meet with little attention, unless as corroborating other and stronger evidence."

With regard to the form in which the question was proposed in the late trial, if the examples of Lord KENYON, LE BLANC, J., and LAWRENCE, J., and Lord TENTERDEN, render it doubtful whether it was the only proper form, I think, on tracing the subject through the books, that it was the most proper form. If the proved document and the controverted are both in Court, and the witness speaks to their resemblance or difference from immediate observation, he seems to perform a task for the jury, which every one of them, even though illiterate, might as well perform for himself. But, if he is a person of some skill (however low in degree, and however generally shared with him), he does what possibly the jury may be incompetent to do. Even in these times, some may serve on juries who cannot read and write; but to produce a person, who could barely read and write, to speak of his own knowledge and judgment in handwriting, would rather tend to throw ridicule than any degree of light on the cause. The witness must be conversant with handwriting, a banker, a printer, the officer of a court of justice (which was the description, I believe, of Mr. Price, when Lord TENTERDEN attended the Oxford circuit as a barrister, and Mr. Justice *LAWRENCE placed the documents in his hand, see *Doe dem. Tilman v. Tarver*, R. & M. 143), to be entitled to any degree of [*750] authority.

From the substitution of a witness for the jury, in forming an opinion on the genuineness of handwriting, an advantage follows so great and obvious, that it would form a strong motive for so framing the rule of evidence: I mean the prevention of that distracting multiplicity of issues which a jury might be called upon to try, arising out of every one of the whole number of documents placed before them. If this could be done, a legitimate argument might be raised from the internal evidence of the contents of each paper, and the nature of each transaction alluded to therein. On these points the party could not be expected to come prepared; and infinite injustice might ensue from prejudices of every kind. I therefore entirely adhere to *Doe dem. Perry v. Newton*, ante, p. 514; 1 Nev. & P. 1, in which we refused a rule nisi for a new trial, moved for on the ground that my brother COLERIDGE had excluded papers tendered in evidence for the mere purpose of being compared with some which were proved. Indeed, in *Griffith v. Williams*, 1 Cro. & Jer. 47, which was urged as an authority for receiving such evidence, the Court of Exchequer drew precisely the line which I think the true one, observing that the Court and jury might compare letters when they had been admitted for the general purposes of the cause, though witnesses are only permitted to compare them with the character of handwriting impressed on their own minds.

The same effect, I am aware, might possibly be produced, if the writings, from which the handwriting was judged of, were in Court; for I apprehend the jury *might then desire to see the documents on which the witness [*751] judged: and my brother PARKE has informed me that at Nisi Prius he has felt himself bound to permit them. Prejudice might thus be unfairly excited by a crafty selection. This would be an abuse; and, when exposed in broad daylight, would draw the usual consequences of taking unfair advantages on the party making the attempt. But the possibility of abuse is no reason for excluding what may throw light on the truth, and is in its own nature, evidence.

Some other matters were discussed at the bar, connected with this interesting subject, which do not require a detailed notice. On the question whether handwriting, looked at by itself, is genuine or forged, the cases appear to me to have justly exploded the notion that bare inspection by the most skilful person can furnish means for forming an opinion, and *Gurney v. Langlands*, 5 B. & Ald. 330, is a correct decision, I think, of WOOD, B., supported by the dicta of Lord TEN-

TERDEN and HOLROYD, J., that such an opinion cannot be received from one not acquainted with the handwriting supposed to be imitated. I do not indeed understand how such evidence could be rejected, if a witness should swear that his habits gave him the requisite skill; but I do not think that either Court or jury would believe him, or place the least reliance on his opinions; practically, therefore, this chapter may be considered as expunged from the book of evidence.

I know not whether any argument was raised on the knowledge being gained *post litem motam*. But the judgment is almost always formed *post litem motam*, both on handwriting and other subjects of speculation. There seems no reason [*752] why the knowledge should be *not obtained in the same stage; indeed, the opinion of medical men is constantly taken on facts brought to their knowledge during the trial.

On the whole, I think the question regular, and the exclusion of the evidence improper; but, the Court being equally divided, the rule for a new trial must be discharged. Rule discharged.¹

¹ The apparent inaccuracy in the statute reversing Sidney's attainder is noticed by Mr. Phillipps, in 1 Phil. Ev. p. 466 (6th ed.), and 2 "State Trials," p. 111; and had before been pointed out in p. 184 of Sir W. D. Evans's treatise (cited p. 728, *antè*), and in a note to 9 Howell's St. Tr. 864. Mr. Hallam, too, observes upon it, in his Constitutional History of England, vol. ii. p. 620, 2d ed., where, after stating that the evidence of handwriting, "unless the printed trial is falsified in an extraordinary degree," was such as would be received at present, he adds in a note, "Though Jefferies is said to have garbled the manuscript trial before it was printed (for all the trials, at this time, were published by authority, which makes them much better evidence against the judges than for them), yet he can hardly have substituted so much testimony without its attracting the notice of Atkins and Hawles, who wrote after the revolution. However, in Hayes's case, State Trials, x. 812, though the prisoner's handwriting to a letter was proved in the usual way by persons who had seen him write, yet this letter was also shown to the jury, along with some of his acknowledged writing, for the purpose of their comparison. It is possible therefore, that the same may have been done on Sidney's trial, though the circumstance does not appear. Jefferies indeed says, 'comparison of hands was allowed for good proof in Sidney's case.' Id. 818. But I do not believe that the expression was used in that age so precisely as it is at present; and it is well known to lawyers that the rules of evidence on the subject have only been distinctly laid down within the memory of the present generation." Mr. Starkie also suggests (2 Stark. Ev. 374, 2d ed.) that at, and for some time after, the period of Sidney's attainder, the terms "comparison of handwriting" were understood as including that which is now considered the legitimate course of proof.

Whether actual comparison in Court was or was not resorted to on Sidney's trial, the objection there taken seems to have extended to all the evidence offered on this branch of the case. When Sheppard deposed to Sidney's handwriting, and stated as his means of knowledge, that he had seen the prisoner write several endorsements, Sidney objected that "similitude of hands can be no evidence," 9 How. St. Tr. 854; and in his defence [*753] he repeated that "there is nothing but the similitude of hands offered for *proof," 9 How. St. Tr. 864, adding, p. 865, "The similitude of hands is nothing: we know that hands will be counterfeited, so that no man shall know his own hand." In Sir John Hawles's Remarks on Colonel Algernon Sidney's Trial, printed, 9 How. St. Tr. 999, from a work published in 1689, the objection is thus stated:—"And as this indictment was an original in one part," "the evidence on it was an original in another part, which was proving the book produced to be Col. Sidney's writing, because the hand was like what some of the witnesses had seen him write; an evidence never permitted in a criminal matter before." P. 1003. It is remarkable, that while Hawles, condemning the course taken at Sidney's trial, makes at least no express complaint of any "comparison" in the modern sense of the term, North, who defends the proceedings against Sidney, alludes to this part of them as follows:—"I may justly say there was not only the common proof of the opinion of witnesses, but writings produced and sworn to be his hand, as bills, and letters, and compared in court; but the prisoner made a considerable defence against that sort of evidence." Examen, Part II. c. 5, s. 150, p. 409, ed. 1740.

It seems probable that the objection pointed at by the Act of Reversal was considered by all parties as applying, not to the process by which the similitude of handwritings was ascertained, but to the practice of allowing that similitude to go to the jury at all as proof in a criminal case, unless as an adjunct to other evidence upon the point to which it was adduced; mere opinion of handwriting, however formed, being thought, by

the objecting party, too slight a testimony to countervail the ordinary presumption in favor of innocence. Burnet, in his History of his own Time, says (referring to the trial of Sidney): "As for the book, it was not proved to be writ by him; for it was a judged case in capital matters, that a similitude of hands was not a legal proof, though it was in civil matters;" vol. ii. p. 396, ed. 1823; to which is subjoined, from a note by Speaker Onslow, "Quere, whether that was a mistake, and so now allowed?" (The mention of a "judged case" may perhaps be an inaccurate reference to that of *Roy v. Da. Ma. Carr*, 1 Sid. 418, on an information for perjury, which was cited by Sidney on his trial.) On the Trial of the Seven Bishops, the objection to "comparison" of handwriting was not only that the evidence offered was unsatisfactory, but that it was so because the case was a criminal one (see pp. 785, 786, ante): which argument was adopted by POWELL and HOLLOWAY, *Ja.*, 12 How. St. Tr. 305, 306. The supposed distinction between civil and criminal cases, with the reason drawn from the balance of presumptions, will be found fully stated in Gilbert's Law of Evidence, p. 46 (of the 6th ed.) The author there observes, that, in a case of perjury assigned on an answer in Chancery, though there be no witness to prove directly that the party swore it, the perjury may be "illustrated" by a comparison of hands, "which possibly may be evidence in concurrence with other proof," showing, independently of the document itself, the identity of the party: and he then proceeds to state his opinion of the law as to comparison of hands, pronouncing it to be a good proof in civil cases, but not in criminal, because "of the presumption in favor of the defendant, and concluding as [+754] follows:—"Therefore, when the comparison of the hands is the only evidence in a criminal prosecution, there is no more than one presumption against another, which weighs nothing."

Consistently with this doctrine, in *Rex v. Crosby*, 12 Mod. 72 (S. C. 1 Ld. Ray. 39), on an indictment for high treason, several treasonable papers being produced which witnesses swore they believed to be the handwriting of the prisoner, and a question arising, "whether comparison of hands were sufficient?" the Court said, "It is not sufficient for the original foundation of an attainder, but may be well used as a circumstantial and confirming evidence, if the fact be otherwise fully proved; as in my Lord Preston's case" (Trial of Sir Richard Grahame and others, 12 How. St. Tr. 726, 786), "his attempting to go with them into France, and principally where they were found on his person; but here, since they were found elsewhere, to convict on a similitude of hands was to run into the error of Colonel Sidney's case." And, in the case of Sidney, it would appear that he himself conceived the error on this subject to lie in permitting any proof of handwriting, founded merely on opinion, to pass as substantial and independent evidence. For, in "The Apology of Algernon Sydney in the Day of his Death" (written between his trial and execution, and published with his Discourses concerning government, London, 1768; also printed in 9 How. St. Tr. 916); he states among the points of law which he was desirous of raising at the trial; "7thly, That, supposing the Lord Howard to be a creditable witness, he is but one: no man can be thereupon found guilty, as appears by Whitebread's case" (see 7 How. St. Tr. 120); "the papers cannot be taken for another witness; similitude of hands is no evidence, whosoever writ them; they can have no concurrence with what is said, being unknown to him, written many years since," &c., 9 How. St. Tr. 981. And he makes no complaint of the manner in which the "similitude" was established. In the Report to the House of Lords, December 20th, 1689, from the "Committee for Inspection of Examinations, concerning the Murders of Lord Russell, Colonel Sidney," &c., Lords' Journals, vol. xiv., p. 377, 9 How. St. Tr. 951, three depositions are set out, detailing the acts of injustice committed on Sidney's trial; in none of these statements is any comparison of documents in court by witnesses, or by the jury, mentioned; but one of the deponents who had been "of counsel for Colonel Sidney," states that, after the conviction, Sidney told him, "that they proved the paper which they accused him of, for being his handwriting, by a banker who had only once his hand to a bill; and to that he quoted the Lady Carr's case" (1 Sid. 418, but not as here cited; and see, as to that case, 16 How. St. Tr. 200-204, and 546); "wherein it was adjudged, 'That, in a criminal case, it is not sufficient for a witness to swear he believes it to be the hand of the party; but that he saw the party write it.'"

See also the discussions on this point of Sidney's case, in the trial of Laver, 16 How. St. Tr. 200, 208, 4; and the argument of Mr. Wynne, counsel for Bishop Atterbury, 16 How. St. Tr. 544-548.

GRINDELL v. GODMOND. Nov. 17.

[755]

Where a wife, ill treated by her husband, indicts him for assaulting and imprisoning her, a party who advances money for her to the attorney, without which he would not have undertaken the prosecution, cannot recover the amount from her husband as money supplied to procure her necessaries.

Otherwise, semble, if she exhibit articles of the peace against her husband.

ASSUMPSIT for money laid out and expended, at defendant's request, in and about the finding, carrying on, and prosecuting a certain bill of indictment preferred by one Mary Godmond, then and now being the wife of defendant, against the said defendant and others, for assaulting and imprisoning the said Mary Godmond, then and still being the wife of defendant, in pursuance of a certain recognizance before then entered into by her the said Mary Godmond for that purpose: and on an account stated. Plea, non assumpsit. On the trial before ALDERSON, B., at the York Spring assizes, 1835, the following facts appeared. The defendant, having ill treated his wife, was indicted as above mentioned, on her prosecution, at the Beverley sessions, together with some other parties. He was convicted, and sentenced to twelve months' imprisonment, and to pay a fine of 50*l*. The wife had requested Johnson, an attorney, to carry on the prosecution for her, which he had refused to do unless money was advanced: she then applied to the plaintiff, her brother, and he paid 66*l*. towards the costs of the prosecution, and made himself liable for the residue of Johnson's bill.¹ The particulars of demand were for cash paid in the course of the prosecution, on account of witnesses' expenses; for moneys paid to Johnson in respect of his disbursements; and for the balance of Johnson's bill; the whole demand amounting to 115*l*. It was insisted, on behalf *of the defendant, that the action [*756] did not lie. A verdict was taken for the plaintiff for 115*l*., with leave to the defendant to move to enter a nonsuit; the bill to be taxed if the verdict stood. A rule nisi for entering a nonsuit was obtained in the ensuing term.

Cresswell now showed cause. *Shepherd v. Mackoul*, 3 Camp. 326, shows that an attorney, who has acted for a wife in exhibiting articles of the peace against her husband, may recover against him for the business done, if it be clear that the proceeding taken was necessary for her protection. If any evidence of such a necessity appeared in the present case, there could not be a nonsuit. In exhibiting articles of the peace, the intention obviously is to avoid an impending evil; but in prosecuting an indictment, also, the object is, not merely to punish for what is passed, but to be secured from future injury; and an indictment, successfully prosecuted, would be even more effectual for this purpose than the exhibition of articles. It was clearly necessary, here, to prevent a repetition of the violence complained of. In *Williams v. Fowler*, M'Clel. & Y. 269, it was held that an action lay against a husband for the costs of proceedings against him on the prosecution, and at the suit, of his wife. In *Harris v. Lee*, 1 P. Wms. 482; S. C. (Anonymous) Prec. in Chanc. 502, although it was admitted that a wife cannot at law borrow money, even for necessities, so as to bind her husband, it was held that, the money having been applied to the use of the wife for necessities, the lender must, in equity, stand in the place of those who had supplied her, and who would otherwise have been creditors of the husband. The demand here for the 66*l*. actually paid comes directly within the authority of [*757] *the cases cited; the residue, which is still owing to the attorney, and for which the plaintiff is liable, falls under the same principle; for the assistance was necessary, and the wife actually received it. [COLERIDGE, J., mentioned *Jenkins v. Tucker*, 1 H. Bl. 90.] There the debts were strictly the wife's; the necessities had been contracted for and supplied before the plaintiff advanced his money; the wife gained no advantage by his interposition. Here the required services could not have been obtained but for the advances and undertaking of the plaintiff.

Alexander, with whom was *Wightman*, contra, was stopped by the Court

Lord DENMAN, C. J. We are all satisfied that this action cannot be maintained. It is impossible to say that, under any circumstances, a prosecution of the husband is necessary for the wife, within the rule on this subject. If she apprehends ill treatment from him, she has another mode of proceeding open to her, by exhibiting articles of the peace: in the case of her doing so, *Shepherd*

¹ The facts of the case, as above, were admitted without proof.

v. Mackoul, 3 Camp. 326, would be an authority. In *Williams v. Fowler*, M'Clel. & Y. 269, there was evidence of an express agreement by the husband to pay the bill if reasonable. In *Harris v. Lee*, 1 P. Wms. 482; S. C. (Anonymous) Prec. in Chanc. 502, the question was whether trustees for discharging the husband's debts were liable to the plaintiff for money lent by him to the wife, to pay surgeons for curing her of a disease; and the Master of the Rolls, considering that what had been done was in the course of obtaining necessaries, held that the plaintiff should stand in the place of those who would have been creditors if the money had not been advanced. Unless the indictment here was a necessary, the defendant cannot be charged. [*758]

PATTESON, J. It is clear that all the authorities apply to the case where necessaries have been obtained for the wife. It cannot be said that an indictment against the husband for assaulting his wife is a necessary.

WILLIAMS, J. I am of the same opinion. There is nothing here to raise an assumption in law.

COLERIDGE, J., concurred.

Rule absolute.

MANNING *v.* WASDALE. Nov. 18.

The privilege of washing and watering cattle at a pond, and of taking and using the water for culinary and other domestic purposes, is not a profit à prendre, but a mere easement.

Such a right may be claimed by reason of the occupation of an ancient messuage, without any limitation as to the quantity of water to be taken.

Semble, that, supposing such a right to be a profit à prendre, a declaration stating the plaintiff to be entitled to it, by reason of his occupation of an ancient messuage with the appurtenances, "for the more convenient use and enjoyment of his said messuage and premises," would not be bad on general demurrer, for want of expressly limiting the claim to water taken by cattle levant and couchant, or to be used on the premises.

CASE. The first count stated that, whereas the plaintiff, before and at the time, &c., was, and from thence hitherto hath been, and still is, an inhabitant residing and inhabiting within the parish of St. Ives, in the county of Huntingdon, to wit, in and upon a certain ancient messuage with the appurtenances there situate, and being the occupier thereof, and, by reason thereof, during all the time aforesaid, of right was entitled to the use, benefit, privilege, and easement of washing and watering his cattle in a certain pond in the parish aforesaid, to wit, &c. (naming the pond), and also of taking and using the water of the said pond for culinary and other domestic purposes, for the more convenient use and enjoyment of his said messuage and premises, every year, and at all times of the year, at his free will and pleasure; yet the defendant, well knowing, &c., whilst the plaintiff was and continued to be an inhabitant and residing within the said parish in manner aforesaid, and so entitled to the said privilege and easement, to wit, 10th October, 1815, and on divers other days and times between, &c., wrongfully and unjustly encroached upon, and closed up, contracted and narrowed, and filled up, lessened, and obstructed the said pond, to wit, by putting, placing, and throwing therein and thereon divers large quantities of bricks, &c., and thereby diminished, soaked up, and absorbed divers large quantities of the water of the said pond, and continued and kept the said pond so closed up, &c., and the water thereof so diminished, &c., for a long space of time, to wit, from the day and year aforesaid hitherto, and thereby rendered the plaintiff's access to the said pond, for the enjoyment of his privilege and easement aforesaid, less convenient and easy. [*759]

The second count claimed the use, benefit, privilege, and easement of washing and watering the plaintiff's cattle in the said pond, and of taking and using the water thereof, for his domestic and other purposes, at all times of the year; and described the nuisance to the pond somewhat differently.

Second plea to the first count. That the plaintiff has not, nor have the

owners or occupiers of the said messuage for the time being, in the said first count mentioned, at any time within twenty years next before the [*760] committing of the grievances in the said first count mentioned, used, exercised, or enjoyed the said use, benefit, privilege, and easement, in the said first count mentioned, in manner and form, &c. Verification.

Seventh plea, to the second count, like the second plea, *mutatis mutandis*.

Demurrer, assigning for cause that non user alone, as alleged, for twenty years, is insufficient to destroy the rights and easements; and that the pleas allege mere matter of evidence, which at most would only found a presumption in law of a release or other conveyance or abandonment of the rights; and that the defendant, if he means to rely on lapse of time as evidence of a release, destruction, or extinguishment of the right, ought to have distinctly pleaded the legal effect of such evidence; and that neither of the pleas alleges that the plaintiff has at any time acquiesced in any interruption to or disturbance of his rights, nor in fact that there ever has been at any time any interruption; nor do the pleas deny that the plaintiff has continually asserted his right during the whole period of the said twenty years; and that it is consistent with the pleas, that the rights and easements claimed continue altogether undisturbed and unaltered. Joinder in demurrer.

The Court called on

Wightman for the defendant. The declaration is bad. The right claimed is divisible. The plaintiff claims, by reason of his occupancy of a messuage, the right to take the water for washing and watering his cattle, and for culinary purposes. This is a claim to take as much water as he pleases for cattle whence-soever they come, and for culinary purposes in as many places as he pleases. [*761] *The first claim should have been limited to cattle levant and couchant; the second to culinary purposes in the plaintiff's house. Otherwise the pond might be exhausted. This is the rule as to all profits à prendre. Every claim to take on the soil of another, as, for instance, turbary, must be so limited that the concurrent rights of others may not be encroached upon; *Valentine v. Penny, Noy*, 145. Thus it is said, in an Anonymous case in *March's Reports*, 83, pl. 137, that "Prescription to have common for all his cattle commonable is not good, for thereby he may put in as many beasts as he will. But a prescription to have common for his cattle commonable levant and couchant, is a good prescription." *Jeffry v. Boys, Noy*, 145, and note (3) to *Mellor v. Spateman*, 1 Wms. Saund. 346, f, are to the same effect. That the claim is too large appears from the language of Lord ELLENBOROUGH in *Wilson v. Willes*, 7 East, 121, though that was the case of a custom; but the judgment there did not turn upon the objection to the claim of custom, as opposed to prescription. The principle therefore applies, even considering this as a prescription. But, as a custom (simply claimed for an inhabitant, and not for the occupier of the particular messuage), it is clearly bad, being a claim to take profits in alieno solo; *Gateward's Case*, 6 Rep. 59 b, *Blewett v. Tregonning*, 3 A. & E. 554. [PATTERSON, J. May not the words "for the more convenient use and enjoyment of his said messuage" be an informal way of limiting the claim, and so good on general demurrer?] These words do not limit, any more than the allegation that the right is by reason of the occupation. This is a right appurtenant to [*762] the messuage; **Tyringham's Case*, 4 Rep. 36, b: and the limitation must be expressed; it is not enough simply to connect it with the messuage, see *Morse and Webb's Case*, 18 Rep. 65. If the defendant had traversed the right, the plaintiff would have insisted that he might prove his right for any quantity of water. [PATTERSON, J. In *Corbyson v. Pearson*, Cro. Eliz. (458), it was held that, after verdict, by the statute of jeofails, where a party justified for a right of common for his beasts levant and couchant, and averred that he had put them in utendo communia sua prædicta, it should be intended that the beasts were such as might use the common.] After verdict it would be intended that the proof had been given as to such only. [PATTERSON, J.

That would have been by common law; but the decision was that the intendment might be made by the statutes of jeofails, see note (1) to *Stennel v. Hogg*, 1 Wms. Saund. 228 a. COLERIDGE, J. Can this be called a profit à prendre at all? Water is publici juris. In stat. 2 & 3 W. 4, c. 71, s. 1, right of common or profit to be taken is distinguished from easement, watercourse, or "the use of any water," mentioned in sect. 2.] *Primâ facie* the right to the water is in the owner of the soil: the plaintiff here claims, not the use of it in its passage, as an easement, but the right to abstract it from the soil. He, therefore, claims it as a profit à prendre, not as an easement. [COLERIDGE, J. You cannot bring an action to recover a pond; 2 Bla. Com. 18.]

Kelly, contrâ. The claim is sufficiently limited in the declaration; at any rate, there is no more than an informality, cured by pleading over. The right to water "for the more convenient use and enjoyment" of the *messuage [*763] can be only a right to so much water as would be required to enable the plaintiff to use and enjoy the messuage more conveniently. It must clearly be used upon the premises. And it may be remarked that the pond, if supplied by a spring, would be inexhaustible. The Court will put a reasonable construction on the language of the declaration. Could it be argued that a claim to use a highway for carriages, horses, and servants, was bad, because a party might put so many carriages, horses, and servants, on the highway, at one time, as to obstruct it? Besides, this is not, as assumed by the objection, a profit à prendre. It is a mere easement. Thus it was said, *arguendo*, in *Fitch v. Rawling*, 2 H. Bl. 395, that a custom to water cattle at a certain watering place was an easement,¹ though this was an admission making against the general object of the argument. This was cited in *Blewett v. Tregonning*, 3 A. & E. 571, and not disputed. [*Wightman*. There the instance was adduced as showing, a fortiori, that the right to take sand from another's soil was mere matter of easement; it would have shown this if the dictum had been good law; yet the Court held the latter right to be a profit à prendre; and they decided that there could be no custom for inhabitants to take the sand in alieno solo.] Such a right as that claimed here has often been the subject of actions.

LORD DENMAN, C. J. It is not consistent with ordinary language to call the taking of water a profit à prendre. But, assuming it to be so, I cannot see that *the declaration here necessarily claims more than enough for the supply [*764] of water for the culinary purposes of the house, and for cattle levant and couchant on the premises. There is, therefore, no objection available on general demurrer.

PATTESON, J. At all events, the declaration is not bad on general demurrer. Strictly speaking, the words "for the more convenient use and enjoyment of his said messuage and premises" may not be applicable to cattle: but the allegation is well enough on general demurrer. [*Wightman* suggested that the limitation was not in the second count.] It is then necessary to decide the other question; and I am of opinion that this is not a profit à prendre, which must be something taken out of the soil. And, if there is any mode in which the declaration here can be supported, it is sufficient. Now it occurred to me, as an instance, that inhabitants of a parish might have a right to an easement of this sort, and that afterwards there might be an inclosure act directing commissioners to set out the pond, so that an inhabitant might acquire a right against strangers, answering to the statements in this declaration.

WILLIAMS, J. I think the restriction in the first count is sufficient; and, as to the second, I agree that this does not appear to be a profit à prendre.

COLERIDGE, J. My judgment rests upon a ground which makes the difference between the two counts immaterial. I think the right claimed in each is a mere easement.

Judgment for the plaintiff.²

¹ *Pain v. Patrick*, 3 Mod. 294, is cited (but quære if to this point). The dictum there refers only to a watercourse. In *Goodday v. Michell*, Cro. Eliz. 441, a way to a common fountain is mentioned as an easement claimable for parishioners by custom.

² See *Tyler v. Bennett*, ante, p. 377.

[*765] *The KING v. The Inhabitants of the Parish of EASTRINGTON.
Nov. 21.

Indictment alleging that a public highway within a parish is out of repair, and that the parish ought to repair it. Plea, that the highway lies in a township within the parish; that the inhabitants of the township have been accustomed, and ought, to repair all public highways within it which otherwise would be repairable by the parish at large; that the parishioners never have repaired the said highway; and that, by reason of the premises, the township ought to repair, and the parish ought not to be charged. Replication, traversing the custom of the township to repair all public highways within it which would otherwise, &c.

Verdict for defendants.

Judgment arrested, because the plea did not aver that the highway was one which, but for the custom, would be repairable by the parish at large, and so did not show what party other than the defendants was liable to repair.

Judgment for the Crown non obstante veredicto, refused.

INDICTMENT for non-repair of a highway. The indictment described the portion of highway in question as situate in the parish of Eastington, in the East Riding of Yorkshire, and alleged that the inhabitants of that parish ought to repair.

Plea, that within the parish aforesaid there now is, and from time whereof &c., there hath been, a certain township called the township of Eastington, and that the part of the said highway alleged in the indictment to be out of repair is, and at the time of the taking of the inquisition was, situate within the said township: and that the inhabitants of the said township, from time whereof, &c., have repaired and amended, and been used and accustomed, &c., and during all the time aforesaid ought, &c., "and still of right ought, to repair and amend all the common highways within the said township that would be otherwise repairable by the inhabitants of the said parish at large; and that the inhabitants of the said parish at large have not during all or any part of the time aforesaid repaired and amended, and have not been used or accustomed to repair or amend, and of right ought not to repair or amend the King's common highways within the said township, or any of them; and that by reason of the *premises

[*766] the inhabitants of the said township ought to have repaired and amended and still ought to repair and amend the part of the said highway in the said indictment specified, and thereby alleged to be out of repair, when and so often as it hath been and shall be necessary, and that the inhabitants of the said parish at large ought not to be charged with repairing and amending the same."

Replication, that the inhabitants of the said township, from time whereof, &c., have repaired, &c., and have not been used and accustomed, &c., and during all the time aforesaid ought not, &c., and still of right ought not, "to repair and amend all the common highways within the said township that would be otherwise repairable by the inhabitants of the said parish at large, as in the said plea is above alleged." Issue was joined on this traverse.

On the trial before ALDERSON, B., at the York Spring assizes, 1835, a verdict was found for the defendants; and in the ensuing term *Starkie* obtained a rule to show cause why judgment should not be entered for the Crown non obstante veredicto, or why judgment should not be arrested. The ground of application was that the plea did not state the highway in question to be one which but for the alleged custom would be repairable by the parish at large, and did not show who were the parties liable to repair.

Cresswell and *Alexander* now showed cause. The prosecutors cannot have judgment non obstante veredicto, unless the Court can see distinctly, on the whole record, that the verdict ought to have been for the Crown; note [c] to *Bennet v.*

[*767] *Holbech*, 2 Wms. Saund. 319 c, 5th ed. The parishioners *here allege that they are by custom exempt from repairing all roads which, but for the custom, would be repairable by them; and the jury have found the custom:

but the objection is, that this is not alleged to be a road which, but for the custom, would be repairable by the parish. If it were not such a road, the parish could not be liable, on the present verdict. The plea expressly denies the liability of the parish; the prosecutors say that it does not in terms state whether the township or a third party is liable; but, even if the replication could be taken to mean that, admitting the custom as alleged, a third party, and not the township, is liable, that upon the present issue and finding, would not warrant a judgment non obstante veredicto. Nor is there any ground for arresting the judgment. The plea and indictment must be taken together. The prosecutors found their charge upon the common law liability of the parish to repair all roads within it: the defendants say, in effect, that the whole of such liability is, by immemorial usage thrown upon the township, so far as that extends. A replication that A. B. was liable, *ratione tenuræ*, to repair the road in question, would have been bad; the defendants were not obliged (unless as mere matter of form to exclude that state of things by averment. Suppose that, in a civil action, the plaintiff declared in covenant, as reversioner, stating that A. was seised in fee, and being so seised, demised for a term of years to the defendant, who entered into the covenant declared upon; and that A. died seised, leaving the plaintiff his heir-at-law. If the defendant pleaded that A., by will duly executed, devised to C. all lands of which he was seised in fee, not averring that the lands *in question were part of them, the declaration would supply that fact, and the plea would be a sufficient answer. So here the [*768] indictment supplies the fact that the roads in Eastrington township are such as the parish would be liable to repair but for the custom pleaded. And the plea here, after alleging the township to be in the parish of Eastrington, and the road in question to be in the township; and after setting forth the custom, alleges that, by reason of the premises, the township ought to repair. That averment here is an averment of fact, and fixes the road in question as one which, but for the custom, would be repairable by the parish. The form of plea given in note (10) to *Rex v. Stoughton*, 2 Wms. Saund. 159 c, contains no averment as to the road being repairable by the parish or any other district, but for the custom pleaded; and, although the indictment in *Rex v. Ecolesfield*, 1 B. & Ald. 348, did contain the statement said to be requisite here, Lord ELLENBOROUGH takes no notice of it when recapitulating the material parts of the plea in his judgment.

Starkie, with whom was *Wightman*, contra. At least the defendants cannot have judgment. Parishioners indicted for non-repair of a highway lying within their parish, cannot exonerate themselves merely on non debent reparare; and they must show who is liable; *Rex v. St. Andrew's*, Holborn, 1 Mod. 112: the same rule may be collected from *Rex v. Yarton*, 1 Sid. 140; S. C., as *Rex v. Yarenton*, 1 Keb. 277, 498, 514. [Lord DENMAN, C. J. I do not think there is any doubt on this point; but Mr. *Cresswell* has given an ingenious answer to the objection, by arguing that the averment *wanting in the plea is supplied by the indictment.] The allegations of the indictment are those [*769] usual in every such case. The presumption is, *prima facie*, against the parish. A prosecutor cannot be supposed to know that there is any other party indictable. He can only state that the road is a public highway, is within the parish, and is out of repair. Those allegations cannot be construed into an admission that the road is one which the parishioners would be liable to repair but for a custom which they plead, the plea failing to show of itself how any other party is liable. But, further, suppose there were within the parish a township containing three districts, in one of which the repairs were done *ratione tenuræ*, in another the district repaired, and in a third the whole township; and the parishioners, being indicted for the non-repair of a road within the township pleaded as the defendants have in this case. According to the argument on the other side, they would be entitled to judgment, and yet the public could not know, by the result, who ought to be indicted in future. The parishioners, to discharge themselves, must find out the party liable. [WILLIAMS, J. And you argue that there is a general averment of liability in the township, but that the plea does not apply it to

the particular road.] Till some other party is shown to be liable, the presumption must be against the parish, in favor of the public. [Lord DENMAN, C. J. The prosecutors apparently do not insist upon the prayer of judgment non obstante veredicto. PATTESON, J. That cannot be demanded; it is granted only when the merits are clear; in this case they are not so, if there is a third party who may be liable; and it is on that assumption only that the plea fails.]

[*770] *Lord DENMAN, C. J. As to the other part of the motion; I was struck at first with Mr. *Cresswell's* argument, but the reply to it is sufficient. The public, when they find a highway out of repair, cannot know who is the party liable, except as at common law. They proceed, in ignorance as to this point, against the nuisance as they find it. The parishioners, if they would discharge themselves, must point out the party who is liable.

PATTESON, J. I am of the same opinion, though, if this had been an action and not an indictment, I should have said that the objection ought to be taken by special demurrer.

WILLIAMS, J. concurred.

COLERIDGE, J. I am of the same opinion. The parishioners here set up a special defence, that the township has been accustomed to repair such roads within it as would otherwise be repairable by the parish at large; but they state nothing which applies this to the road in question.

Rule absolute for arresting judgment.

The KING v. The Inhabitants of the Lower District or Division of CUMBERWORTH and CUMBERWORTH HALF. *November 22.*

This case is reported, 4 A. & E. 731.

[*771] *WOODHAM v. EDWARDES. *Nov. 22.*

In assumpsit on a bill of exchange against the acceptor, defendant pleaded that; after the accepting and after the time for payment, he being resident in Scotland, and subject to the laws thereof, in consideration that certain supposed creditors should forbear to molest or sue him, made his deed or writing, duly stamped and attested according to the law of Scotland, by which he conveyed to J. D., and such persons as might thereafter be appointed trustees by the creditors, for the use of the creditors mentioned in the deed, and of other creditors whom the trustees should assume into the benefit of the disposition, all his movable estate in Scotland, in lieu and full satisfaction and discharge of all his debts owing to the said creditors; that notice of the execution of the deed was given to divers supposed creditors in Scotland and England, including the plaintiff; that plaintiff by writing signed by him, and valid by the law of Scotland, appointed H. R. his attorney, to concur in and adopt the deed, and receive the dividends; that H. R. did adopt the deed and its provisions on plaintiff's behalf, acted therein as plaintiff's authorized agent, took part in the management of the estate, &c.; that other creditors, in consideration of the said assignment, and the acceptance thereof by plaintiff, agreed to accept, and did accept, the same, in full satisfaction of their debts; that funds of defendant had since become available under the deed for the benefit of the creditors, sufficient to pay the debts of defendant, including that to plaintiff; and that all the proceedings were pursuant to the laws of Scotland; whereby, and by reason of the premises, and by the aforesaid laws, defendant had become absolutely discharged from the causes of action stated in the declaration.

Replication, that the defendant had not become nor was discharged in respect, &c., in manner and form, &c., on which issue was joined.

Held that, assuming that the allegations in the plea respecting the law of Scotland could be rejected (and seem, that they could not), and the plea be construed as setting up a defence according to the law of England, such a defence was not shown on the plea; that the pleadings, therefore, must be understood to put in issue the law of Scotland; and that the defendant, to succeed on the plea, was bound to prove such law as a fact.

ASSUMPSIT upon five bills of exchange, for 50*l.* each, accepted by the defendant, drawn by the plaintiff, payable to himself or order.

Plea: that, after acceptance of the bill, and after the term for payment had

elapsed, to wit, &c., the defendant, being at that time resident in Scotland, and subject to the laws thereof, in consideration that certain persons, being or supposed to be, creditors of him the defendant, should forbear to molest or sue him in respect of any debt, moneys, or claims, before and at that time due or supposed to be due to them or any of them from him, made his certain deed or writing, by which deed or writing (duly stamped and attested according to the law of Scotland, and shown to the Court here), defendant did alienate, assign, dispose, convey, and make over to and in favor of John Donaldson, and to such person or *persons as might thereafter be appointed by his creditors as trustees, to and for the use of his said creditors in the said deed mentioned, and of other creditors whom the said trustees should assume into the benefit of the said disposition, all and sundry his movable goods, furniture, &c., and other effects, and in general the whole movable estate presently appertaining and belonging to him, situated within the kingdom of Scotland, together with the lease of his dwelling-house at Clermiston, to and in favor of the said trustees and of such other persons as his said creditors might thereafter appoint trustees whom he did thereby surrogate and substitute in his full right and place thereof, in lieu of, and in full satisfaction and discharge of all the said debts, moneys, and claims, due from him to the said creditors; that notice of the execution of the said deed or instrument of disposition was given to divers persons being or supposed to be creditors of the defendant, as well in Scotland as in England, and, among the rest, to the plaintiff; that plaintiff by his writing signed by him, and which writing was, by the law of Scotland, valid and effectual in that behalf, did nominate and appoint one *Henry Richards* as his attorney in that behalf, and as such attorney empowered him to concur in and adopt the said deed, and to receive the dividends which might and should become due in respect of the said property by virtue of the said assignment; and that H. R. by virtue and in pursuance of such nomination, appointment, and authority, did adopt the said deed for and on behalf of the plaintiff, and did act therein as his authorized agent, and was appointed one of the committee chosen by the said creditors for the management and distribution of the defendant's estate and effects, and attended meetings of *the creditors under the said deed, and voted and acted as the representative of the plaintiff in the matters [773] thereof in that behalf; that divers other persons, creditors of the said defendant, to wit, &c. (naming twenty-four persons or firms), in consideration of the execution of such assignment by defendant, and the acceptance thereof by plaintiff as aforesaid, did agree to accept the assignment of the goods and chattels of defendant as aforesaid, and did accept the same, in lieu of and in full satisfaction of their respective debts and claims. The declaration then alleged that, from the time of executing the said trust deed by defendant, and the adoption thereof by plaintiff as aforesaid, defendant had not at any time accepted any other bill of exchange drawn upon him by plaintiff, and that plaintiff had no cause of action against defendant except those mentioned in the declaration, and which accrued before the execution of the deed by defendant and the adoption thereof by plaintiff as aforesaid; that, since the execution, &c., and the adoption, &c., certain funds, goods, and chattels of the defendant, of the value of 2000*l.* and upwards, have become available under the trust deed for the benefit of the creditors of the said defendant, and for the benefit (among others) of the said plaintiff, and that the said sum of 2000*l.* is sufficient to pay all the debts of defendant in the said trust deed mentioned, and, among the rest the debt of the plaintiff. And that all and singular the proceedings aforesaid were pursuant to and in conformity with the law of Scotland aforesaid. *Whereby, and by reason of the said several premises, and by effect of the aforesaid laws, he, the said defendant, hath become absolutely discharged in respect of his person, lands, goods, and chattels, from the several causes of *action in the said declaration mentioned: and this, &c.* Verification. [774]

Replication. That the defendant hath not become, nor is he, discharged, in respect of his person, lands, goods, and chattels, from the several causes of action in the said declaration, in manner and form, &c. Conclusion to the country.

On the trial before Lord DENMAN, C. J., at the Middlesex sittings after Easter term, 1835, the defendant's counsel contended that the pleadings admitted his case: and, no evidence being given on either side, the Lord Chief Justice directed a verdict for the defendant, giving leave to move to enter a verdict for the plaintiff. *Dampier* obtained a rule accordingly in Trinity term, 1835.

Erle and *Sewell* now showed cause. The replication is an informal demurrer, admitting all the facts, and taking issue on the law. In order to traverse the facts, the plaintiff should have replied specially; or at least generally, *de injuriâ*. At the time of the trial, it was conceived that a plaintiff could not reply *de injuriâ* in such a case as this: but it has since been ruled that he may; *Isaac v. Farrar*, 1 M. & W. 65; S. C. Tyrwh. & Gr. 281. His replication is, however, not so framed as to raise the same issue as a replication *de injuriâ*. The plea formally alleges, at the conclusion, the legal effect of the facts averred in the body of the plea; the replication traverses that allegation of the effect by denying the discharge *modo et forma*, following out the words of the conclusion of the plea: therefore no fact in the body of the plea is traversed by the replication,

[*775] and there was nothing for the defendant to prove. It will be said that the fact as to the operation of the law of Scotland was in issue under the *virtute ejus*. But the *virtute ejus* only collects the facts contained in the plea, and without introducing new matter, draws a conclusion from them; and such a *virtute ejus* is not traversable. If it introduced new matter, then it might be traversable, *Lucas v. Nockells*, 10 Bing. 157; but here the plea is perfect of itself, without the *virtute ejus*, which amounts only to an inference of law: and the replication is an issue of law, which is not permitted. But, further, the plea discloses a defence according to the law of England, and the allegation as to the law of Scotland is merely introduced as one of many circumstances necessary to substantiate that defence. Wherever a debtor consents to hand over his property in trust for all creditors who choose to come in, a creditor who assents cannot sue the debtor on the original debt, because he cannot replace him in the situation in which he was before the transfer was made; *Butler v. Rhodes*, 1 Esp. 286; *Brady v. Shiel*, 1 Campb. 147. In this case, the averment of the law of Scotland was necessary to show also the validity of the deed according to the *lex loci*. [COLERIDGE, J. Does the debtor make a transfer according to the law of England, if there be only a parol agreement?] A deed is not necessary, if the assignment be only of chattel interests. Further, the plea shows that other creditors have accepted the assignment in consideration of the plaintiff's acceptance; and a creditor whose assent has induced other creditors to give theirs, cannot recover on the original debt: *Steinman v. Magnus*, 11 East, 390; S. C. 2 Campb. 124, and a large class of subsequent cases decide [*776] *this; and the principle was admitted by *BULLER, J.* in *Heathcote v. Crookshanks*, 2 T. R. 28, and lately adhered to, at *Nisi Prius*, in *Seager v. Billington*, 5 C. & P. 456. [Lord DENMAN, C. J. Suppose they had produced evidence that this was not a discharge by the law of Scotland, do you say that you still might have insisted upon its being a good discharge by the law of England?] Certainly the argument, as to this branch, must go so far.

Smirke, *contra*. The argument of the defendant is, that the replication traverses nothing but the inference of law from the facts stated in the plea, and, therefore, that the facts themselves are admitted; and that these constitute a good defence. But the rule is that matter of law mixed with matter of fact is traversable; *The Grocers' Company v. The Archbishop of Canterbury*, 2 W. Bl. 770, 776; *Lucas v. Nockells*, 10 Bing. 157. Here the allegation traversed is a mixed inference, first of Scotch law, next of English law: for, whether the facts stated in the introductory part of the plea are a discharge by the law of Scotland, is a question of Scotch law, which is mere matter of fact; *Male v. Roberts*, 3 Esp. 163. A traverse of those facts would be wrong; for they may be all true, yet may not constitute a defence by the law of Scotland. Supposing the circumstances stated in the plea to be a good discharge in Scotland, then it

is an inference of English law that a discharge good in that country is also available in the English courts. The replication, therefore, puts the defendant on the proof, if not of all the matters in the plea, at least that the matters set forth in it are a defence *by the Scotch law; and for this purpose he ought to have called witnesses on the trial. Even if the allegation traversed had been (which it is not) a mere inference of law, yet it does not follow that the defendant would not be obliged to prove the facts contained in the plea, having chosen to take issue on the traverse instead of demurring: thus *nil debet* is a bad plea to a bail bond, because it refers matter of law, viz., the validity of the bond, to the jury, *Smith v. Whitehead*, cited in *Warren v. Consett*, 2 *Ld. Raym.* 1503: yet, if the plaintiff takes issue on it instead of demurring, the defendant is let into any defence under it; *Rawlins v. Danvers*, 5 *Esp.* 38.

It is however said that the defendant is entitled to reject all reference to the law of Scotland, and insist on the facts as a good defence by the law of England.

But, first, the assignment, authority, &c., are only stated to be good by the law of Scotland, and the plea throughout entirely relies on it; so that, if all reference to that law be suppressed, the plea will fail altogether. Secondly, even if this difficulty be overlooked, the facts will be no discharge by the law of England. A substituted agreement, in order to be pleadable as a defence, ought to amount to a release, or to an executed accord, or to give to the plaintiff a clear ground of action in lieu of the one on which he sues, as in *Good v. Cheesman*, 2 *B. & Ad.* 328, and *Cartwright v. Cooke*, 3 *B. & Ad.* 701. The instrument set forth is only a partial trust in favor of certain creditors, to which the plaintiff was no party. It is not said that he accepted it in satisfaction, or agreed to forbear to sue, or that the trustee "assumed" the plaintiff "into the benefit" of the disposition, or that all, or a majority, of *the creditors came in, or that the plaintiff received any benefit whatever from the arrangement. (See *Garrard v. Woolner*, 8 *Bing.* 258: *Reay v. Richardson*, 2 *C. M. & R.* 422; *S. C.* 5 *Tyrwh.* 931. It was not alleged in the present plea, nor did it appear on the pleadings, that the bill was made or accepted in Scotland. See *Phillips v. Allan*, 8 *B. & C.* 477.) (He was then stopped by the Court.)

LORD DENMAN, C. J. The argument for the plaintiff is, that the fact as to the law of Scotland is put in issue by this replication, which traverses the discharge alleged in the plea to arise from that law; and that, if this be the effect of the issue, the plaintiff is entitled to recover, because the defendant has not proved what he undertook to prove. On the other side, it is said that, whether the issue be well joined or not, the plea shows a good defence according to English law. But that does not appear to be the case. There is no binding deed; and nothing is shown, from the situation either of the debtor or of other parties, to prevent the creditor from coming upon the debtor.

PATTESON, J. If this had been a motion for judgment non obstante veredicto, it could not have succeeded unless the plea had been bad on its face, admitting the facts alleged. But, on this motion, the objection is, that the plea states facts which the defendant was bound to prove, and did not prove. Some facts at least are traversed: the onus, therefore, was on the defendant; and he has given no proof. Consequently the rule must be made absolute. It is clear that the fact of the Scotch law is put in issue. The plea speaks of the Scotch law throughout, and concludes with the allegation that the proceedings were pursuant to and in conformity with *the laws of Scotland, whereby, and by reason of the said several premises, and by effect of the aforesaid laws, the defendant has become absolutely discharged; and the replication traverses the discharge modo et formâ. The replication, therefore puts the Scotch law in issue, and that is a matter of evidence. But then it is said that all relating to the Scotch law may be rejected, and that the plea may be taken as showing a discharge by the English law. I doubt that, upon a record thus framed. Here is a traverse: can you reject the traverse, and say that the matter traversed is unnecessary? But, even if that could be done, it is clear

that the plea shows no defence by the English law: for it is not alleged that the plaintiff either executed the deed of composition, or said that he would do so, or induced others to do so; but only that he nominated and appointed a person as his attorney, and authorized and empowered him to concur in and adopt the deed, and that such person did adopt the deed on behalf of the plaintiff. The law of England has no such phraseology, although a man may be estopped by acting under a deed. There is no averment here to show that the defendant was put by the plaintiff in an altered situation, according to the English law, or that other creditors came in under circumstances which would make it fraudulent in the plaintiff to proceed for his debt. The discharge, therefore, which is traversed, is a discharge by the Scotch law.

WILLIAMS and COLERIDGE Js., concurred.

Rule absolute.

[*780]

*The KING v. EVE and PARLBY. Nov. 24.

D. obtained a rule nisi for a criminal information against the publishers of a libel, on his affidavit that the imputation in the libel was false. The Court discharged the rule, on the sole affidavit of S., who deposed that the imputation was true. Afterwards S. made declarations, and depositions in an ecclesiastical suit (but not, apparently, material to such suit), contradicting his affidavit in all particulars. D. then indicted S. for perjury, and the bill was found, but S. left the country. In the term after S. had made the declarations and depositions, and after he had gone away, D. obtained another rule for a criminal information against the publishers, on affidavit of the above facts, and of his innocence as before. In answer, affidavit was made that S. gave the information, after the publication, voluntarily, and that the deponent then and now believed such information to be true; but no affidavit was made as to information or belief at the time of the publication.

The Court, under the peculiar circumstances, made the rule absolute.

In Trinity term last, *Wightman*, on behalf of Simon Digby, obtained a rule nisi for a criminal information against the defendants, for publishing a libel in a Sunday newspaper, of May 29th, 1836, called *The Satirist and the Censor of the Time*, in the following words:—"Simon, but more commonly known in the play world, as 'King' Digby, from his skill in 'palming' that card at *écarté*, and who long enjoyed an unenviable notoriety among the legs at the club at Brighton, is living in obscurity in Devonshire. He has been, however, recently in town, and was seen at Epsom during the races, sharply upon the look-out, it was presumed, for flats." In support of the rule, Digby made affidavit that he never was guilty of palming the king at "*écarté*," nor of unfair play at cards or any other game; and that he had not been at Epsom races since 1829. The only affidavit in opposition was that of Thomas Shepard, described, in the title of the affidavit, as of Frederick Street, Hampstead Road, Middlesex, who deposed that he was intimately acquainted with Digby, and that, on one occasion when Digby dined with the deponent at the deponent's then residence in Shaftesbury Terrace, Pimlico, Digby played at *écarté* with him, won of him from 80*l.* to 85*l.*, was detected by him, while at play, in palming the king, confessed the fact, and returned the money. [*781] *On these affidavits, this Court, in Trinity term last, discharged the rule.

In this term, Sir John Campbell, Attorney-General, obtained a rule nisi for a criminal information against the defendants, for the libel before complained of. In support of the rule, Digby made affidavit that all the statements in Shepard's affidavit respecting the deponent were false; that the deponent had never seen or heard of Shepard up to the time of reading his affidavit; denying, as before, the charge in the libel; that, immediately after the previous rule was discharged, he proceeded to make inquiry concerning Shepard; that, having learned that a person of the name, and answering to the description of him, was to be examined on the 16th of June last, in a cause in the Consistory Court in

London, at the office of a proctor, he went thither on that day, and, without mentioning his own name, addressed the person in question, who then denied all acquaintance with him; that, at his suggestion, the same person was interrogated on the subject, in the cause, and, in answer to such interrogatories, swore that he did not know the party who had addressed him as above, that he never resided in Frederick Street, Hampstead Road, nor in Shaftesbury Terrace, Pimlico, that he had no knowledge of the previous proceedings on the libel, except from reading them in a newspaper, that he was not the person who had made the affidavit in those proceedings, that he did not know Digby, and had never dined in his company, nor played at cards with him at Shaftesbury Terrace or elsewhere, and, that he never was in his company at all. There were affidavits identifying this Shepard with the person who made the affidavit upon which the *previous rule was discharged, by means of the signatures to [*782] that affidavit, and to the deposition in the Consistory Court; and an affidavit identifying the person who made the deposition in the Consistory Court with a Thomas Shepard who had resided at Shaftesbury Terrace, Pimlico. Digby also deposed that he had preferred an indictment for perjury against Shepard at the Central Criminal Court, in August last, after his deposition in the Consistory Court; and that the bill was found, on the deponent's oath denying the truth of the statements in Shepard's affidavit, and on the testimony of several other witnesses; that he had obtained a warrant from the Lord Chief Justice for the apprehension of Shepard, which was put into the hands of an officer, but the officer had not been able to find Shepard; and that he was believed to have left the country. There were also affidavits of several noblemen and gentlemen, deposing to the integrity of Digby, and to their disbelief of the charges in the libel, and in Shepard's affidavit.

In opposition to the rule, an affidavit was made by an attorney (not employed as such on this or the former proceeding), that, after the first rule nisi was obtained, he made inquiries in quarters where he thought it probable that information could be obtained, to enable the proprietors of the newspaper to show cause; that Shepard (of whom he had no previous knowledge) had called on him, and given him the information from which Shepard's affidavit was afterwards prepared; and that, after the interview, the deponent had satisfied himself by inquiry that a person, answering to the description and name of Shepard, had resided in Shaftesbury Terrace, Pimlico, and was at the time residing in Frederick Street, Hampstead Road; that he did then, *and still, believe [*783] that Shepard had stated nothing but truth in his affidavit; and that no persuasion or control had been exercised over Shepard to induce him to make the affidavit.

Thesiger and Kelly now showed cause. There is no pretence for saying that the affidavit on which the rule was originally discharged was not the affidavit of the party in whose name it was professedly sworn: indeed, the prosecutor insists on the identity. The question, therefore, is whether the Court, having once discharged a rule upon affidavit, will afterwards permit the question to be opened, on a suggestion that such affidavit was false. There is no precedent for such a proceeding; and it would be very dangerous to create one. The prosecutor insists that Shepard is perjured. It is as likely that the perjury was committed in the case in the Consistory Court, as on showing cause against the rule for a criminal information; indeed the former is the more probable, as the depositions in the Consistory Court, so far as they relate to the question now before this Court, do not appear to be sufficiently material to admit of perjury being assigned upon them: whereas the affidavit was sworn under a direct liability to a prosecution for perjury, if it was false.

Sir *John Campbell*, Attorney-General, with whom were *Wightman*, and *J. W. Smith*, contra. The defendants do not even now swear that, when they published the libel, they believed it to be true. The Court having refused the prosecutor his remedy, on the affidavit of a party who now appears, upon any sup-

[*784] position, to be *unworthy of belief, and who is beyond reach, the prosecutor now asks to be put in the situation he would have stood in if no such affidavit had been sworn. (He was then stopped by the Court.)

Lord DENMAN, C. J. The Court will always feel very jealous when an application is made to re-open a rule on the ground that the affidavits on which it was discharged were false. But the circumstances of this case are so peculiar, that there is no fear of our creating an improper precedent by making this rule absolute. A party, who has been most grossly calumniated as a swindler, vindicates himself from the charge, so far as to satisfy the rule which this Court lays down in cases of applications for a criminal information; but he is met by the affidavit of Shepard, who swears to the truth of the charge. Afterwards it appears that Shepard has sworn falsely in all respects, and has fabricated the whole history. That being made probable to us, the publishers are called on to show cause why the rule, having been discharged upon an affidavit which was apparently a perjury, should not be revived. They do not, in answer, say that they had any other information, leading them to believe that the charge was true, at the time of the publication; nor even that, at that time, they had the information from Shepard himself; but only that, after the publication, a person obtained the account from Shepard. There is every reason to believe that that account was false. I think, therefore, that the circumstances are quite peculiar enough to enable us to say that we are not likely to create a dangerous precedent by granting the rule.

[*785] *PATTESON, WILLIAMS, and COLERIDGE, Js., concurred.

Rule absolute.¹

¹ For the general practice on this subject, see *Rex v. Smithson*, 4 B. & Ad. 861, as to criminal informations. As to other matters, *Davies v. Cottle*, 3 T. R. 405, and *Phillips v. Weyman*, 2 Chitt. Rep. 265; to which the following case may be added.

BODFIELD v. PADMORE. June 13.

Where a rule had been obtained to discharge a party out of custody, and had been afterwards discharged, the Court refused to entertain the same question on a subsequent application, founded upon facts which had occurred before the previous rule was obtained; it not appearing that the party applying was then ignorant of the facts, though they were not then brought before the Court.

Crowder had obtained a rule calling on the plaintiff to show cause why the defendant should not be discharged out of the custody of the marshal, and a mortgage deed held by the plaintiff be delivered up. A rule to the same effect had been previously obtained (in Michaelmas term last), and subsequently discharged; and the facts deposed to in support of the present rule had occurred before the former rule was obtained; but it did not appear that they had then been brought before the Court.

Busby now showed cause, and contended that, inasmuch as it was not suggested that the facts now insisted upon had come to the defendant's knowledge since the obtaining of the former rule, and as they had occurred before, the defendant could not raise the question anew.

Crowder, contra, contended that, as the facts had not been before the Court on the former occasion, the defendant could not be bound by a decision not affecting the merits of the present case.

Lord DENMAN, C. J. It is impossible to re-open this question. If a party have proper materials at the time of his first application, and be not in a state of ignorance, he is not to make a new application because he did not bring them forward at first. Nothing could be more dangerous.

LITTLEDALE, PATTESON, and WILLIAMS, Js., concurred.

Rule discharged.

[*786] *The KING v. The Churchwardens and Overseers of WESTOE.
Nov. 24.

The Court will not grant a mandamus, calling upon parish officers, appellant against an order of removal, to produce the pauper's indentures of apprenticeship (sworn to be in their custody), at the instance of the respondents, in order that an assignment thereon endorsed may be stamped, so as to be evidence on the hearing of the appeal.

CRESSWELL, in this term, obtained a rule nisi for a mandamus, calling upon the churchwardens and overseers of the township of Westoe, in the county of Durham, to produce to the commissioners of stamps a certain indenture or instrument in writing, purporting to be an indenture of apprenticeship between parties named in the rule, in order that a stamp might be affixed upon a certain deed poll or instrument of assignment endorsed on the said indenture, so that the said endorsement might be read in evidence at the hearing of an appeal now depending between the township of Scarborough, in the North Riding of Yorkshire, and the said township of Westoe; or otherwise to give up the said indenture of apprenticeship, for the purpose aforesaid, to the churchwardens and overseers of Scarborough, or their attorney. Westoe had given notice of appeal against an order of justices removing a pauper to that township from Scarborough. On the pauper's examination it appeared that he had been bound to a person in Westoe. The attorney for the parish officers of Westoe had the indenture in his possession; it having been obtained (in what manner did not appear) from the master of the apprentice. It purported to bind the pauper to a person in North Shields, and was duly stamped and executed; but on the back of it was an endorsement purporting to be an assignment of the pauper to a master in Westoe, with whom the pauper had served; that endorsement *was [787] duly executed, but not stamped. Possession of the indenture had been demanded, on behalf of Scarborough, for the purpose of stamping, but refused. The sessions respited the appeal to give time for making the present application.

Bliss now showed cause. The overseers are unwilling to furnish evidence against the township for which they are trustees, unless the law requires them to do so. The application is new; it calls upon them, not merely to produce a document for inspection, but to give up the control of it for the purpose of stamping. If this were simply a motion for a mandamus to allow inspection, the Court would not grant it. This is evident from *Rex v. The Bishop of Ely*, 8 B. & C. 112, and the authorities there cited. Lord TENTERDEN said in that case, "The books of a corporation are kept for the use of the body at large, or that of the individual members, and not for the use of strangers; so also are parish books; but a bishop's register of institutions is kept for the use of all persons claiming title to livings in his diocese. It, therefore, differs from the others, and is of a public nature." On that ground the mandamus was granted; had such ground been wanting, the writ would not have issued; *Cox v. Copping*, *Ld. Ray.* 337; *Rex v. Smallpiece*, 2 Chitt. Rep. 288. In the *Mayor of Southampton v. Graves*, 8 T. R. 590, this Court held that a mandamus calling on a corporation to allow an inspection of their books by a stranger ought not to be granted, although there were several recent instances in which this had been done. But the demand to have a document given up for the purpose of *being stamped is still more objectionable. If a mandamus were [788] granted here, a party might in the same manner be required (at whatever risk to his own estate) to produce his title deeds in any settlement case where a question arose upon which deeds might be thought to bear. But this cannot be demanded by persons who are not parties to such deeds, or interested in them. *Ratcliff v. Bleasby*, 3 Bing. 148; *Lawrence v. Hooker*, 5 Bing. 6; *Cocks v. Nash*, 9 Bingh. 723; *Travis v. Collins*, 2 Cro. & Jer. 625; *S. C.* 2 Tyrwh. 726; *Bateman v. Phillips*, 4 Taunt. 157, show the description of interest requisite to authorize such a demand; the advantage which persons may derive, as parties to an appeal, from the production of a particular document in evidence, is clearly not such an interest. It cannot be said that the officers of Westoe hold this document as trustees for any party but their own township. Besides, the Court will not, for this purpose, notice trusts, except in suits actually before it. In *Cocks v. Nash*, 9 Bing. 727, ALDERSON, B., says, "The practice has been to compel a party to the suit to produce a document required by the adverse party, where both have an interest in the same document; and this, in order that the suit may proceed;—that the adverse party may not have an obstacle

thrown in his way." "Over trustees as trustees, this Court has no jurisdiction." Then, if the case is not one in which the Court will interfere as in the exercise of its ordinary control over a suit, but the parties are obliged to ask for a mandamus, they must found themselves on a legal right. Here that right must be grounded on a service under the very assignment in question; but, the [*789] *assignment not being stamped, the service is as if it had never taken place. The defect in the instrument removes the foundation of their claim; the case is in this respect like *Jackson v. Warwick*, 7 T. R. 121; *Aldridge v. Ewen*, 3 Esp. N. P. C. 188, and *Hunt v. Stevens*, 3 Taunt. 113. Further, it does not appear when the assignment was executed; if before the passing of stat. 44 G. 3, c. 98, it could not now be rendered valid by stamping, *Rex v. Chipping Norton*, 5 B. & Ald. 412. But see *Rex v. Ide*, 2 B. & Ad. 866. And it is an additional reason for refusing this application, that it may subject third parties to penalties, under the revenue laws and otherwise, *Lawrence v. Hooker*, 5 Bing. 6, besides other liabilities to which the production of such a document might possibly expose them. If it be alleged, as a ground of the application, that it calls on public officers to discharge a public duty, that argument applies only to such duties as the office properly calls on them to fulfil. And the objection before urged would still apply, that the claimant does not show an interest in himself, or a legal right.

Cresswell, contra. The question is, not whether the instrument, if produced, could be rendered available, but whether the officers of Westoe are entitled to withhold it. The ground upon which a mandamus was granted in *Rex v. The Bishop of Ely*, 8 B. & C. 112, was that the register was a public document, and ought to be open for the use of all persons claiming title to livings in the diocese. The same argument applies here. Paupers are maintainable by parishes according [*790] to certain conditions *prescribed by law; and the question of settlement, under that law, is a public question. Having then in their possession a document relating to the settlement of a pauper, they are bound to produce it at the request of any person having an interest in that fact. They have possessed themselves of the evidence on a question of public right; and they resort to a technical difficulty to excuse themselves from producing it. In *The Mayor of Southampton v. Graves*, 8 T. R. 590, the application was to inspect documents in which the corporation had an interest like that of a private party in his title deeds. Lord KENYON said there, "Corporations, like individuals, have their rights and estates;" "but according to the doctrine now relied upon by the defendant, in every case where a corporation are parties to a suit, an inspection of their writings is to be granted of course. Where indeed the dispute is between different corporators, there an inspection of the writings belonging to the corporation may be granted, because each party has a right to see them: but I cannot conceive why an inspection of the muniments of a corporation should be granted when a similar inspection would be denied if the suit were between private persons only." But this writing is not a muniment of the parish officers of Westoe; if subpoenaed to produce it, they could not withhold it on that ground. If a mandamus does not issue, injustice must be done. It is not denied that there was an indenture, an assignment, and a service in Westoe; but, if this document cannot be made a subject of proof, Scarborough must maintain the pauper. If, when the instrument has been stamped, the officers of [*791] Westoe can show that it ought *not to be produced in evidence on the hearing of the appeal, they may allege their reasons hereafter: and it will then become a question whether or not secondary evidence shall be received.

Lord DENMAN, C. J. I think that a mandamus cannot be granted. Mr. Cresswell is obliged to support the application by contending that this is a public document, but we cannot consider it so. No case goes so far.

PATTERSON, J. The argument as to want of interest in this document is beside the question. Mr. Cresswell does not contend that the parish officers of Scarborough have an interest in the document, but only that it is of a public

nature, which there is no pretence for asserting. It is said that injustice will result from its being withheld: but the public is not concerned, for the pauper must be settled somewhere. The rule must therefore be discharged.

WILLIAMS, J. I am of the same opinion. It is impossible to say that this is a public document.¹ Rule discharged.

¹ COLERIDGE J., was in the bail court.

*BALLANTYNE v. TAYLOR. Nov. 24.

[*792]

Plaintiff held defendant to bail for a debt sworn to be 20*l.* 2*s.* 1*d.* The demand consisted of many items, none exceeding 12*s.* in amount. Defendant pleaded, 1. Part payment. 2. Infancy; and no other plea. Defendant traversed the payment, and rejoined, to the second plea, that the goods were necessaries. On the trial, defendant failed as to the plea of payment, and, the judge leaving it to the jury whether the goods supplied were necessaries, the plaintiff had a verdict for 10*l.*, being the whole of his claim for those articles which he had proved the delivery:

Held, that defendant was entitled to costs under stat. 48 G. 3, c. 46, s. 8, though plaintiff, upon the motion, put in affidavits to show that goods had been supplied to the whole amount claimed (which defendant, in general terms, denied), and though the affidavits stated that plaintiff's failure to prove his whole demand at the trial was owing to a part of the goods having been delivered by himself.

DEBT for goods sold and delivered, and on an account stated. Plaintiff arrested defendant, and held him to bail for 20*l.* 2*s.* 1*d.* Defendant pleaded, 1. Infancy. 2. Payment of 5*l.* 15*s.* 3*d.*, part of the demand. Replication: 1. That the goods were necessaries: 2. Traversing the payment. Issues thereon. On the trial before Lord DENMAN C. J., at the sittings in London after last Trinity term, the plaintiff proved delivery of part of the goods; the plea of payment was not supported; and the Lord Chief Justice left it to the jury whether any part of the goods proved to have been delivered were necessaries, desiring them, if so, to give a verdict for the amount claimed in respect of such goods. The jury gave a verdict for 10*l.* In this term a rule nisi was obtained for costs, under stat. 48 G. 3, c. 46, s. 3.

By particulars, delivered before plea, under a judge's order, it appeared that the action was brought for 25*l.* 17*s.* 4*d.*, minus 5*l.* 15*s.* 3*d.*, admitted to have been paid in 1831, the items being of various dates, from September, 1831, to July 1834. The articles were gloves, hosiery, cravats, &c., the highest item of charge amounting to 12*s.*, the lowest to 1*s.* 4*d.* The defendant by his affidavit, denied that at or since the commencement of the suit he owed the plaintiff 20*l.*, and alleged *that no bill of particulars had been delivered to him, before [*793] the arrest, beyond the amount of 9*l.* 9*s.* 9*d.* The affidavits in answer, by the plaintiff and others, stated that 20*l.* 2*s.* 1*d.* was owing at the time of the arrest, as stated in the particulars, which the deponents confirmed by reference to the plaintiff's books; that (as one of the deponents believed, assigning reasons) accounts of the whole were duly delivered; that defendant's father had paid the 5*l.* 15*s.* 3*d.* on account in 1831, and had then told plaintiff that he must look to defendant for the balance, as his allowance was sufficient to enable him to pay it; that in 1835, plaintiff having written a letter pressing for payment, defendant returned an answer, saying, among other things, "if you think you can recover the bills by law, you had better try it;" that, in consequence of this letter, plaintiff, believing that defendant meant to act dishonestly, instructed his attorney to demand payment, and to arrest, if the application was not attended to; that, at the trial, plaintiff, having delivered many of the articles himself, could only prove his demand as to a part, which his shopman had delivered; that the jury gave a verdict for the whole amount of these; and that the prices were reasonable, and the goods suitable, in quality and quantity, to the defendant's apparent condition in life.

Sir F. Pollock and Stunn now showed cause. There was according to the

statute, "reasonable or probable cause" for holding to bail. The plaintiff failed only so far as he was unable to prove the delivery of particular articles. The defendant asserts generally that he did not owe 20*l.* when arrested, but he does not deny specifically the receipt of any article; nor does he say that he did not [*794] *know the amount of the plaintiff's claim, though he denies that any bill of particulars (except as to 9*l.* 9*s.* 9*d.*) was delivered to him before the arrest. On both the issues which he has raised, the verdict is against him. The real question was upon the defence of infancy. There was a *bonâ fide* claim as to the whole amount, with a fair ground for expectation, on the plaintiff's part, that he might succeed; costs therefore ought not to be given against him; *Stovin v. Taylor*, 1 Dowl. P. C. 697, note (a); *Twiss v. Osborne*, 4 Dowl. P. C. 107; *Cawthorne v. Cawthorne*, 4 Dowl. P. C. 182. The amount of the verdict is not to govern the discretion of the Court; *Graham v. Beaumont*, 5 Dowl. P. C. 49.

Humfrey, *contrâ*, was not heard.

LORD DENMAN, C. J. It has always been held that, in a case of this kind, the amount recovered was *primâ facie* evidence. Here the plaintiff has sworn to an amount just sufficient to authorize an arrest; and I think we cannot say that he had "reasonable or probable cause" to arrest for 20*l.*

PATTESON, J. I am of the same opinion; and it is right that parties should understand the risk they run in making affidavit of a debt of 20*l.* when it is but just about that amount.

WILLIAMS, J. I am of the same opinion. There is great risk in making an affidavit to hold to bail, where the bill is of such an amount as this, and composed of many small items.¹ Rule absolute.

¹ COLERIDGE, J., was in the bail court.

[*795] *The KING v. The Inhabitants of ABERGELE. Nov. 24.

For obtaining a certiorari on behalf of a parish, to remove an order of sessions, a notice to the justices, signed by the attorney for the parish, stating the intention of the parish to apply for such writ, is a sufficient notice by the "party or parties suing forth the same," within stat. 13 G. 2, c. 18, s. 5.

The recognisance, under stat. 5 G. 2, c. 19, s. 2, for prosecuting such appeal, must be entered into by one or more of the inhabitants on behalf of themselves and the other parishioners, and also by sureties.

Where a certiorari had been allowed on an insufficient recognisance (it being given merely by two persons appearing on the recognisance to be inhabitants of the parish), this Court refused to quash the certiorari, but quashed the allowance, and enlarged the return to the writ, sending the writ back to the sessions in order that it might be duly allowed, after the parties prosecuting the writ should have entered into a proper recognisance.

An order for the removal of certain paupers from the parish of Abergele in Denbighshire, was quashed by the sessions, April, 1836, on appeal. Notice in writing was given to the chairman and justices, that the respondents intended applying for a certiorari to remove the order of sessions. The notice was under the hand of the attorney employed for the parish. The certiorari was sued out, and was delivered to the justices at the October sessions, 1836, together with a recognisance entered into by W. H., of, &c., in the parish of Abergele, farmer, and A. W. of the town of Abergele, innkeeper, before a justice of the county, in 50*l.*, with condition that the inhabitants of Abergele should prosecute the said writ of certiorari, &c. In this term a rule nisi was obtained for quashing the certiorari, on the grounds, that the notice for applying for the certiorari was not given by the "party or parties suing forth the same," according to stat. 13 G. 2, c. 18, s. 5; and that the recognisance was irregular, being entered into by two inhabitants of the parish merely as inhabitants, and not by any person or persons in the name of the parish generally, whereas stat. 5 G. 2, c. 19, s. 2,

enacts "that no certiorari shall be allowed to remove any such judgment or order" (of justices) "unless the party or parties prosecuting such certiorari, before allowance thereof, *shall enter into a recognisance with sufficient sureties," "in the sum of 50*l.*, with condition to prosecute the same at [*796] his or their own costs and charges with effect," &c., and to pay costs, &c.¹

J. Servis now showed cause. Notice, under the hand of the attorney for the respondents, of their intention to apply for a certiorari² was a notice by the parties within the meaning of the statute. [Lord DENMAN, C. J. That is a reasonable construction.] *Rex v. The Justices of Cambridgeshire*, 3 B. & Ad. 887, shows that such a notice is sufficient, and not open to the objection taken in *Rex v. The Justices of Lancashire*, 4 B. & Ald. 289. [*Humfrey*, contra, said that this point would not be insisted on.] As to the recognisances, *Rex v. Boughey*, 4 T. R. 281, may be cited on the other side: but there the certiorari was applied for by individuals, who might themselves have been bound. A parish cannot be personally bound; and the respondents here have given two sureties, and that is the *practice in such cases. [Lord DENMAN, C. J. [*797] The objection to the recognisances in *Rex v. Boughey*, 4 T. R. 281, was not necessary to the decision, because the certiorari had been applied for too late.]

Humfrey, contra. The words "party or parties prosecuting" apply to a parish; the recognisances on its behalf might be entered into by the parish officers: and it would seem, by the language of PARKE, J., in *Rex v. The Justices of Cambridgeshire*, 3 B. & Ad. 889, that all should enter into it. If two inhabitants, or one, could be said to represent the parish, still there is not a recognisance by the party and sureties. It appears from a manuscript note of *Rex v. Boughey* that one or two inhabitants may become bound on behalf of the parish; but that has not been done here. And whatever the practice may have been, effect ought to be given to the statute, according to its plain words.

(A note of *Rex v. Boughey and Others*, by the late Mr. Dealtry, was here submitted to the Court, stating as follows;—"There was an affidavit that, by the constant practice of the Crown Office, a party was not required to enter into recognisances to prosecute a certiorari; if he found two good sureties, it was always considered a compliance with the statute. And in the present case, but particularly in cases where a whole parish were defendants, it was impossible that they could all enter into a recognisance. But the Court determined" "that the statute absolutely required a party removing to enter into the recognisance; and Lord KENYON said, in the case of a parish, one or two of the inhabitants might *enter into the recognisance on behalf of the rest, as on [*798] an indictment they plead in the name of the whole."

The officers of the Crown Office now stated, in addition, that, since the decision in *Rex v. Boughey*, the recognisance in the case of a certiorari to remove orders at the instance of a parish had continued in the same form as before, except that it was altered from sureties by two inhabitants in 25*l.* each, to sureties by two inhabitants in a joint sum of 50*l.*)

¹ It was also objected that the certiorari was not "moved or applied for within six calendar months next after" the making of the order of sessions, pursuant to stat. 13 G. 2, c. 18, s. 5. The order was made, April 7th; but the sessions began on the 5th, and it was contended that the judgment must have relation to the first day. The agent for the respondents went to the chambers of the Lord Chief Justice, October 4th, to obtain a fiat for a certiorari. The Lord Chief Justice was out of town (as were the other Judges of this Court;) but his Lordship's clerk promised the agent that he would send the necessary papers to the Lord Chief Justice in Derbyshire, by that evening's post, and desired him to call again on the 8th, that being the first day on which it was probable the papers could be returned. The agent applied again on the 8th, and received the fiat, endorsed by the Lord Chief Justice; after which he immediately proceeded to obtain the certiorari. These facts were commented upon in argument; but the Court laid no stress upon the objection.

² The notice was described in these terms, in the affidavit on which the rule was granted, and no other account of it was given.

LORD DENMAN, C. J. The Court is of opinion that recognisances ought to be given here on behalf of the parish, and two sureties also. But nothing limits the time for doing this; and we think the rule ought to be enlarged, in order that the proper recognisances may be entered into. [*Humfrey* suggested that the time was limited by stat. 13 G. 2, c. 18, s. 5.] I do not think the words of that clause have the rigid sense contended for. The statute enacts that no certiorari shall be granted, unless moved or applied for within six calendar months after the making of the order. This was so applied for. Why may not there be an allowance now, if the first allowance is incorrect? It is doing no violence to the act to say so. If the application for a certiorari were made when the six months were expiring, the allowance would necessarily be after the six months. And, by stat. 5 G. 2, c. 19, s. 2, the recognisances are to be entered into "before the allowance" of the certiorari. That relates to allowance merely.

PATTESON, J. The allowance is by the persons to whom the certiorari is directed. Here the allowance is said to be irregular, on account of a defect in [*799] the *recognisances. Why should not it go back in order that proper recognisances may be entered into?

Humfrey contended that, as the case now stood, the allowance being clearly irregular, the appellants were entitled to have the certiorari itself quashed.

J. *Jervis*. There is no objection to the writ, though the proceedings for allowing it are defective. When those are amended, the certiorari will come into operation. [PATTESON, J. If a certiorari has been obtained within the six calendar months, but not used for a long time afterwards, it does not therefore become invalid.]

LORD DENMAN, C. J. The rule will be moulded so that the allowance may be quashed. When the proper recognisances are entered into and another allowance obtained, the respondents will make what use of it they can.

PATTESON and WILLIAMS, Js., concurred.¹

The rule was, that the allowance of the certiorari be quashed, and the recognisances discharged. And, "That the return to the said writ of certiorari be enlarged; and the said writ of certiorari, and the orders returned therewith, be sent back to the sessions, in order that the said writ may be duly allowed, after the defendants shall have entered into a recognisance by one of them the said [*800] defendants, on behalf of himself and *the other inhabitants prosecuting the said writ of certiorari, with sufficient sureties, in the sum of 500*l.*, pursuant to the provisions of the statute in that case made and provided."

¹ COLERIDGE, J. was in the bail court.

CROSS v. METCALFE, Executor of WILLIAM METCALFE. Nov. 24.

A cause was referred at nisi prius, and a verdict taken for the plaintiff, subject to a reference. The arbitrator certified to the Court, pending the reference, that it would be agreeable to the justice of the case to allow the plaintiff to amend his replication, by substituting *de injuria*, or some other replication which should put in issue all the allegations in the plea.

Held, that such amendment could not be ordered without consent of both parties.

At the York Spring assizes, 1836, this cause came on for trial; and, by consent, a verdict was taken for the plaintiff for 500*l.* damages, subject to the award of a barrister, to whom all matters in difference in the cause were referred, with power to order a verdict for either party, or a nonsuit, to be entered, and to raise any point of law which the parties or either of them might require. Pending the reference, the arbitrator made the following certificate:—"After hearing all the evidence tendered by both parties, and the arguments of counsel for both parties thereon, I certify respectfully to the Court that I am of opinion that it will be agreeable to the justice of the case to allow the plaintiff to amend the

replication to the last plea, by substituting for the present replication the general replication de injuria, or other replication putting in issue all the allegations in that plea, upon payment of the ordinary costs of the amendment and application for leave to amend, if such an amendment can be ordered to be made in the present stage of the cause." A rule was obtained, in this term, calling on the defendant to show cause why the plaintiff should not have leave to amend, according to the above certificate, *by substituting the replication de [801] injuria for the present replication to the last plea.

W. H. Watson, now showed cause. There is no authority to make this amendment. The arbitrator is put in the place of a judge sitting at nisi prius; but even a judge had no power to amend during the trial, before the statutes 9 G. 4, c. 15, and 3 & 4 W. 4, c. 42; and he can do so now only in cases of variance. A misleading cannot be amended at this stage of the cause. If this be in the nature of an application for a repleader, the rule is that a repleader be not granted in favor of the party making the first fault.

Joseph Addison, *contrà*. This amendment is necessary for the purpose of justice; and it is said in 1 Tidd's Practicé, 713, 9th ed., that, "notwithstanding the general rule, which prohibits amendments not authorized by the above statutes," (of amendments) "after the proceedings are entered upon record, the courts, we have seen, have in particular instances permitted the plaintiff to amend his declaration or replication, and the defendant to amend his plea, in cases where there has been nothing to amend by, after issue joined, and after the proceedings have been entered on record, and even after a trial has been had thereon, and the plaintiff has been nonsuited, or failed in producing the record. The amendment may be made in any stage of the proceedings." [Lord DENMAN, C. J. Not for the purpose of giving a new defence or reply.] The arbitrator here thinks that the replication takes issue on an immaterial *fact [802] in the plea; and he wishes the whole matter of the plea to be put in issue, that the cause may be tried on the merits. *Tufton and Ashley's Case*, Cro. Car. 144; *Tite v. The Bishop of Worcester*, 1 Ld. Raym. 94; *Smith v. Fuller*, 1 Ld. Raym. 116; *Rex v. Wilkes*, 4 Burr. 2527, 2566; *Richardson v. Mellish*, 3 Bing. 334, show the latitude taken in practice, as to the periods at which the courts will allow amendments. In ejectment, it has been common to enlarge the term stated in the demise, after verdict.¹ On demurrer the courts have occasionally permitted material amendments after judgment has been pronounced. In *Hooper v. Mantle*, 13 Price, 695, 736, which was an action for not carrying away tithes of grass and hay, the declaration alleged the closes in which, &c. to have been sown with grass; a new trial was granted on account of a variance, it having been proved that the grass was natural; and afterwards the Court of Exchequer gave the plaintiff leave to amend by striking out the averment on which the variance arose. [PATTESON, J. There is no instance in which the courts have allowed the substance of the issue to be altered after verdict, without setting the verdict aside.] The verdict here is only nominal; it is in fact suspended till after the arbitrator awards.

Lord DENMAN, C. J. None of the cases approach what is now contended for. It would be going too far to grant it.

*PATTESON, J. The verdict has been taken on a particular issue, [803] by consent. Can we alter the terms on which the verdict was taken and the reference made, without consent?

WILLIAMS, J. If the proposed alteration is a material one, there ought to be a consent of the parties: if it is not material, there is no need of the application.² Rule discharged.

¹ See *Vicars v. Haydon*, lessee, of *Carrol*, 2 Cowp. 841; *Doe v. Rendell*, 1 Chitt. Rep. 585, and the cases there cited.

² COLERIDGE, J., was in the bail court.

[*804] *The KING v. The Commissioners of the Navigation of the Rivers THAMES AND ISIS. Nov. 23.

By acts relating to a river navigation, commissioners were authorized to make such cuts as they should deem necessary for the navigation, provided that no cut should divert or stop up the present channel of the river, or alter the course of the stream; and to make such horse towing paths as they should think convenient for the navigation. If any person should think himself aggrieved, damaged, or injured, by any work made by the commissioners, or by the operation or effect of any such work, and should make complaint to the commissioners, they were to hear, and report to a subsequent general meeting, at which the commissioners were to make such order, determination, and judgment thereon as to them should seem just, and give such satisfaction as they should think reasonable. And, if the party complaining should be dissatisfied with such order, &c., he might appeal to the quarter sessions, who should make adjudication thereon, and award such costs to either party as they should think reasonable, which order and determination should be final and conclusive to all intents and purposes whatever.

A mandamus recited that B. was seised in fee of an ancient towing path, on a part of the river, and to the exclusive right of towing barges at that part, taking reasonable tolls for such towing by his horses; that the commissioners made a cut, by which the barges were enabled to avoid that part of the river, and dispense with the use of the horses, and withhold the tolls; that the commissioners had, by the cut, injured the old channel of the river, and made the navigation of the part aforesaid less easy and convenient, and diverted the navigation of the river from B.'s towing path, and rendered the towing path, and his exclusive right, wholly unprofitable; that so B. was aggrieved, &c.; that he had complained to the commissioners and demanded compensation adequate to the injury which he had sustained; that the commissioners, at a subsequent general meeting, made an order, determination, and judgment that they could not accede to B.'s application; that B., being dissatisfied with such order, appealed to the quarter sessions, who ordered the commissioners to pay B. 1000*l.* in full compensation for the injury sustained by him, and 200*l.* costs, which they refused to pay; and the writ commanded them to pay.

Return, That the commissioners, believing B. had no claim to compensation, did not hear evidence on the complaint, or the amount of the alleged loss, and notified to B. that they refused to accede to his application; that B. treating this refusal as an order, &c., appealed; that, on the appeal, the commissioners objected that the refusal was not an order, but that the quarter sessions overruled the objection; that the cut enabled navigators to avoid a dangerous bend of the river; that B. was no further entitled to the path than as owner of the land; that they had not obstructed his towing path, nor placed any obstacle to the navigation against the towing path; that the parties might, sometimes did, still navigate by the old channel. Held,

1. That the refusal of the commissioners was an order, determination, and judgment, from which an appeal lay to the sessions.
2. That the sessions had jurisdiction to award compensation to B., both for the damage suffered by his towing-path being less used, and for the obstruction of the old navigation.
3. That the order of sessions was final and conclusive, and must be held to have been made on both complaints, inasmuch as the return (assuming it to negative the obstruction of the navigation) did not deny that the sessions had found such obstruction.
4. A peremptory mandamus was awarded to the commissioners to pay the money.
5. But the Court would not give the prosecutor costs of the mandamus, under stat. 1 W. 4, c. 21, s. 6, considering the question to have been very doubtful.

MANDAMUS. The inducement suggested that, by an act, &c. (stat. 52 G. 3, c. xlvii., local and personal, public), after reciting acts passed in 11 G. 3, [*805] *(c. 45.), 15 G. 3, (c. 11.), 28 G. 3, (c. 51.), and 35 G. 3, (c. 106.), it was enacted, stat. 53 G. 3, c. xlvii. s. 1, that all and every the powers, authorities, provisoes, restrictions, clauses, penalties, forfeitures, matters, and things contained in the recited acts should continue in force for executing the works by the said former acts, and by that act, authorized and directed to be done (except such parts thereof as should be altered, &c., by that act); and the commissioners appointed under the said acts, or either of them, should have power and authority to execute so much of the said acts as should remain in force, and also that act: and that, in and by the said stat. 35 G. 3 (c. 106.), it was enacted, stat. 35 G. 3. 106, s. 22, that, if any person should think himself

aggrieved, damaged, or injured by any work made by the commissioners, or by the operation or effect of any such work, and should make complaint thereof in writing to the said commissioners at any district or general meeting, &c., the said commissioners should hear and report on such complaint to the next or some other subsequent general meeting, and should, at such next or subsequent general meeting, make such order, determination, and judgment thereon as to them should seem just, and give such satisfaction to the party complaining as they should think reasonable; and, if the said party should be dissatisfied with such order, judgment, or determination, it should be lawful to appeal to the next General Quarter Sessions of the county in which the cause of complaint should arise, give notice, &c., to the general clerk of the commissioners; and the said Court should entertain, and take cognizance of, such appeal, and make such order and adjudication thereon *as to the justices should seem just, and award such costs, &c., which order and determination should be final and [*806] conclusive to all intents and purposes whatsoever.

That the Right Honorable George Lord Boston hath been for divers years last past, and now is, seised, possessed of, and entitled to, the fee simple and inheritance of an ancient towing path, situate in the several parishes of, &c., in the county of Bucks, for the towing of barges, and of goods, &c., contained therein, up and down the river Thames, for a great distance, to wit, one mile and two furlongs, to wit (describing the termini, above and below Cockham Ferry); and that the said G. Lord B. hath been for divers years last past, and now is, seised, possessed of, and entitled to the sole and exclusive right and privilege of towing barges, &c., and goods, &c., to and from, &c. (mentioning the termini), taking, for the towing of such barges, &c., with horses kept by him, or by his authority for that purpose, certain reasonable tolls or payments.

And that the commissioners have made, under the authority of the said above recited acts,¹ a certain *new cut or canal, from that part of the Thames which is opposite Cliefden bank, &c., and into the Thames again, a [*807] short distance below Cockham Ferry, by the making of which new cut or canal all persons navigating barges, &c., up and down the river Thames, are enabled to avoid that part of the said river along which the said towing path of G. Lord B. is situate, and to dispense with the use of the horses kept by, or by the authority of, G. Lord B. for the towing of such barges, &c., and to withhold the said tolls or payments, &c., for the use of such horses. That the commis-

¹ Stat. 52 G. 3, c. xlvii. s. 8, after repealing stat. 28 G. 3, c. 51, s. 16, so far as it gives restricted powers to make cuts and erect locks, enacts, "That it shall be lawful for the said commissioners to erect any lock or locks, pound lock or pound locks, or other device for the improvement of the said navigation from the boundary of the jurisdiction of the city of London, near Staines, in the county of Middlesex, to the town of Cricklade, in the county of Wilts; and to make any cut and so many cuts as they shall deem necessary for the said navigation, or for the purpose of erecting or communicating with any lock or locks, pound lock or pound locks on the same navigation: provided nevertheless, that no one cut shall" "be made so as to divert or stop up the present or usual channel of the said river, or to turn, divert, or alter the course of the stream or water passing through the same. Stat. 35 G. 3, c. 105, s. 23, reciting that "it would greatly conduce to the benefit and advantage of the said navigation if a free, continued uninterrupted, and public horse towing path were made and established throughout and on the whole of the said navigation, so that barge masters or other persons might employ their own horses or cattle in the towing of barges, boats, and vessels, on the said navigation, either upward or downward, without interruption or impediment;" enacts that it shall "be lawful for the said commissioners to purchase and make any such horse towing paths, roads, and ways, for the haling of barges, boats, and vessels, or for passing from any public road to any horse towing path, as the said commissioners shall think convenient and necessary for the use of the said navigation, &c., with certain exceptions not material here; "the said commissioners paying and allowing unto all and every person or persons full recompense or satisfaction for all such losses or damages as he or they shall or may sustain or be put unto by reason of the taking of such lands or grounds for the making of a towing path, way, or road, for the use of the said navigation;" the damages, if not agreed upon between the parties, to be settled by a jury.

sioners have also made, under the authority of the said acts, at or near the said new cut or canal, a certain pound lock, at which tolls and payments are, under the said acts, demanded and taken by the commissioners, for the use of the said new cut for barges, &c., whether such barges, &c., shall or shall not have passed through the said new cut. And that the commissioners by the making of the [*808] said new cut, have materially injured the old channel of the river *Thames, and made the navigation of that part thereof, along which the said towing path is situate, less easy and convenient; and that so, by the making of the said new cut or canal as aforesaid, and by the demanding and taking of the said tolls as aforesaid, and by the injuring of the said channel as aforesaid, the commissioners have diverted the navigation from the towing path of the said G. Lord B., and rendered his said towing path, and his said sole and exclusive right and privilege of towing barges, &c., useless and unprofitable to him. And the said G. Lord B. has been aggrieved, damaged, and injured by the said work of the commissioners, and by the operation and effect thereof.

The indictment then suggested that the said G. Lord B., being so aggrieved, &c., did, in pursuance of stat. 35 G. 3, c. 106, s. 22, make complaint thereof, in writing, &c., to the commissioners at a general meeting held on 6th February, 1833, and demanded compensation; and thereupon the said commissioners, at a subsequent general meeting holden on the 29th June, 1833, made an order, determination, and judgment on such complaint, which order, &c., was to the purport and effect following; to wit, "that the said commissioners could not accede to his Lordship's application:" that the said G. Lord B., being dissatisfied with such order, &c., appealed to the next practicable general Quarter Sessions for the county; which court of Quarter Sessions, in pursuance of the last-mentioned act, made an order and adjudication thereon, that the commissioners should forthwith, upon notice of that order, pay to the said G. Lord B., or to J. B., his solicitor, 1000*l.* in full compensation for the [*809] injury sustained by him as aforesaid, and the further *sum of 200*l.* for costs of the said appeal; which sums of 1000*l.* and 200*l.* ought thereupon to have been paid, &c. The inducement then suggested that Lord Boston had given notice to the commissioners, and their general clerk, of the order of Sessions, and had applied for payment; but that they had not paid, and still neglected and refused to pay.

The writ then commanded the commissioners to pay or cause to be paid to G. Lord B., or to J. B. his solicitor, the said two sums pursuant to such order, &c., or show cause, &c.

Return. That the cut or canal, in the writ described as having been made by order of the said commissioners, according to the provisions of the several statutes in the said writ recited, empowering them to make cuts or canals, pound locks, towing-paths, and other works for improving and completing the navigation of the said rivers between the points mentioned, was opened on 30th of October, 1830; that it was not until 31st of January, 1833, that Lord B., of whom the commissioners had purchased some land towards making the said cut,* applied to them for compensation in consequence of an alleged loss by the disuse of the said path: that the commissioners, believing that his Lordship had no claim to compensation under the recited acts, did not think it necessary to hear any evidence on the subject of his complaint, or the amount of his alleged [*810] loss: that, they having notified to his Lordship, through *their general clerk, that the commissioners refused to accede to his application, Lord Boston, treating that refusal as if it were an order, determination, and judgment of the commissioners upon his claim, made it the ground of an appeal to

¹ See ante, p. 806, note 1. The powers recited in the return were given by different clauses of the several statutes, not affecting (except as above set forth) the points decided by the Court.

² The statutes empowered them to purchase for the purposes of the navigation, the value to be assessed by a jury, if necessary.

the quarter sessions: and that, before the case was heard, the commissioners objected that the said refusal was not an order, determination, &c., against which an appeal lay under 35 G. 3, c. 106, or any other of the recited acts; but the Court overruled the objection. The return then certified that the said cut or canal enables persons navigating the Thames to avoid a dangerous curve or bend of the river, &c. (adding circumstances to show that the navigation was benefited by the cut): that, by making the said cut, the commissioners have not done or caused any injury to the channel of the said river: that Lord B. is no otherwise entitled to the said path in the said writ mentioned than as owner of the land through which it passes, and to such part thereof only as passes through his land: that the commissioners have not, by the said cut, or by any other work, obstructed Lord B. in the use and enjoyment of the said path, or his wharfs, or other private property, nor have they placed any fence or other obstacle to navigation against the said towing-path, wharfs, or other property of the said Lord B.: that, by the effect or operation of the said cut, traders, and others, if they prefer it, are not prevented from navigating the old channel, or from proceeding to or from Lord B.'s wharfs, and that some barges still navigate the old channel; but that, even before the making of the said cut, when barges came down the stream so as not to require his horses, nothing was paid to Lord B. or his tenants in virtue of any alleged exclusive right of *towing [*811] barges: that the commissioners do not take toll for barges coming to or from the wharfs by the channel of the river: that the commissioners are not empowered by any of the recited statutes to make compensation for the disuse or abandonment of a towing-path, or on account of traders, &c., being enabled by improvement in the navigation to dispense with the horses of any person claiming a supposed exclusive right of towing barges; and therefore, and for the reasons before stated, that the commissioners are not bound, nor by the said acts or any of them authorized to pay, &c.

A concilium having been obtained, the case was argued in Trinity term last, by Sir John Campbell, Attorney-General, against the return, and Sir W. W. Follett in support of it. The arguments on each side may be fully collected from the judgment of the Court. *Cur. adv. vult.*

Lord DENMAN, C. J., in this term (November 23d), delivered judgment as follows.

This case, of a mandamus to pay Lord Boston 1000*l.*, as compensation for damage arising from the act of the commissioners, and 200*l.* costs, has been long pending, and has been more than once brought under the notice of the Court. On showing cause against the rule, in Trinity term, 1834,^a it underwent much discussion, *which ended in the writ issuing: to that writ the [*812] commissioners have made a return, the sufficiency of which was argued in the last term. After a great deal of deliberation and doubt, we have at length agreed on the judgment we ought to give.

The facts are these. One of the acts done by the commissioners was to cut off a bend in the river, and make a new channel straight across from one extremity of the bend to the other. A towing path belonging to Lord Boston, which went beside the ancient bend, was hereby rendered useless, and the

^a May 28th, and June 1st, 1836. Before Lord DENMAN, C. J., LITLEDAL, PATTERSON, and WILLIAMS, Js.

^b Cause was shown on June 7th, 1834, before Lord DENMAN, C. J., LITLEDAL, TAYLOR, and WILLIAMS, Js., by Sir James Scarlett and J. S. Taylor; and Sir John Campbell, Attorney-General, and Winthrop M. Praed, were heard in support of the rule. Besides the points argued on the return, and noticed in the judgment, it was contended, in opposition to the rule, that for the non-payment of the money in obedience to the order of sessions, the remedy (if any) was by indictment, not mandamus. On this point, the following authorities were cited: *Rex v. The Treasurer of the County of Surrey*, 1 Chitt. 650; *Rex v. The Severn and Wye Railway Company*, 2 B. & Ald. 646; *Rex v. St. Katherine Dock Company*, 4 B. & Ad. 360. The Court said that an indictment would not give a sufficient remedy. See *Rex v. Jeys*, 3 A. & E. 420, and the cases there cited.

channel of the river was supposed to be made less convenient for the purposes of navigation.

For the injury thus sustained, his Lordship applied for compensation to the commissioners, who refused to accede to his demand, and thought it unnecessary to hear any evidence on the subject. Lord Boston then appealed to the Quarter Sessions for Buckinghamshire, who, after a full hearing, set aside the commissioners' judgment, and awarded a compensation of 1000*l.* for the said injury, and 200*l.* for his costs. The mandamus was to compel payment of these two sums by the commissioners.

The cause shown by their return was that the damage described was not, within the act of parliament, a grievance; and that Lord Boston cannot be [*813] considered *a party aggrieved. Their argument was that a mere diversion of custom from the owner of a towing path who lets out his horses to be used there can be no more considered as an injury resulting from the act of the commissioners, than could the loss of guests brought upon the owner of an ancient public house by their making a new road cutting off a bend by which the house stood.

We were referred to authorities where a claim somewhat similar was held inadmissible.¹ The answer is to be found in the very peculiar language of this act of parliament, which differs altogether from the numerous acts of the same nature which were sent to us after the argument.²

We might have found little difficulty in deciding that such damage could not give the sufferer the denomination of a party aggrieved. And, though the remedy is provided for the party who thinks himself aggrieved, and that question is sent to the Quarter Sessions, yet those words would probably have not been held extensive enough to prevent our judgment that such damage was no grievance. But the clause empowers every one who may think himself aggrieved, damaged, or injured, by any work made by the commissioners, or by the operation or effect of any such work, to apply for compensation to the commissioners, [*814] who are *to make such order, determination, and judgment thereon as to them shall seem just, and give such satisfaction to the party complaining as to them shall seem reasonable, and, on refusal by the commissioners, the party is to apply to the sessions, who are required to entertain and take cognizance of such appeals, and to make such order and adjudication thereon as to the justices then present shall seem just, and award such costs to either party as they shall think just and reasonable: which order and determination shall be final and conclusive to all intents and purposes.

Lord Boston then, thinking himself damaged and aggrieved by the operation and effect of a work made by the commissioners, asks them for compensation, and is refused. On his appeal to the sessions, that court is invested with cognizance of the cause, and enjoined to make such order and determination thereon as to the justices present seems just; a much wider power than merely to assess damages for some recognized injury. Can we say that they have done wrong in deciding that the damage has accrued by the operation and effect of works done by the commissioners? On the contrary, to assert that it has not, would have been a direct untruth in the ordinary sense of the words; and no other sense is attached to them by any clear legal authority.³

Another objection to the mandamus, that the order of sessions included two

¹ On this point, the following authorities were cited: *Rex v. The Commissioners of the Nene Outfall*, 9 B. & C. 875; *Rex v. The London Dock Company*, ante, p. 168; *Rex v. The Directors of the Bristol Dock Company*, 12 East, 429.

² By the direction of the Court, copies of several local acts were sent to the learned Judges, for the purpose of showing that (as was contended) there was nothing peculiar in the language of the present act. On this point, the General Turnpike Acts, 3 G. 4, c. 126, ss. 85, 145, and 4 G. 4, c. 95, s. 87, were also referred to.

³ It was urged, in support of the mandamus, that the series of acts relating to this navigation recognised the towing paths as property; but, as the judgment of the Court did not turn upon this point, it is not considered necessary to state the clauses.

objects, for one of which the prosecutor was clearly entitled to no compensation, was not much pressed at the bar, but has occupied the attention *of the Court. For if the 1000*l.* were awarded, partly for the loss of profits [*815] from the towing path, and partly for obstructing the old channel, and the latter had certainly not been made out within the meaning of the clause, we were disposed to think that the judgment comprehending both could not have been sustained.¹ But this objection also is cured by the extensive language of the act.

The mandamus alleges the obstruction as one cause of complaint, and the loss of profits from the towing path as another; and recites that the sessions gave their compensation for "the said injury;" that must be the twofold injury. The return indeed denies that the channel was at all obstructed,² and states that all who prefer that course may still pursue it. But the sessions must be taken to have found the fact, when they gave compensation for it; and their order to do what to them seems just and reasonable is made final and conclusive. If the sessions did not inquire into the point, the return might have so averred, and an issue of fact might have been raised. The fact of the commissioners asserting the channel not to have been obstructed is quite consistent with the fact of the sessions having adjudged that it was.

Another objection of a technical kind was more relied on, that the jurisdiction of the sessions did not attach, because the commissioners had come to no order, determination, *or judgment, from which an appeal would lie.³ [*816] On the facts above stated, which appear in the writ and are not denied in the return, we have not the least hesitation in saying that the refusal to accede to Lord Boston's application, or to hear any evidence in support of it, was a plain determination that he was not entitled to what he claimed, and consequently a proper subject of appeal.

This is one of a class of cases which has become exceedingly numerous, in which the Court has found itself constrained to give the words of a private act an effect probably never contemplated by those who obtained the act, and very probably not intended by the legislature which enacted it. But our duty is to look to the language employed, and construe it in its natural and obvious sense. The liabilities thus imposed on themselves by bodies of men are the conditions upon which the public empower them to perform works expected to be beneficial to both contracting parties. We are not at liberty to inquire whether the bargain is reasonable, but are bound to see it executed. Therefore we must award a peremptory writ of mandamus. Peremptory mandamus awarded.

Afterwards, in Hilary term, 1837, Sir *J. Campbell*, Attorney-General, obtained a rule, calling upon the commissioners to show cause why they should not pay to Lord Boston his costs of the application to this Court for the mandamus, and also the costs of the writ and other proceedings had thereon, and the costs of this *application. The affidavits in answer stated that the commissioners had no personal interest in the question. [*817]

Sir *W. W. Follett* (with whom was *J. S. Taylor*), showed cause in Easter term, 1837.⁴ Under stat. 1 W. 4, c. 21, s. 6, the costs are in the discretion of the Court: and, this having been a case of great doubt and difficulty, the commissioners acted properly in bringing it to a legal decision. (He was then stopped by the Court.)

¹ As to a mandamus for purposes, which are partly legal and partly not, see *Rex v. The Church Trustees of St. Pancras*, 3 A. & E. 535.

² Some discussion arose, during the argument, whether the return fully negated the fact that the navigation by the old channel was rendered less convenient; but Lord DENMAN, C. J., said that, for the purpose of the present argument, it might be assumed that there was such a denial.

³ It was contended, against the mandamus, that it ought (supposing the case within the act) to require the commissioners to make an order, determination, and judgment, or to hear and report. *Rex v. The Justices of Middlesex*, 16 East, 810, was cited.

⁴ May 8th, before Lord DENMAN, C. J., LITTLERDALE, PATTISON, and COLERIDGE, Js.

Sir J. Campbell, Attorney-General, contra. It must be admitted that the question was one of very great doubt: but that is not an answer; the rule which the Court has laid down, as to the exercise of its discretion, is to give the successful party costs, unless he has been guilty of improper conduct.

Lord DENMAN, C. J. That rule applies to cases under stat. 3 & 4 W. 4, c. 42, s. 31, as to giving costs against executors, where it lies on the unsuccessful party to show a ground of exemption. See *Fairly v. Briant*, 3 A. & E. 839, 861. But here we are to exercise a discretion; and it is a case in which we all felt that there was great doubt, and in which we regretted the conclusion to which we came. The commissioners would have acted improperly if they had not defended; and we ought not to make them pay costs.

LITTLEDALE, PATTESON, and COLERIDGE, Js., concurred.

Rule discharged.

[*818] FOWELL and Another v. PETRE. November 25.

WRIGHT v. ELLIOT.

An affidavit to hold to bail, in an action against the drawer of a bill of exchange, is bad if it omit to state the amount for which the bill is drawn, and allege merely that defendant is indebted to plaintiff, in a sum named, for principal moneys due on a bill of exchange, drawn by, &c. (adding the parties.) Per Lord DENMAN, C. J.

Per Curiam, this objection comes too late, where the party was detained on a capias issued on October 26th, and does not move to be discharged out of custody till November 14th, although no step has been taken by either party in the mean time.

Delay in taking such an objection is not excused by the fact that the party has been in custody ever since.

Seemle, per Lord DENMAN, C. J., that, if a Judge is applied to at chambers to discharge on account of irregularity in the affidavit of debt, and refuses to interfere, and an application is afterwards made to the Court for the same purpose, the motion, in point of form, should be, to discharge the Judge's order.

In the first of these cases, the defendant was detained on a writ of capias issued in October 26th, 1836. The affidavit of debt stated that the defendant was indebted to the plaintiffs in the sum of 500*l*. "for principal moneys due upon a certain bill of exchange," drawn by defendant upon, &c., payable to the order of one of the plaintiffs, and by him endorsed to both plaintiffs, which bill had been refused acceptance and payment. *Bagley*, on the 14th of November, obtained a rule to show cause why the defendant should not be discharged out of custody as to this action, on the ground that the affidavit of the debt was irregular in not stating the sum for which the bill was drawn. On a subsequent day of the term.¹

W. H. Watson showed cause. First, the application comes too late. The rule of Court, Hil. 2 W. 4, I. 33, 3 B. & Ad. 378, is, that "no application to set aside process or proceedings for irregularity shall be allowed, unless made within a reasonable time, nor if the party applying has taken a fresh step after knowledge of the irregularity." In *Sharpe v. Johnson*, 4 Dowl. P. C. 324, an application *like this was granted more than two months after the arrest; [*819] but there the affidavit to hold to bail was a nullity, having been sworn before a person who was not a commissioner for taking affidavits. In *Tucker v. Colegate*, 2 Cro. & J. 489; S. C. 2 Tyr. 496, it was held that a similar application could not be made when the time for putting in bail above (four days after the return of the writ) had expired. As to the merits of the application; there have been cases in which an affidavit of debt on a bill, not stating the amount for which it was drawn, has been held sufficient, see *Hanley v. Morgan*, 2 Cro. & J. 331; *Lewis v. Gompertz*, 2 Cro. & J. 352; S. C. 2 Tyr. 317; but it was determined by all the Judges, in *Brooke v. Coleman*, 1 Cro. & M. 621; S. C. 3

¹ Nov. 24th. Before Lord DENMAN, C. J., PATTESON and WILLIAMS, Js.

Tyr. 593, that the amount must be specified; and the same was decided in *Westmacott v. Cook*, 2 Dowl. P. C. 519, and *Molineux v. Dorman*.¹ The reason, however, which was assigned in the two latter cases, that the debt itself might be below 20*l.*, and the rest of the demand be made up of interest, cannot apply here; for in this affidavit the debt is expressly said to be for "principal moneys." [PATTESON, J. In the case of an affidavit to hold to bail, is the objection too late if made before the party objecting has taken any step amounting to a recognition of the proceedings?] The rule Hil. 2 W. 4, I. 33, 3 B. & Ad. 378, is in the alternative, "unless made within a reasonable time, nor if the party applying has taken a fresh step." In *Firley v. Rallett*, 2 Dowl. P. C. 708, where the arrest was on May 22d, and a motion was made, on June 7th, *that the bail bond might be delivered up to be cancelled for a defect in the affidavit to hold to bail, the plaintiff had ruled the sheriff to return the writ, but no step had been taken by the defendant; and it was held that he came too late. [PATTESON, J. There are many instances in which, though a party himself takes no step, yet, if he lies by and suffers the other side to go on, he is held to have precluded himself from taking an objection.]

Bagley, contra, mentioned that, in the present case, an application had been made to LITTLEDALE, J., on summons, taken out, November 5th, for the defendant's discharge; and that the case had stood over for the opinion of this Court. [But the affidavit stating this was objected to as inadmissible, and held so by the Court.²] It is not usual to deal strictly with a prisoner as to the time of making an application. The defendant had not taken any step in the cause before making this motion. As to the form of affidavit, the rule, that the affidavit ought to state the amount of the bill, is laid down without qualification in *Brooke v. Coleman*, 1 Cro. & M. 621; S. C. 3 Tyr. 593, and *Molineux v. Dorman*, 3 Dowl. P. C. 662. And in *Witham v. Gompertz*, 2 Cro. M. & R. 736; S. C. Tyr. & G. 6, which was also a case arising on the form of an affidavit of debt upon a bill of exchange, the Court of Exchequer insisted upon the expediency of adhering to usual forms.

Lord DENMAN, C. J. If the application is not out of time, I think the affidavit is certainly bad. A person is *not to take upon himself to vary the ordinary forms. And I do not know what is meant by "principal moneys" due upon a certain bill of exchange.³ The party may even mean expenses. As to the other point.

Cur. adv. vult.

In *Wright v. Elliot* a motion was made in this term, November 16th, for discharging the defendant out of custody as to this action, on entering a common appearance. The defendant was arrested on the 23d of August, and had been in custody ever since. He took out a summons, returnable September 27th, to show cause at chambers why he should not be discharged on entering a common appearance. On the hearing of the summons, TINDAL, C. J., refused to make any order thereon, and dismissed it. The affidavit to hold to bail stated that the defendant was justly and truly indebted to the plaintiff in 175*l.*, on a bill of exchange, dated 10th June, 1836, drawn by Good & Co., on defendant, and accepted by him, for the payment of 100*l.* to the order of G. & Co. one month after date, endorsed by them to Charles Dalrymple, "and by the said Charles Dalrymple paid and delivered to the said James Wright," the plaintiff. The objections were, that the bill appeared to have been endorsed to Charles Dalrymple, specially, and was not stated to have been endorsed over by him; and that it was not stated to be due and unpaid at the time of making the affidavit. It did not appear that any step had been taken since the arrest. On this day.

¹ 3 Dowl. P. C. 662. And see, as to this point, *Tidd's New Practice*, 120.

² Lord DENMAN, C. J., afterwards intimated that the Judge would inquire of LITTLEDALE, J., whether anything had passed, before him, as to the time of making the application; but it did not ultimately appear whether or not the learned Judge had been referred to.

Busby showed cause, and contended that the application, not being made in reasonable time, must fail, though coming from a prisoner: *Primrose v. [822] *Badeley*, 2 Cro. & M. 468; S. C. 4 Tyr. 370. He argued, further, that enough appeared on the face of the affidavit to warrant holding to bail.

Humfrey, contra, cited on the latter point, *Latreille v. Hoepfner*, 3 Moore & Sc. 800; S. C. 10 Bing. 334, as showing the strictness with which affidavits of debts are to be construed; and, on the want of an averment of default by the acceptor, *Crosby v. Clarke*, 1 M. & W. 296; S. C. Tyr. & G. 660. [Lord DENMAN, C. J., mentioned *Phillips v. Turner*, 1 Cro. M. & R. 597; S. C. 5 Tyr. 196.] As to the objection of delay in making the application, *Mortimer v. Piggot*, 4 A. & E. 363, note (a), furnishes an answer. [Lord DENMAN, C. J. Should not your motion have been to discharge the order of *TINDAL*, C. J. ?] He made none. [Lord DENMAN, C. J. His refusal was an order. *PATTESON*, J., mentioned, as to the point of reasonable time, *Finley v. Rallett*, 2 Dowl. P. C. 708, cited yesterday in *Fowell v. Petre*.]

Lord DENMAN, C. J. We think that in this case, and likewise in *Fowell v. Petre*, argued yesterday, the defendant comes too late. The rules must therefore be discharged in both cases.

PATTESON, WILLIAMS, and COLERIDGE, Js., concurred

Rules discharged.

[823]

*PLOMER v. BALL. Nov. 25.

A party who has been arrested under color of a ca. sa., but discharged by a Judge's order, on the ground that the sheriff's officer had no warrant at the time of the taking, may be arrested again under the same writ.

HUMFREY, in this term, obtained a rule to show cause why the defendant should not be discharged out of the custody of the marshal as to this action. The defendant stated, in his affidavit, that he was in the custody of the Sheriff of Middlesex, March 3d, on a ca. sa. at the plaintiff's suit, for 95l.; that a Judge, on summons, ordered him to be discharged on the ground of irregularity; and that, on July 16th, he was taken by the sheriff of Middlesex on the same writ of ca. sa. and for the same sum, and was now in custody on that writ. The plaintiff's attorney made affidavit, in answer, that the defendant, on the former occasion, was taken under color of the writ, but not on the writ, for that the defendant applied before a Judge for his discharge on the ground (which the deponent believed to be true) that the officer had arrested the defendant illegally, not having had in his possession a warrant from the sheriff on the said writ at the time of such arrest; and that, upon this ground solely, the learned Judge made the order for the defendant's discharge.

Peacock now showed cause, and contended that the defendant might legally be arrested on the 16th of July, for that, on the former occasion, there was no arrest; and he cited *Barratt v. Price*, 9 Bing. 566.

[824] **Humfrey*, contra. The discharge of the defendant from a detainer in *Barratt v. Price*, 9 Bing. 566, is no authority against this application. The defendant there, as in the present case, was taken under the writ, though the officer was not furnished with that which would have justified him in the taking, namely, the sheriff's warrant.

Lord DENMAN, C. J. The facts are too plain in this case to raise any question. The defendant was clearly not arrested under the writ upon the former occasion.

PATTESON, WILLIAMS, and COLERIDGE Js., concurred.

Rule discharged.

OHRLY v. DUNBAR. Nov. 25.

Sixty-five actions being brought by one party, on policies of insurance, against individual underwriters and incorporated companies, for sums amounting in the whole to 27,200*l.*, the defendants obtained a consolidation rule, which by its terms bound the plaintiff as well as the defendants. One cause was tried, the plaintiff had a verdict, and a rule nisi was granted for a new trial, on affidavit of surprise and of merits. From the state of the new trial paper, it was expected that cause could not be shown for a very long time; two of the defendants had lately died; and the plaintiff alleged that, while the cause stood over, he lost the interest of the 27,200*l.*

The Court would not, on these grounds, direct the amount insured to be paid into Court, or invested, to wait the event of the cause in which a rule nisi had been granted.

The plaintiff effected insurances, by six policies, to the amount of 27,200*l.*, on the ship *Pylades*, which was lost in January, 1835. He gave notice of abandonment in the same month, and, in April, 1835, brought sixty-five actions upon the policies, against various companies and individual underwriters, claiming as for a *total loss. The action against the present defendant was for 300*l.* [*825] An order was made in all the other actions, June 22d, 1836, that, upon [*825] submission of the plaintiff and the defendants in the last-mentioned actions to be bound and concluded by the verdict to be given in this (if the Judge should be satisfied therewith), all further proceedings in the last-named actions should be stayed, the defendant admitting his subscription, and the interest as averred. The present cause was tried, and the plaintiff had a verdict; but, in this term, the defendant obtained a rule nisi for a new trial, on affidavits stating surprise, and other grounds of fact for setting aside the verdict. The plaintiff thereupon moved for a rule to show cause why the defendant should not pay into Court the loss on the ship *Pylades*, or invest the amount according to the direction of this Court, or why the rule for a new trial should not be discharged. The affidavits stated, as grounds for this application, that, from the heavy arrear of causes in the new trial paper, the rule obtained by the defendants could not, in all probability, come on for argument for a very long time; that rules for new trials, granted in Michaelmas term, 1835, were still in the paper for hearing; that the assured had already sustained a very large loss of interest on the sum insured; and that two of the underwriters were lately dead. Other statements were added, as to the fairness of the plaintiff's proceedings in commencing this action, and the merits of the cause in other respects.

Sir *J. Campbell*, Attorney-General, and *Maule*, now showed cause. No sufficient reason is given for departing from the usual practice. There is no suspicion of insolvency, or imputation of misconduct, nor is any *indulgence [*826] sought by the defendants. It is now settled that a consolidation rule does not bind the plaintiff: *Doyle v. Douglas*, 4 B. & Ad. 544; *Long v. Douglas*, 4 B. & Ad. 545, note (a); *Doyle v. Anderson* and *Doyle v. Stewart*, 1 A. & E. 635; nothing, therefore, prevents a trial of any of the other actions while this is depending; and the defendant has no objection to that course being taken. There will not necessarily be any loss of interest; because the jury, if they think proper, may give interest from the time when the debt was payable, by stat. 3 & 4 W. 4, c. 42, s. 28. The possibility of deaths might be urged in most cases; but less properly in this than in many others, because several of the policies here are subscribed by incorporated companies.

Sir *W. W. Follett*, and *Alexander*, contrâ. Whatever may be the effect of an ordinary consolidation rule, the plaintiff, under this, is bound in express terms. The rule was obtained by the defendants. No blame is attributable to the plaintiff; the delay is caused by the proceedings on the other side. In the mean time parties are receiving interest to a large amount on the sums insured; and, the actions being so numerous, the plaintiff runs a more than common risk of losing some of the interest and principal, in consequence of death or insolvency. It is true that some of the policies are effected with incorporated companies;

but the plaintiff is willing that the rule should be limited to the actions not brought on such policies. It is not desired to introduce any change in the general practice; the facts of this case are peculiar.

[*827] *Lord DENMAN, C. J. The remarkable circumstances of this case induced us to grant a rule to show cause: we have now heard the rule discussed; and I am of opinion that, if we complied with applications of this kind on account of special circumstances, we should introduce greater delay than that which now arises from the state of the papers. All parties have, unfortunately, to suffer some delay; but we cannot consider such an application as this with reference to the state of business before the Court.

PATTESON, J. I am of the same opinion. The delay arises here, not because there is a consolidation rule, but because a new trial is granted.

WILLIAMS and COLERIDGE, Js., concurred.

Rule discharged.

E. P. BASTARD, Esq. v. SMITH and Others. Nov. 25.

The Court will not, under the new rules permit the following pleas to be pleaded together, to a declaration in trespass:—1. A custom for all tanners in the stannaries to make trenches in any lands for conveying water to any stannary worked by them, for the better working of the same. 2. The like, alleging the custom to be on making reasonable compensation.

TRESPASS, for cutting a watercourse through plaintiff's lands in the parishes of Ashburton and Buckland in the moor, Devonshire.¹ The defendants [*828] *applied to COLERIDGE, J., on summons for leave to plead two pleas: first, justifying the trespass under a custom for all stanners and tanners in the stannaries to make trenches in any lands for conveying water to any stannary worked by them, for the better working of the same; secondly, the like plea, but alleging the custom to be on making a reasonable compensation for the injuries done. The learned Judge refused permission to plead more than one plea. *Erle*, in this term, obtained a rule to show cause why the two pleas should not be pleaded.

Sir W. W. Follett, and M. Smith, now showed cause. By the General Rules and Regulations, Hil. 4 W. 4, 5, 5 B. & Ad. ii., several pleas are not to be allowed, "unless a distinct ground of answer or defence is intended to be established in respect of each." And the examples there given are analogous to this case. [COLERIDGE, J. I thought that this was, in effect, pleading a custom with and without a qualification.] *Jenkins v. Treloar*, 1 M. & W. 16, S. C. Tyrwh. & G. 316, is a direct authority, in principle, against the rule. A custom is supposed to originate in a grant; these pleas would state the same grant in different modes. The defences, in several pleas, ought now to be distinct in point of fact; in these pleas they would not be so.

Erle, contra. The customs of the stannaries have been much before the Court of Exchequer of late, and have been considered not so much in the light of local customs as of common law applicable to those districts. And, supposing the customs to originate in grants, there may have been different grants [*829] from several persons; *the earlier without, the later with, a qualification. [COLERIDGE, J. You propose to set up these two customs as concurrent.] The defendants have a large body of evidence as to each. They may co-exist. To refuse the rule may occasion a second trial at great expense.

¹ An injunction had been obtained by the plaintiff against some of the defendants, to restrain them from proceeding with the alleged trespass; and, on motion, afterwards, to dissolve the injunction, the Lord Chancellor continued it, but ordered that the plaintiff should be at liberty to bring an action of trespass against the present defendants, to try their alleged right to enter the lands and make a watercourse therein.

Lord DENMAN, C. J. The case falls expressly within the new rule of pleading. We have no power to grant the permission.

PATTESON, WILLIAMS, and COLERIDGE, Js., concurred.

Rule discharged.¹

¹ The first plea was retained, and, on the trial, the jury found against the custom.

ROXBURGH v. CRESSWELL, ASDELL, and DEVINE. Nov. 25.

Defendant having been arrested, and executed a bail-bond, obtained a summons for time to put in bail above. Pending the summons, but more than eight days after the arrest, he put in bail, who were excepted to, and did not appear on the day of justification, whereupon the plaintiff, on that day, took an assignment of the bail-bond; after which, on the same day, the bail above, whose names continued on the bail-piece, rendered the defendant.

Held, that they might do so: and, the plaintiff having served a writ of summons in an action on the bail-bond, the Court set it aside.

At the time when the writs were served, there had been no affidavit made of notice of render having been given, nor had an exoneretur been entered on the bail-piece: Held, that these steps were not necessary for the purpose of exonerating bail to the sheriff, bail above having been put in, and a render made.

THIS was an action on a bail-bond, against the principal and two bail. The defendant, Cresswell, was arrested September 21st. On the 28th he took out a summons for time to put in special bail, returnable on the 29th; no Judge then attending, a second summons was taken out for the 30th, but on that day bail were put in, and notice thereof given to plaintiff. The plaintiff excepted: and Cresswell gave notice that the bail would justify on October 10th. The plaintiff attended at a Judge's chambers in pursuance of the notice; but *no one appeared for the purpose of justifying; whereupon the plaintiff, on the same 10th of October, took an assignment of the bail-bond, [*830] and issued writs of summons in this action. Afterwards, between three and four o'clock on the same day, notice was served upon the plaintiff that Cresswell had rendered, which was the fact. On summons before BOSANQUET, J., the writs issued on the 10th were set aside as premature; and on October 13th the plaintiff issued fresh writs. A summons was then taken out on behalf of the Sheriff's bail, Asdell and Devine, to show cause before COLERIDGE, J., why the writs should not be set aside for irregularity. The plaintiff, on the summons, justified issuing the writs, on the ground that the render was irregular; first, because the sheriff's bail (as the plaintiff alleged) had rendered, without putting in bail above; secondly, because no affidavit had been made of notice of render; thirdly, because no exoneretur had been entered. The learned Judge was of opinion that the condition of the bail-bond had been complied with by the putting in of bail on behalf of the defendant, and the subsequent render, which was equivalent to a justification of bail; and that the other steps pointed out were not necessary for exonerating bail to the sheriff: and he set aside the writ against Devine; the case of Asdell (against whom a distringas had issued) not being at this time gone into. *Humfrey* in the present term obtained a rule to show cause why the order of COLERIDGE, J., should not be rescinded.

Erle now showed cause. Bail above were put in, whether by the sheriff's bail or by the defendant is immaterial; in either case the render was authorized. It took place within the time limited for justifying bail; and the plaintiff had notice of it. Everything has been *done which is necessary for exonerating bail to the sheriff. [*831]

Humfrey, contra. Supposing that, if the bail had originally been put in at the proper time, the render would have been authorized, yet, in this case, an extended time having been obtained for putting in bail, and no justification having taken place, it is as if no extension of time had been obtained; *Rex v. The Sheriffs of London*, 1 Chitt. Rep. 567. [COLERIDGE, J. It would seem that, in that case,

Sir *J. Campbell*, Attorney-General, contra. It must be admitted that the question was one of very great doubt: but that is not an answer; the rule which the Court has laid down, as to the exercise of its discretion, is to give the successful party costs, unless he has been guilty of improper conduct.

LORD DENMAN, C. J. That rule applies to cases under stat. 3 & 4 W. 4, c. 42, s. 31, as to giving costs against executors, where it lies on the unsuccessful party to show a ground of exemption. See *Fairly v. Briant*, 3 A. & E. 839, 861. But here we are to exercise a discretion; and it is a case in which we all felt that there was great doubt, and in which we regretted the conclusion to which we came. The commissioners would have acted improperly if they had not defended; and we ought not to make them pay costs.

LITLEDALE, PATTESON, and COLERIDGE, Js., concurred.

Rule discharged.

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An affidavit to hold to bail, in an action against the drawer of a bill of exchange, is bad if it omit to state the amount for which the bill is drawn, and allege merely that defendant is indebted to plaintiff, in a sum named, for principal moneys due on a bill of exchange, drawn by, &c. (adding the parties.) Per LORD DENMAN, C. J.

Per Curiam, this objection comes too late, where the party was detained on a capias issued on October 26th, and does not move to be discharged out of custody till November 14th, although no step has been taken by either party in the mean time.

Delay in taking such an objection is not excused by the fact that the party has been in custody ever since.

Semle, per LORD DENMAN, C. J., that, if a Judge is applied to at chambers to discharge on account of irregularity in the affidavit of debt, and refuses to interfere, and an application is afterwards made to the Court for the same purpose, the motion, in point of form, should be, to discharge the Judge's order.

IN the first of these cases, the defendant was detained on a writ of capias issued in October 26th, 1836. The affidavit of debt stated that the defendant was indebted to the plaintiffs in the sum of 500*l*. "for principal moneys due upon a certain bill of exchange," drawn by defendant upon, &c., payable to the order of one of the plaintiffs, and by him endorsed to both plaintiffs, which bill had been refused acceptance and payment. *Bagley*, on the 14th of November, obtained a rule to show cause why the defendant should not be discharged out of custody as to this action, on the ground that the affidavit of the debt was irregular in not stating the sum for which the bill was drawn. On a subsequent day of the term.¹

W. H. Watson showed cause. First, the application comes too late. The rule of Court, Hil. 2 W. 4, I. 33, 3 B. & Ad. 378, is, that "no application to set aside process or proceedings for irregularity shall be allowed, unless made within a reasonable time, nor if the party applying has taken a fresh step after knowledge of the irregularity." In *Sharpe v. Johnson*, 4 Dowl. P. C. 324, an appli-

[*819] cation *like this was granted more than two months after the arrest; but there the affidavit to hold to bail was a nullity, having been sworn before a person who was not a commissioner for taking affidavits. In *Tucker v. Colegate*, 2 Cro. & J. 489; S. C. 2 Tyr. 496, it was held that a similar application could not be made when the time for putting in bail above (four days after the return of the writ) had expired. As to the merits of the application; there have been cases in which an affidavit of debt on a bill, not stating the amount for which it was drawn, has been held sufficient, see *Hanley v. Morgan*, 2 Cro. & J. 331; *Lewis v. Gompertz*, 2 Cro. & J. 352; S. C. 2 Tyr. 317; but it was determined by all the Judges, in *Brooke v. Coleman*, 1 Cro. & M. 621; S. C. 3

¹ Nov. 24th. Before LORD DENMAN, C. J., PATTESON and WILLIAMS, Js.

The case may perhaps be compared to that of an inchoate corporate right under the old system, where a mandamus lay. [COLERIDGE, J. The revision was completed during the late mayoralty, see sect. 49 of stat. 5 & 6 W. 4. c. 76; and the late mayor must have handed over the list to the town clerk, sect 22.] The assessors are still in office, sect 37. A mandamus may go to the Court of Revision. [PATTESON, J. The mayor who revises is to write his initials against all alterations, sect 19.] The case offers only a choice of difficulties.

*Per Curiam.*¹ We have no power in this case.

Rule refused.²

¹ Lord DENMAN, C. J., PATTESON, WILLIAMS, and COLERIDGE, Ja.

² See stat. 7 W. 4, & 1 V. c. 78, s. 24.

*DOE on the several Demises of JAMES CROSTHWAITE and JOHN HUDLESTON v. WILLIAM DIXON and JOHN WILSON. Nov. 25. [*834]

One of two parceners aliened. The alienee and the other parcener agreed to make partition, and an apportionment having been made, they and each of them, for the perfecting of such partition, conveyed to H., in fee, one portion of the premises, habendum, to the sole use of the alienee in fee, in full of his moiety, and the other portion in like manner to the sole use of the second parcener, in full of his moiety.

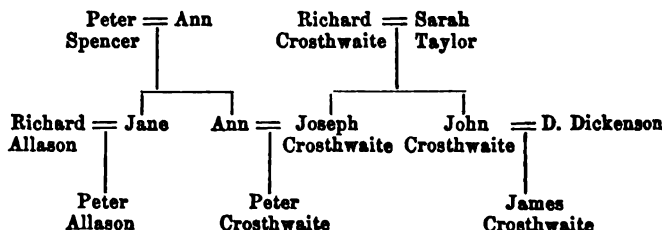
Held, that the line of descent through the second parcener was not broken by the conveyance, but that his moiety passed to the heirs ex parte maternâ.

THIS ejectment for closes of land situate in the parish of Brigham in Cumberland, came on to be tried before Lord ABINGER, C. B., at the Summer assizes for Cumberland, 1835, when a verdict was found for the plaintiff, subject to the opinion of this Court upon the following case.

The lessor of the plaintiff, James Crosthwaite, claims the property as heir ex parte paternâ of Peter Crosthwaite, deceased, and the defendants claim it as devisees of Peter Allason, who was heir-at-law, ex parte maternâ of the same Peter Crosthwaite.

One Peter Spencer was formerly owner of an estate of which the property in question forms a part; and upon his death his estate descended to his two daughters, Jane the wife of Richard Allason, and Ann the wife of Joseph Crosthwaite, in coparcenary. Upon the death of Jane, her estate in the premises descended to the said Peter Allason her son and heir; and, upon the death of Ann, her estate in the premises descended to the said Peter Crosthwaite her son and heir.

The following pedigree was agreed to be correct:—



*In 1810, one John Nicholson purchased Peter Allason's share of the property; and the same was duly conveyed by Peter Allason to John Nicholson and his heirs by indentures of lease and release, dated respectively 15th and 16th of November 1810, which, as well as those next mentioned, were to be referred to as part of the case. [*835]

By indentures of lease and release, dated 15th and 16th April, 1816, between John Nicholson of the first part, Peter Crosthwaite of the second part, and John Hudleston of the third part, after reciting that Nicholson and Crosthwaite were

seised in fee of a messuage and tenement and closes (which were described), and that they, being desirous that the said tenement, lands, and hereditaments should be divided and partition thereof made between them, had appointed certain persons to allot and divide the same, and they had done so (as was particularly specified), and that Nicholson and Crosthwaite, being satisfied with such division and partition, had agreed to join in these indentures for the ratification thereof, it was witnessed that, to perfect such partition, and to the end that each of the said parties, their heirs and assigns, might hold and enjoy for ever thereafter in severalty and distinct from each other the hereditaments and premises set out and divided as aforesaid, and for certain considerations, which were stated, the said John Nicholson and Peter Crosthwaite, and each of them, did grant, bargain and sell, alien, release and confirm to the said John Hudleston, his heirs and assigns, all that, &c., (describing certain of the premises before mentioned), and the reversion and reversions, &c., and all the estate, &c., habendum to the said J. H., his heirs and assigns, nevertheless to the only sole and [*836] proper use of the said John *Nicholson, his heirs and assigns, absolutely for ever, as and for, and in full of, the moiety, part, and share of the said John Nicholson of and in the said messuage and tenement, land and hereditaments, &c., so divided and set out as aforesaid. Then followed a similar conveyance by Crosthwaite and Nicholson to Hudleston of the residue of the premises, to the sole use of Crosthwaite, his heirs and assigns, as and for and in full of his moiety.

By the deed of partition, the premises sought to be recovered in this ejectment became the property of Peter Crosthwaite, who from that time became and was solely seised thereof in fee, and died so seised in 1819, intestate. On his death, Peter Allason entered into the premises in question, claiming to be entitled as heirs ex parte maternâ, and continued possessed until the time of his death. The said Peter Allason died in 1831, having devised to the defendants his estate and interest in the premises now sought to be recovered. John Hudleston, the second lessor of the plaintiff, was the releasee to uses mentioned in the deed of partition.

The question for the Court was whether James Crosthwaite, being heir ex parte paternâ of Peter Crosthwaite, was, as such, entitled to all or any part of the premises in question, or whether the defendants, as devisees of Peter Allason, who was heir of Peter Crosthwaite ex parte maternâ, were entitled. If James Crosthwaite was entitled, the verdict was to stand for all or such proportion of the property as the Court might direct: if not, a nonsuit to be entered. The case was argued in this term.¹

**Wightman* for the plaintiff. When the premises were conveyed to [*837] Hudleston for the purpose of partition, the course of descent ex parte maternâ was broken, the general rule of inheritance attached, and consequently the portion allotted to Peter Crosthwaite descended to his heir ex parte paternâ; for, by the effect of the deed, Crosthwaite had become as a first purchaser. The difference between this case, where the estate vests in the taker as a first purchaser, and those in which the conveyance passes it merely to the old use, is shown by Co. Litt. 13 a, see 14 Vin. Abr. 287, 288; Heir (W), (W. 2), 2 Roll. Abr. 780; tit. Uses (D), *Abbott v. Burton*, 2 Salk. 590; S. C. 1 Com. Rep. 160, *Godbold v. Freestone*, 3 Lev. 406. If the conveyance to Hudleston did not of itself alter the character of the whole estate, as to the line in which it was transmissible, at least the partition had that effect upon the portion which came to Peter Crosthwaite; for he was a first purchaser, at any rate to the extent of the share which had been Allason's.

W. H. Watson, contrâ. Under the deed of partition, Peter Crosthwaite took ex parte maternâ. The line of descent was not broken. The rules on this subject are entered into, and several authorities collected, in *Martin dem. Tre-*

¹ November 18th. Before Lord DENMAN, C. J., PATTERSON, WILLIAMS, and COLKIDGE, Js.

gonwell v. Strachan, 5 T. R. 107, note (b); S. C. 2 Str. 1179, and in *Error*, Willes, 444; 1 Wils. 66; 6 Brown's P. C. 319 (2d edit.), where it is said, "If a man seised as heir on the side of the mother make a feoffment in fee to the use of himself and his heirs, the use being a thing in trust and confidence shall ensue the nature of the lands, and shall descend to the heir *on the part of the mother." Unless the conveyance be of such a kind that a different estate is taken under it, the line of descent continues. Then, in the present case, did Peter Crosthwaite take a different estate in entirety or in moiety? The effect of a partition is merely to regulate the enjoyment; it does not alter the character of the estate: the tenant is in of the same estate as before. "Upon partition made, the occupation and descent, which before were in common, shall be several and distinct." "But a coparcener, after partition, continues in the same privity of estate as before; for it does not convey, or make any alteration of the estate." "So, parceners shall be in from the common ancestor, as before." Com. Dig. Parcener (C 15), citing Savile, 113, Thetford v. Thetford. Partition by writ would clearly not have broken the line of descent; and partition by deed is only another mode of enforcing what the law would have compelled by writ. That partition does not alter the estate is proved by the cases in which it has been held not to operate in revocation of a will: *Luther v. Kidby*, 8 Vin. Abr. 148; *Devise*, (R. 6) pl. 30, S. C. 3 P. Wms. 169, note (B); *Risley v. Baltinglass*, Sir T. Ray. 240, Swift dem. *Neal v. Roberts*, 3 Burr. 1490: in all which cases the partition was by deed. *Luther v. Kidby*, 8 Vin. Abr. 148, *Devise*, (R. 6) pl. 30; S. C. 3 P. Wms. 169, note (B.), is recognised as law by Lord KENYON in *Goodtitle dem. Holford v. Otway* (in *Error*) 7 T. R. 399, 417, and is explained, in the same case in the Court of Common Pleas,¹ by BULLER, J., who says, "In the case of a partition, where no estate moves out of the party, I agree there is no revocation." [*Wightman* here admitted *that, if the conveyance to Hudleston was merely to the use of the parties between whom partition was to be made, he could not consent that, by such a conveyance, the character of the estate was altered, as to the course of descent.] Then as to the moiety taken by Peter Crosthwaite on the partition; the portion allotted to him is not of a new estate: it is only a continued enjoyment, so far as the apportionment goes, of the old estate. Nicholson and he were tenants in common, the one holding by purchase, the other by descent. On the partition, Crosthwaite does not take anything by purchase; he is still in, by descent, of the property which he always had by descent.

Wightman in reply. Nicholson and Crosthwaite had an undivided possession of all the premises, occupying per my et per tout; Nicholson as purchaser, and Crosthwaite as heir. By the partition, Crosthwaite took an estate in one moiety, partly made up of his own interest in the moiety, and partly of that which Nicholson had in it by purchase from Allason. Then, at least as to half of that half, Crosthwaite became entitled as purchaser, and his estate would descend to the heir ex parte paternâ.

Cur adv. vult.

Lord DENMAN, C. J. now delivered the judgment of the Court.

In this case one of two parceners alienated his moiety in fee, whereby the alienee and the remaining parcener became tenants in common. Afterwards, by deed of partition between the alienee and the remaining parcener, *the land was divided by metes and bounds, and each of them took a moiety in severalty. The question is whether by that deed the parcener took anything as purchaser, so as to break the descent ex parte maternâ, and to let in the heir ex parte paternâ on the death of the parcener.

It is admitted that, if the deed of partition had been between the parceners themselves, the descent would not be broken; Com. Dig. Parceners (C. 15). But it is said that, inasmuch as one of the parties to the deed was a stranger in blood, whatever was taken from him by the parcener must be taken by purchase.

¹ 1 B. & P. 590-592. See further, as to the case on this point, note (4) to *Duppa v. Mayo*, 1 Wms. Saund. 278 b.

And doubtless this would be so if anything was taken from him: but we are of opinion that nothing was taken by the parcener from the alienee under the deed. The effect of it was only that the parcener had by it a divided moiety in severalty discharged from any right in the alienee, instead of an undivided moiety in common; but he had the same estate in the land as before.

The consequence is that a nonsuit must be entered.

Nonsuit to be entered.

[*841] *The KING v. The Inhabitants of MILVERTON. Nov. 25.

An order of justices for stopping an unnecessary highway, under stat. 55 G. 3, c. 68, s. 2, is bad, if it stop up half the breadth of a highway, leaving the rest open; although the other half be not within their division.

Quære, whether the justices of the two divisions could, by orders made concurrently, stop both sides.

Justices cannot stop several highways by one order, except so far as they are authorized by stat. 5 & 6 W. 4, c. 50, s. 86.

Semble (by Lord DENMAN, C. J., and COLERIDGE, J.) that, if an order has been properly made and enrolled for stopping a highway, it is not necessary, to make such order completely effectual, that an actual stoppage should have taken place.

Held, by Lord DENMAN, C. J., and WILLIAMS, J., that, if an order for stopping a highway, under stat. 55 G. 3, c. 68, begins "We," &c., "having upon view found, and it appearing to us," that a certain highway, &c., is unnecessary, the recital does not imply that the justices acted upon any other information than their own view, and is well enough.

THIS was an indictment against the inhabitants of the parish of Milverton, Somersetshire, for non-repair of certain highways in that parish. The defendants pleaded Not Guilty. On the trial at the Summer assizes for Somersetshire, 1835, a special verdict was agreed to, the material parts of which were as follows.

The parts of the highway mentioned in the several counts of the indictment were in the parish of Milverton, and were out of repair. The several parts of the said highway were called Blackgrove's Lane, which lane was part of a common highway from the village of Oak to the town of Milverton. All the ways mentioned in the indictment were comprised in the after-mentioned order. One portion of the highway, mentioned in the first and third counts of the indictment, was wholly in Milverton; another portion, mentioned in the second and third counts, was, as to half of its breadth, in the parish of Milverton, and, as to the other half of its breadth, in the parish of Oak, in Somersetshire. On February 25th, 1818, an order was duly made under the hands and seals of two justices of the county of Somerset, who therein stated that, at a special sessions holden at, &c., in the parish of Milverton, "having *upon view found, [*842] and it appearing to" them, that a certain public highway in the parish of Milverton, called, &c. (describing it), is useless and unnecessary; and also that a certain other public highway, commonly called Blackgrove's Lane, lying between, &c., is useless and unnecessary, the entirety of which last-mentioned highway from H. common, &c., to the northern corner of close C., &c., of the length, &c., and breadth, &c., is situated and being in the parish of Milverton aforesaid, and the southern side of the said highway to the middle thereof, from the said northern corner of close C. &c., to the northeastern corner of the same close, of the length, &c., and breadth, &c., is situated and being in the parish of Milverton aforesaid, and the northern side thereof to the middle of the same highway, from the said northern corner, &c., to the said northeastern corner, &c., is situated and being in the parish of Oak in the same county; and also that a certain other public highway, &c., is useless and unnecessary (describing another road, which, as to one part of it, was in Milverton, and, as to another, was divided like the preceding, between Milverton and another parish); they did thereby order "the said public highway hereinbefore first described and stated

to be useless and unnecessary, and also the said public highway hereinbefore secondly described and stated to be useless and unnecessary, except so much and such part thereof as is in the said parish of Oak, in the county aforesaid, and likewise the said public highway hereinbefore thirdly described and stated to be useless and unnecessary" (with a like exception), "to be stopped up," and the land sold by the surveyors of Milverton to the proprietors of the adjoining lands, if willing to purchase for the full value; if not, to some *other persons, [†843] &c., for the full value; reserving to the owners and occupiers of adjoining lands and hereditaments free passage for persons, horses, carriages, &c., over the land and soil of the highways ordered to be stopped, to and from the same lands, and hereditaments, according to their ancient usage thereof respectively.

The verdict went on to state that the three highways directed to be stopped up were not joined to or connected with each other, and did not lead into each other, but were altogether distinct, and at considerable distances from each other; that Blackgrove's Lane comprehends as well the parts of the said highway in the said parish of Oak, as those in Milverton; that such portion of the said highway as is stated in the order to be in the parish of Milverton, is the same highway as is mentioned in the indictment; and that no order of justices has been made for stopping such parts of Blackgrove's Lane as are stated to be in the parish of Oak; that the said highway has never been divided and allotted under the provisions of 34 G. 3, c. 64;¹ that the special sessions at which orders are made for stopping up roads in Oak are held at Taunton, and not at Milverton, and the parish of Oak is not within the division for which those justices acted, who signed the present order; that the parts of the said highway which were ordered to be stopped up have not been stopped up in fact, and that the three several highways have been and are in the same state as before the order, and the public has passed and repassed over them with carriages and horses without interruption in the same manner as before, but without any permission by the respective owners of the adjoining lands; that, since the date of the order, *no repairs have been done by the inhabitants of Milverton parish. [†844] upon the highways so ordered to be stopped up; that the land and soil of the said highways have not been sold according to the directions, and subject to the reservations, contained in the said order, such land and soil being of no value to any person, as they could not be enclosed in consequence of the said reservations; that notices of the said order having been made were duly affixed and published, &c.; and that the same was duly confirmed and enrolled, and not appealed against. The verdict was argued this term, November 19th and 21st.

Rogers, for the Crown. The facts stated do not entitle the defendants to an acquittal. First, the order for stopping, which they rely upon, includes three distinct highways. But stat. 55 G. 3, c. 68, s. 2, under which the order was made (and which first enabled justices to stop a highway as unnecessary, without any other being created in lieu), gave no authority to include three highways in a single order, and the power taken under that statute must be strictly pursued. The justices are thereby enabled to stop, "by such ways and means, and subject to such exceptions and conditions," as were mentioned in stat. 13 G. 3, c. 78, in regard to highways to be widened and diverted. That statute does not sanction the including more than one road in an order. It was decided, this term, in *Rex v. The Justices of Middlesex*, ante, p. 626, on the construction of both statutes, that a highway could not be diverted, and the old way stopped, by one order: and in *Rex v. The Justices of Kent*, 10 B. & C. 477, a similar decision was come to, Lord TENTERDEN saying, "The statute gives no power to make such an order, *and there is no form in the schedule applicable to such a mode of proceeding." Stat. 13 G. 3, c. 78, sched. [†845] No. 18, gives the form of an order for stopping up an old highway, with a marginal direction, that "if there are more highways than one to be stopped up,

¹ "For the more effectually repairing of such parts of the highways of this kingdom as are to be repaired by two parishes."

there should be a separate order for each." In general, the marginal note annexed to a statute is not attended to by the Court; but this annotation is stated, in the report of *Rex v. Kenyon*, 6 B. & C. 645, note (a), to be upon the margin of the Parliament roll itself, and the legislature cannot be supposed to have overlooked that fact, when referring, by stat. 55 G. 3, c. 68, s. 2, to the "ways and means," "exceptions and conditions," pointed out in the prior statute. It is also stated in 3 Chitty's *Burn's Justice*, 45, *Highways*, IX. (3) Ed. 26; and see Ed. 28, vol. iii. p. 118, *Highways*, s. XIII. 2, and *Wellbeloved on Highways*, 401, note a (both refer to *Rex v. Kenyon*, 6 B. & C. 645), that, where more than one highway is to be stopped, it seems there should be separate orders. And in the late act, 5 & 6 W. 4, c. 50, s. 86, which is not a declaratory clause, it is enacted "that in any case where it is proposed to stop up or divert more than one highway, which highways shall be deemed to be so connected together as that they cannot be separately stopped or diverted without interfering one with the other, it shall be lawful to include such different highways in one order or certificate." This warrants the inference that, before, it was not lawful so to join them, even in the case pointed out. *Davison v. Gill*, 1 East, 64, shows that the forms given by the old highway acts were to be strictly followed; but this is not a mere objection of form. If notice is given of a cumulative order for stopping several highways, the *public is not so distinctly apprised of [*846] the intention with respect to any one as if that alone were mentioned; and great difficulty might arise as to the notices of appeal to be given against such an order.

A second objection to this order is that, as to one part of the roads indicted, two magistrates of the Milverton division have found the whole of the way useless, but have stopped only a part of its breadth. If any proceeding could be taken for such a purpose, it should have been by stopping each side. The two sides of the road lie in divisions for which different justices act: but two justices of each division might have viewed: and there is no authority for saying that two justices of one division might not have stopped the part of the road lying in the other. "Where an act of parliament says, justices of the peace of such a division shall do so and so, it is only directory quoad the division; and any of the justices of the county may do it." Per *HOLT*, C. J., 19 Vin. Abr. tit. Statutes, 516 (E. 6), pl. 56, citing *Anon.* 12 Mod. 546. [*COLERIDGE*, J. The justices must hold their special sessions for the highways within the limits for which they respectively act. You must contend that, to make an order for stopping the whole breadth of the way, there must be different special sessions, the justices in each making an order as to part of the way. If any of them made an order for more, they would be acting out of the limits for which the session was held.] If each set of justices made an order for the whole, the orders might perhaps be taken distributively, each for so much as the authority of the particular justices extended to. [*COLERIDGE*, J. Is there any authority [*847] for saying that an order of justices *can be made for stopping half the breadth of a road?] There appears to be none. If the power of these justices was to stop half the way only, they ought not to have viewed the whole and declared it unnecessary: if they could view and declare as to the whole breadth, they should have stopped the whole. The power to stop any "highway, bridleway, or footway," does not warrant the partial stopping attempted here. It would be very inconvenient to the public to have half the breadth of a road shut up: if any stopping takes place, they ought to be disburdened of the whole.

Further, nothing has ever been done in execution of the order. By stat. 55 G. 3, c. 68, s. 4, if there be no appeal, "the said inclosures may be made, and the said ways stopped; and the proceedings thereupon shall be binding and conclusive." This shows that something more is necessary than the mere making and enrolment of an order. [*COLERIDGE*, J. Do you contend that there must be a physical stopping of the road?] Something must be done in execution of

the order. [COLERIDGE, J. Suppose the soil is sold to an individual who chooses to keep it open, would the public right over it still continue? It is usual to put up a notice that the passage over the land is closed, but the proprietor might omit doing so.] Parties must do more than obtain an order and keep it to themselves: the public in general must be apprised by some act that the way is stopped; otherwise there is no meaning in the words "proceedings thereupon." And here (which is another ground for contending that the order is ineffectual) the public has in fact been permitted to pass uninterruptedly over the soil in question for seventeen years, or has done so in exercise of an adverse right. * [Lord DENMAN, C. J. Could the user by the public be placed in any more favorable light for you than as strong evidence of a dedication? COLERIDGE, J. And here no person was in a situation to dedicate. The soil did not immediately revert to the owner of the adjoining land, because, in order to entitle him, the statute requires that it should be sold to him.] The statutory power being imperfectly executed, the soil would vest, at common law, in the owner of the adjoining land.

Lastly, the order begins, "we," "having upon view found, and it appearing to us." It is not therefore shown that the order proceeded simply "upon the view" of the two justices, according to stat. 55 G. 3, c. 68, s. 2. In *Rex v. The Justices of Worcestershire*, 8 B. & C. 254, the words were "having upon view found, or it having appeared to us;" which was held objectionable, as representing that the justices had done that which the legislature required, or something else. Here they are shown to have acted on view, *and* something else, which may not have been actual inspection. An order in very similar words was held bad in *Rex v. The Marquis of Downshire*, 4 A. & E. 698. [Lord DENMAN, C. J. The "appearing," as stated here, is a result of the view. In *Rex v. The Marquis of Downshire*, 4 A. & E. 698, the justices did not state that they found anything on view. WILLIAMS, J. If the order had said only "it appearing to us," your objection would have been well founded. Why are we to suppose here that it did not appear on the view?] The Court will intend nothing to give jurisdiction: whatever is necessary to give it must be shown. [Lord DENMAN, C. J. Here it is shown; only something else is added.]

* *Bere*, *contra*. There is no authority which decides that an order of [*849] justices, in general, may not include two distinct subject-matters; *Rex v. Maulden*, 8 B. & C. 78; see *Rex v. St. Nicholas, Leicester*, 3 A. & E. 79, shows that two such matters may be included, and that the order may be good as to one, and bad as to the other. An order must sometimes adjudicate on distinct matters. Where a mother and an infant bastard child are removed by the same order, the settlement of each must be pronounced upon. There is no greater objection to including several roads in one order than in one indictment. Even if several distinct felonies are included in the same indictment, it is not therefore bad. The old highway act, 13 G. 3, c. 78, s. 22, gave a power so far resembling that of stopping unnecessary highways under stat. 55 G. 3, c. 68, s. 2, that, in stopping the old way, the proceeding had no dependence upon any previous step for diverting or newly creating another way: but there is not, in the schedule to stat. 13 G. 3, c. 78, any form applicable to such independent proceeding. The stopping where no diversion was in fact made, as under stat. 55 G. 3, c. 68, was not contemplated in the former statute, and therefore it might be expected that no part of the schedule would be framed to meet that particular case. The marginal note to the schedule in the parliament roll appears to have crept in contrary to usual practice; the body of the statute, in the roll, has none. The note is not imperative, but says merely that there "should be a separate order" for each highway. Even if this were otherwise, a form given in a schedule, without any express direction in the statute itself, is (as PARKER, B., said in *Hennah v. Whyman*, 2 Cro. M. & R. 239; S. C. 5 Tyrwh. 792) "nothing but *an example." In *De Ponthieu v. Pennyfeather*, 5 Taunt. 634, the enactment of stat. 13 G. 3, c. 78, s. 19, as to enrolling the cer- [*850]

tificate of justices there mentioned, was held to be directory only. BAYLEY, J., in *Rex v. Casson*, 3 Dowl. & R. 36, doubted whether it was necessary, in an order for diverting under the same statute, to name the owners of the land through which the road was to pass, though the schedule, No. xvi., leaves a blank for such names. In *Davison v. Gill*, 1 East, 64, the order was substantially defective, in not stating the length or breadth of the new way given to the public. Supposing this order to be incorrect, it is not absolutely void, but voidable only, by some direct judicial proceeding. *Rex v. Stotfold*, 4 T. R. 596, and *Gray v. Cookson*, 16 East, 13, show the principles applicable to this point. It is attempted here to impeach, collaterally, an order which has remained unquestioned for seventeen years. Including several roads in the same order may, in some respects, be more convenient than separating them. It is, at all events, less expensive. Supposing that there had been, in the old highway act, a form applicable to the mere stopping of an unnecessary highway, it is not clear that the words "by such ways and means, and subject to such exceptions and conditions," in stat. 55 G. 3, c. 68, s. 2, ought to be construed as referring to such form, or to anything but the sale mentioned immediately before. Sect. 86 of stat. 5 & 6 W. 4, c. 50, as to stopping more than one highway by the same order, may have been inserted to remove doubts, but it is not an enabling clause; [*851] and the next section speaks of an appeal "against the whole or any part or parts of any order," (not any *such* order), "or certificate for diverting more highways than one." If it had been considered that all orders including several roads, except in the case pointed out by sect. 86, were, and were to continue ineffectual, that would have been expressed.

As to the second objection. It is true that the justices in their recital have found the whole highway, lying partly in Milverton and partly in Oak, to be unnecessary; but they have stopped only the part in Milverton, over which they clearly had jurisdiction. Although the recital may be too large, it shows that the part actually stopped was unnecessary: the finding that the whole was so may be taken as the mode by which they arrive at their conclusions as to the part; and, at all events, *utile per inutile non vitiatur*. And, if the effect of stopping up part were to make the whole useless, it would be proper to show that the whole was unnecessary. If part had been necessary, that would have been a ground of objection, on appeal, against stopping the rest. Whether or not the justices could have stopped the part in Oak, though they would have had no right to be summoned on a special session for the limit within which Oak lies, may be a difficult question. On looking to the form of stat. 13 G. 3, c. 78, sched. No. xvi., and the words "acting within the (hundred, &c.) of —," and "in the said (hundred)," which occur there, it would seem that they could not go beyond their own district. It is said that a second order should have been obtained for stopping the part in Oak, from the justices of that division: but the present order, if bad at the moment of making it, could not have been made good by that proceeding. [COLERIDGE, J. Is there any [*852] authority for stopping less *than the entire highway?] The justices may stop any way, to the extent of their jurisdiction; and here they have done no more. Suppose that, instead of the breadth, the length of a highway were divided between the district for which the justices act, and another; and the stopping of one would stop both; in point of law they would be entitled to stop the part within their jurisdiction; if the part out of their jurisdiction, and which was thus rendered impassable, was necessary to the public, that would be an objection in point of fact to the order; for the finding on which it proceeded, that the part stopped was unnecessary, would not be true. [COLERIDGE, J. Could the justices virtually stop a highway, without giving notices at the places where that effect would be produced?] The notices expressly required by stat. 55 G. 3, c. 68, and no others, would be necessary. [The Court then intimated that it was unnecessary to hear the other points argued for the defendants.]

Lord DENMAN, C. J. This case is very clear, upon the second objection to the order. Power is given to the justices to stop any highway which they find to be unnecessary. Stopping part of a way is not an exercise of that power. In the instance last put, where a road runs through different districts, but a part of it is wholly within one, though it might be very proper that the magistrates of the districts should communicate with each other, and concur in the order, their not having done so would be no decisive objection. But where, as in this case, an entire highway could not be stopped unless two sets of justices concurred, and there is no such concurrence, the statute is not carried into effect.

*PATTESON, J. The second section of stat. 55 G. 3, c. 68, is sufficient to decide this point. The justices have not stopped up an unnecessary [*853] highway, bridleway, or footway, as they are there empowered to do, but they have narrowed it. No such power is given to them. If the difficulty could have been removed by four justices meeting and making orders for stopping the two portions of the road, well and good; but that course has not been adopted. If that could not be done, no order could be made.

WILLIAMS, J. If that course was available, it would have been well that the justices had adopted it; if it was not, the case is not provided for by the act.

COLERIDGE, J. Before the act, 55 G. 3, c. 68, this power for stopping unnecessary highways could not have been exercised. We must therefore look to the act, to see what the justices can do. The difference between the power assumed here, and that given by the act, is material. The inhabitants of a district might be willing that the whole of a road should be stopped, but not half its breadth. Parties charged with repairs might be satisfied to bear the burden for a whole road, but not for the half. Here, the inhabitants would no longer have an entire road, but would still remain liable to repairs. I should think that this was a *casus omissus* in the statute. As to the course which has been suggested, it might not be possible to get four justices to meet for the purpose: but it is not necessary to go into that discussion.

**Bere* afterwards suggested that there was a highway mentioned in the order, and in the indictment, to which the objection now decided [*854] upon did not apply. The Court therefore took time to consider on the first point. *Cur. adv. vult.*

Lord DENMAN, C. J., now delivered the judgment of the Court.

One, among the numerous points, on which we gave judgment for the crown, being applicable to one only of the roads indicted, we have had to consider the other of them which was argued before us on both sides.

The prosecutor contended that the order for stopping up the road in question was invalid, because it stopped up also two other roads perfectly distinct from it: and we are of opinion that this objection must prevail.

The power of stopping roads is vested in the justices of the peace, by 55 G. 3, c. 68, s. 2, a power unknown to the common law, and requiring to be exercised in strict conformity to the statute which creates it.

The clause enacts, that it shall and may be lawful to stop roads by such ways and means in all respects, as are prescribed by the 13 G. 3, c. 78, for widening or diverting highways. These are to be found in the sixteenth section, and in numbers xvi., xvii., and xviii., of the schedule annexed to the latter act; and the form of the order for stopping up, which is No. xviii., clearly contemplates one highway only.

There is a marginal note to this form, which is not merely found in the printed act, but in the parliament roll. "If there are more highways than one to be stopped up, there should be a separate order for each." These words are a part of the act of parliament, and *must receive their full effect. [*855]

— if they were of less weight, the language of 55 G. 3, c. 68, con-
referring to one order, one notice, one highway, would appear to the

Court sufficient to limit the operation of any order to a single road. This is required both for convenience and fair dealing : it is also the proper construction of a statute which creates a new power, and expressly defines the manner in which it must be exercised.

Such was the view taken by Lord KENYON in *Davison v. Gill*, 1 East, 64, and by Lord TENTERDEN in *Rex v. The Justices of Kent*, 10 B. & C. 477, to which, on a late occasion, we felt ourselves bound to adhere, *Rex v. The Justices of Middlesex*, ante, p. 626.

A simple rule is thus laid down for the guidance of magistrates, and the protection of the King's subjects : the former will not be perplexed with small distinctions, nor the latter deprived of their rights without full and clear notice.

Judgment for the crown.

[*856] *Lord BOLTON *v.* TOMLIN and Others, Executors of
JOHN TOMLIN. Nov. 25.

At a letting of lands, the terms of letting were read from a printed paper, and a party present agreed to take certain premises from Lady-day then next, when the lease of the then tenant would expire. No writing was signed by the parties or their agents, but there was at the foot of the printed paper a memorandum, also, read over to the future tenant, stating that the parties had agreed to let and to take, subject to the printed terms, the name of the farm and the rent, and that the letting was for one year certain from Lady-day, and so from year to year, till notice to quit. Some of the terms were special, having relation to husbandry. The new tenant entered at Lady-day, and paid rent.

Held (assuming the first transaction not to have been a demise), that there was a valid demise by parol under stat. 29 Car. 2, c. 8, s. 2, when the tenant entered; that a demise rendered valid by that section might contain the same special stipulations as a regular lease; and that, on the trial of an action by the landlord against the tenant for breach of them, the paper above mentioned might be referred to, to refresh the memory of a witness as to such stipulations.

ASSUMPSIT, on a farming agreement, and for rent. Plea, among others, non assumpsit. The defendants were executors of the lessee. The alleged breaches were of special conditions as to husbandry. On the trial before PARKE, B., at the York Spring assizes, 1835, the following evidence was given to show a letting on the terms insisted upon. The plaintiff's steward said that, when any one applied to take one of the farms, he put into the party's hands a set of printed rules; and, if he were satisfied with the conditions, and with the farm and rent, the steward made a verbal agreement with him; a memorandum was afterwards added at the foot of the printed rules, containing the rent, quantity of land, and any special particulars; and, this having been read over in the presence of the new tenant and a witness, the steward considered the terms concluded upon. The plaintiff's solicitor stated that, in the present instance, the papers of rules and memorandums were produced to the tenants at a meeting, December, 1819, and the memorandums read to each tenant respectively, for the purpose of receiving their acknowledgment of holding on the terms stated.

[*857] The testator's father was then tenant of the premises in question, for a term ending on Lady-day, 1820. John Tomlin, the testator, having agreed with the steward to take the same premises, and having had the printed terms read over to him, attended the above meeting, where the rules were produced, and the memorandum of his taking read to him by the plaintiff's solicitor, and he was asked if he agreed to take the farm on those terms; to which he assented. The memorandum stated that W. S. (the steward), as agent of Lord BOLTON, agreed to let, and J. T. (the testator) agreed to take, &c., stating the farm, the rent and times of payment, and that the term was for one year certain, and so from year to year, until due notice to quit, from Lady-day next, subject to the printed terms. The memorandum purported to be "in the presence of me, L. T." (the plaintiff's solicitor), and was signed by him, but not by either of the parties or his agent for that purpose. The testator entered at Lady-day, 1820

and held and paid rent till 1821, when he died, and his executors, the now defendants, succeeded him. They paid the rent down to 1833; and on some occasions they asked to have deviations allowed (it was not stated in what particulars) from the terms of the holding. The paper containing the memorandum was produced at the trial, stamped with a lease stamp; but its reception as evidence was objected to, the defendants' counsel insisting that, for want of proper signature, it was not admissible as a lease, under sect. 1, of the Statute of Frauds; nor, for the same reason, was it admissible as an agreement under sect. 4, since the terms were not to be performed within one year from the making of such agreement. The learned Judge allowed the document to be read, being of opinion that it was only a qualification of a *demise, which demise was itself valid without writing under sect 2, of the Statute of Frauds.¹ He [*858] gave leave, however, to move to enter a nonsuit; and the plaintiff had a verdict. In the next term, a rule nisi was obtained for entering a nonsuit.

Alexander and Joseph Addison showed cause in this term.² First, the evidence showed a demise for a term not exceeding "three years from the making" of such demise, within stat. 29 Car. 2, c. 3, s. 2, and consequently not within the operation of sect. 1, which enacts that leases not in writing and signed by the parties making the same, or their agents, shall have the effect of leases at will only. It is contended that, as the term here was not to commence immediately, there was no actual demise within the protection of sect. 2, and that the document produced at the trial must be considered as an agreement within sect. 4, and therefore void, because not signed by the party to be charged. But *Ryley v. Hickes*, Bull. N. P. 177, S. C. 1 Stra. 651, shows that the exception in sect. 2 is not confined to leases which commence from the time of making, but extends to others, provided the term granted by them does not exceed three years from the making. And *DAMPIER, J.*, in *Inman v. Stamp*,³ admitted that the practice had been with the foregoing *case, though he himself inclined to the opinion that sect. 2 was confined to leases executed by possession. In a lease to commence at a [*859] future period, an *interesse termini* passes, and the lessee is tenant, for some purposes, from the time of the execution; note (1) to *Took v. Glascock*, 1 Wms. Saund. 251. It may be urged that the grant here was of a reversion merely, and therefore ought to have been by deed; but in 4 Bac. Abr. 847, *Leases* (N), 7th ed., it is said that, "if one makes a lease to A. for ten years, and the same day makes a parol lease to B. for ten years of the same lands, this second lease is absolutely void;" but that, "if such second lease had been made for twenty years, then it had been good as a future *interesse termini* for the last ten years." [*COLERIDGE, J.* The parol lease there is supposed to commence immediately.] *Bracegirdle v. Heald*, 1 B. & Ald. 722, which may be cited, was the case of a contract for a year's service, to commence at the end of a month. The present contract is not an agreement for something to be done in the future, but the conveyance of an immediate interest. Nor has the instrument any of the characters of an agreement. The memorandum endorsed upon the paper of terms is not an agreement for something to be done in future, nor part of such agreement; it is rather to be considered as a note of the bargain, taken by a third person, as in *Rex v. St. Martin's Leicester*, 2 A. & E. 210, 4 N. & M. 202; and *Rex v. Wrangle*, 2 A. & E. 514, 4 N. & M. 375, by way of precaution, but not forming part of the transaction, nor necessary to render it valid. Although no part of the written instrument may have operated of itself as a demise, still, an entry and occupation in fact being *proved, this document might be [*860] made use of, under the circumstances, to show upon what terms the parties held. The tenants had recognised the terms, and had even in one instance,

¹ As to the use made of the document, see the judgment of the Court, p. 864, post.

² November 21st. Before Lord DENMAN, C. J., PATTERSON, WILLIAMS, and COLERIDGE, J.

³ 2 Selw. N. P. 844, 9th ed. S. C. 1 Stark. N. P. C. 12, see *Edge v. Stafford*, 1 Cr. & Jer. 391, S. C. 1 Tyr. 295, cited 2 Selw. N. P. (as above). In the present argument the 8th edition was referred to.

asked permission to deviate from them. It was for the defendants to show that they held, not upon those terms, but on other and independent ones. Where a demise in writing has been considered void, as to the length of the term, by sect. 1 of the Statute of Frauds, the Court has nevertheless held that distinct stipulations in the same instrument might be looked to as showing the conditions of the tenancy in other respects; *Doe dem. Rigge v. Bell*, 5 T. R. 471; *Richardson v. Gifford*, 1 A. & E. 52.

Cresswell and Wightman, *contra*. The instrument in question was an agreement "not to be performed within the space of one year from the making," within stat. 29 Car. 2, c. 3, s. 4, and therefore void for want of signature. If *Rex v. St. Martin's Leicester*, 2 A. & E. 210, 4 N. & M. 202, and *Rex v. Wrangle*, 2 A. & E. 514, 4 N. & M. 375, apply here, the rule must be absolute, because it is clear that the writings under discussion there could not have been used in evidence, but the instrument in the present case was so used. This, however, was, in fact, not a mere note to refresh the memory, but, as its language imports, an agreement for a future letting. By a lease to commence in future, an *interesse termini* is granted, but not a present estate in the land: if it were, such estate would merge, if the grantee, while entitled to it, took an estate for life in the same premises; but the contrary was decided in *Doe dem.*

[*861] *Rawlings v. Walker*, 5 B. & C. 111. A lease for not more than three *years from the making may be granted without writing, though to commence in future, and, when so granted, will be sufficient, if it be not sought to enforce by it any terms beyond those ordinary ones which are understood to result from the relation of landlord and tenant, and the custom of the country. But, if special terms are to be added, that must be by express agreement; and, if the agreement is one which, according to the contemplation of the parties when making it, will not be performed, that is completely performed (*Boydell v. Drummond*, 11 East, 142), within a year, there must be a writing, properly signed, within sect. 4 of the Statute of Frauds. Now a demise, as in this case, to hold for one year certain, and so from year to year until notice to quit, is, according to all the authorities (from *Say v. Smith*, Plowd. 273, downwards), a demise for two years certain; and the terms of the present holding are, in many instances, special, and such as could be established only by express agreement. *Bracegirdle v. Heald*, 1 B. & Ald. 722, therefore, is an applicable authority; and *Ryley v. Hickes*, Bull. N. P. 177, S. C. 1 Stra. 651, supposing it to be law, which was questioned in *Inman v. Stamp*, 2 Selw. N. P. 844, 9th ed., does not apply, being a case on sect. 2 of the statute, whereas the present case falls under sect. 4. *Ryley v. Hickes*, Bull. N. P. 177, S. C. 1 Stra. 651, only shows that a demise for less than three years may be made by parol upon such ordinary terms as are understood without special agreement. To hold that a demise containing special terms came within sect. 2, would let in all the frauds which the statute was intended to prevent. The conditions here are not a qualification of the demise, but the very terms of *it; and they are [*862] properly the subject of a special agreement within sect. 4. [PATTERSON, J. Your argument tends to show that, on a tenancy from year to year created without writing, there could not be a specific rent reserved, but that the demand must always be on a quantum meruit.] If the tenant went in and paid rent for a time, the rent so paid would show what ought to be paid subsequently. A difficulty like that now suggested might have been raised in *Bracegirdle v. Heald*, 1 B. & Ald. 722. If the present transaction were held to be a demise protected by sect. 2 of stat. 29 Car. 2, c. 3, special terms might always be annexed to the letting by means of some parol agreement, supposed to have taken place before the tenancy began.

Cur. adv. vult.

LORD DENMAN, C. J., now delivered the judgment of the Court as follows:—

This was a special action of assumpsit for breach of the terms of a parol lease. The defendants were executors of the lessee. The facts were that, in

the order. [COLERIDGE, J. Suppose the soil is sold to an individual who chooses to keep it open, would the public right over it still continue? It is usual to put up a notice that the passage over the land is closed, but the proprietor might omit doing so.] Parties must do more than obtain an order and keep it to themselves: the public in general must be apprised by some act that the way is stopped; otherwise there is no meaning in the words "proceedings thereupon." And here (which is another ground for contending that the order is ineffectual) the public has in fact been permitted to pass uninterruptedly over the soil in question for seventeen years, or has done so in exercise of an adverse right. * [Lord DENMAN, C. J. Could the user by the public be placed [*848] in any more favorable light for you than as strong evidence of a dedication? COLERIDGE, J. And here no person was in a situation to dedicate. The soil did not immediately revert to the owner of the adjoining land, because, in order to entitle him, the statute requires that it should be sold to him.] The statutory power being imperfectly executed, the soil would vest, at common law, in the owner of the adjoining land.

Lastly, the order begins, "we," "having upon view found, and it appearing to us." It is not therefore shown that the order proceeded simply "upon the view" of the two justices, according to stat. 55 G. 3, c. 68, s. 2. In *Rex v. The Justices of Worcestershire*, 8 B. & C. 254, the words were "having upon view found, or it having appeared to us;" which was held objectionable, as representing that the justices had done that which the legislature required, or something else. Here they are shown to have acted on view, *and* something else, which may not have been actual inspection. An order in very similar words was held bad in *Rex v. The Marquis of Downshire*, 4 A. & E. 698. [Lord DENMAN, C. J. The "appearing," as stated here, is a result of the view. In *Rex v. The Marquis of Downshire*, 4 A. & E. 698, the justices did not state that they found anything on view. WILLIAMS, J. If the order had said only "it appearing to us," your objection would have been well founded. Why are we to suppose here that it did not appear on the view?] The Court will intend nothing to give jurisdiction: whatever is necessary to give it must be shown. [Lord DENMAN, C. J. Here it is shown; only something else is added.]

* *Bere*, *contra*. There is no authority which decides that an order of [*849] justices, in general, may not include two distinct subject-matters; *Rex v. Maulden*, 8 B. & C. 78; see *Rex v. St. Nicholas, Leicester*, 3 A. & E. 79, shows that two such matters may be included, and that the order may be good as to one, and bad as to the other. An order must sometimes adjudicate on distinct matters. Where a mother and an infant bastard child are removed by the same order, the settlement of each must be pronounced upon. There is no greater objection to including several roads in one order than in one indictment. Even if several distinct felonies are included in the same indictment, it is not therefore bad. The old highway act, 13 G. 3, c. 78, s. 22, gave a power so far resembling that of stopping unnecessary highways under stat. 55 G. 3, c. 68, s. 2, that, in stopping the old way, the proceeding had no dependence upon any previous step for diverting or newly creating another way: but there is not, in the schedule to stat. 13 G. 3, c. 78, any form applicable to such independent proceeding. The stopping where no diversion was in fact made, as under stat. 55 G. 3, c. 68, was not contemplated in the former statute, and therefore it might be expected that no part of the schedule would be framed to meet that particular case. The marginal note to the schedule in the parliament roll appears to have crept in contrary to usual practice; the body of the statute, in the roll, has none. The note is not imperative, but says merely that there "should be a separate order" for each highway. Even if this were otherwise, a form given in a schedule, without any express direction in the statute itself, is (as PARKER, B., said in *Hennah v. Whyman*, 2 Cro. M. & R. 239; *S. C.* 5 Tyrwh. 792) "nothing but *an example." In *De Ponthieu v. Pennyfeather*, 5 Taunt. [*850] 634, the enactment of stat. 13 G. 3, c. 78, s. 19, as to enrolling the cer-

[*865]

*MICHAELMAS VACATION.

IN THE EXCHEQUER CHAMBER.

(ERROR FROM THE KING'S BENCH.)

A. M. CAMPBELL, Clerk, J. KELLY, and J. COCHRANE, v. MAUND.
November 26.

The right to demand a poll is by law incident to the election of a parish officer by a show of hands.

At the election of a churchwarden of the parish of Paddington, in Middlesex (subsequently to stat. 58 G. 3, c. 69), the show of hands was in favor of M. A poll was demanded by a rate-payer present, who required that it should be taken according to stat. 58 G. 3, c. 69 s. 3 (allowing plurality of votes to individuals in respect of property), to which mode an inhabitant present objected. The poll was taken by plurality of votes, by which H. and G. had the majority; they also had the majority at the poll, reckoning by single votes. During the poll, several parishioners protested against the mode of taking it, and did not vote. By stat. 58 G. 3, c. 69, s. 8, nothing in that act is to change or affect the right or manner of voting in any vestry or meeting holden by virtue of any ancient or special usage or custom. By stat. 5 G. 4, c. cxxvi. the vestrymen of the parish of P. are to be elected by ballot, by plurality of votes, as under stat. 58 G. 3, c. 69, s. 3; elections of churchwardens are to be conducted in such manner as hath been usual in the same parish; and overseers are to be nominated by the vestry as may be done by parishioners in vestry in other cases. Before either act passed, and ever since, churchwardens were elected in P. by show of hands, no poll ever having been demanded.

1. Held, that (assuming stat. 58 G. 3, c. 69, s. 8, to be inapplicable to the parish of P.) G. and H. were duly elected, the irregularity in the form of demanding the poll (if any) having been waived by the poll being in fact taken without objection from either party to there being a poll; and H. and G. having a majority on the poll according to either way of reckoning the votes.
2. Also, that stat. 58 G. 3, c. 69, s. 8, was applicable to P.; for that the fact of no poll ever having been demanded did not show that the usage de facto in P. excluded a poll, and the elections were, at the time of passing stat. 5 G. 4, c. cxxvi., subject to stat. 58 G. 3, c. 69, s. 8, in the event of a poll being demanded.
3. A poll may be demanded at an election of parish officers, after the chairman has declared the result of a show of hands.

ERROR from the Court of King's Bench, on a bill of exceptions.

The defendant in error declared in trespass against the plaintiffs in error, for that they, on 4th August, 1835, with force &c., assaulted him, he then being one of the churchwardens of the parish of Paddington, in the county of Middlesex, expelled him from the vestry-room of the parish, and hindered and prevented [*866] him from being present at a certain general meeting of the vestry of *the said parish, holden at such vestry-room on that day, pursuant to the provisions of the statute in such case, &c., and at which meeting he the plaintiff, as one of the churchwardens of the said parish, was legally entitled to be present; and other wrongs, &c.

Pleas, 1. Not Guilty.

2. That, before and at the time when, &c., to wit, 4th August, 1835, a certain general meeting of the vestry of the said parish convened, pursuant to the provisions of the statute in that case, &c., was duly assembled and holden, &c., in the vestry-room in the parish, for the transaction of business touching the care and management of the overseers of the parish; but that, just before the time when, &c., and whilst the vestry was duly assembled and sitting in the vestry-room on parochial business as aforesaid, the plaintiff, without right or authority so to do, and he the plaintiff not being, before or at the said time when, &c., one of the churchwardens of

the said parish, as in the declaration mentioned, nor a vestryman of the said parish, unlawfully intruded himself, entered and came, into the said vestry-room, and then and there made a noise, &c., and remained therein making such noise, without the leave or license, and against the will of the said vestry so assembled as aforesaid, and thereby greatly disturbed the said vestry so assembled; and thereupon the said A. M. Campbell, then being the minister and perpetual curate and one of the vestrymen of the said parish, and the said J. Hill, then being one of the churchwardens and vestrymen of the said parish, and the said J. Cochrane, being one of the beadles and constables of and for the said parish, then and there requested the plaintiff to cease from making such noise and disturbance, and to go and *depart, &c., which he then and there wholly refused to do, and then unlawfully continued such interruption, &c., whereupon the [867] said A. M. Campbell, being such minister, &c., and the said J. Hill, being such churchwarden, &c., and the said J. Cochrane, being such beadle, &c., and as the servant of the said A. M. Campbell and J. Hill, and by their command, at the said time when, &c., did gently lay their hands, &c., in order to remove, and did then remove, the plaintiff, &c., as it was lawful, &c. Replication, de injuriâ Similiter.

The bill of exceptions stated as follows. The issues were tried before Lord DENMAN, C. J., at the Middlesex sittings, after Michaelmas term, 1835. Upon the trial, the plaintiff's counsel gave in evidence that the plaintiff, on 4th August, 1835, was forcibly turned out of the vestry-room of the parish of Paddington, where a general meeting of the parish, duly convened, was then assembled and holden by order of the defendants, the plaintiff claiming to be there present as having been duly elected churchwarden of the parish on the 21st of April, being the Easter Tuesday preceding. The defendant, John Hill, also claimed to have been duly elected churchwarden, and was a vestryman of the parish. The defendant, A. M. Campbell, was minister and perpetual curate, and one of the vestrymen of the parish, and chairman of the meeting. The defendant, James Cochrane, was one of the beadles and constables of the parish, and acted, in turning the plaintiff out of the room, in obedience to the directions of the other two defendants. The plaintiff gave further in evidence an act, 5 G. 4, c. cxxvi. (*the bill here referred to ss. 3 and 10 of that act). The mode of elect- [868] ing churchwardens in the parish, both long before and after the passing the act of 58 G. 3, c. 69,* and long before, and at, and after the passing of the act of 5 G. 4, c. cxxvi., had been and was by show of hands, no poll ever having been demanded. On the Easter Tuesday, 1835, the plaintiff below, Maund, and one Hobbs were proposed as churchwardens, as were also one Goodhind, and

*Stat. 5 G. 4, c. cxxvi. (local and personal, public) is "for better governing and regulating the parish of Paddington," &c.

Sect. 3 enacts, that vestrymen (with the exception of certain *ex officio* vestrymen, including the minister and churchwardens, by sect. 6, and of others nominated by particular parties) shall be chosen by ballot, by the inhabitants and occupiers qualified as thereafter mentioned: each of whom is to be entitled to the same number of votes as under stat. 58 G. 3, c. 69, s. 3.

Sects. 8 and 9 provide for the election of future vestrymen, as in the original election.

Sect. 10 enacts, that the election of churchwardens "shall take place on Easter Tuesday, and be conducted from year to year in such manner as hath been usual in the same parish."

Sect. 25 enacts, that the vestrymen shall "nominate the overseers of the poor for the said parish of Paddington, in such manner as the inhabitants of parishes in vestry assembled are in other cases empowered to nominate them," with a proviso as to the time.

*Stat. 58 G. 3, c. 69, is "For the regulation of parish vestries," extending (ss. 9 and 10) to all parishes not in the city of London, or in Southwark.

Sect. 8 enacts, that every rated inhabitant shall, in the vestry, have a number of votes in the proportion there assigned to the amount of property in which he is assessed.

Sect. 8 enacts, that nothing in the act shall "extend to take away, lessen, prejudice, or affect the powers of any vestry or meeting holden in any parish, township, or place, by virtue of any special act or acts, of any ancient and special usage or custom, or to give or affect the right or manner of voting in any vestry or meeting so holden."

the defendant below, Hill. The majority of the electors present at the said meeting, on a show of hands, was in favor of the plaintiff below and Hobbs, and was so declared to be by the chairman; whereupon a rate-payer present demanded [*869] *a poll, and required that the poll should be taken pursuant to stat. 58 G. 3, c. 69. This mode of taking the poll, giving a plurality of votes to one person according to the amount of his rateable property in the parish, was objected to by an inhabitant present, who insisted that only one single vote should be allowed to each person. On the poll being so demanded, the chairman immediately granted a poll as demanded, in pursuance of the following notice, which had been previously circulated in the parish.

Paddington, Middlesex, 16th April, 1836.

"If a poll should be demanded for the election of churchwardens on Tuesday next, it will be open at the National School Room, Harrow Road, immediately after the meeting of the inhabitants and occupiers, and will continue open for the convenience of the rate-payers until six o'clock on Tuesday evening, and likewise from eight to six on the following day, &c.

"A. M. CAMPBELL, Minister.

"THOMAS FRANCE, } Churchwardens."

"JOHN GOODHIND, }

The chairman withdrew, for the purpose of taking such poll, into the school-room, being at a small distance from the vestry-room, and within the parish, and more convenient for taking the poll. The poll was then and there taken according to the plurality of votes; and, upon the result of that poll, the defendant below, Hill, and Goodhind were declared duly elected, not only by a majority of votes as respecting property, but also by the plurality of single votes. The poll was kept open for two days; and all rate-payers within the parish, who had paid their taxes, were allowed to vote, whether they [*870] *had been present or not when the candidates were proposed, and the show of hands taken. During the taking of such poll, several of the parishioners protested against the mode in which such poll was taken; and acting upon such protest, did not vote. All the four candidates were afterwards sworn in by the surrogate: and the plaintiff below, having come to the vestry-room on the 4th of August, claiming to be legally elected churchwarden by a majority on the show of hands, but not being a vestryman of the parish, came to the said meeting, and assisted on his right to attend the same as churchwarden, against the will of the said vestry. Whereupon, having been previously requested to withdraw by the defendants below, and refusing to do so, but continuing as aforesaid, he was turned out by the defendant below, Cochrane, the beadle, under the directions of the defendants below, Campbell and Hill, with instruction to use no unnecessary violence. The counsel for the defendants below insisted on their behalf that the said several matters, so produced and given in evidence, were sufficient to entitle the said defendants to an acquittal on both the issues, that the poll was duly taken under stat. 58 G. 3, c. 69, that Hill was duly elected churchwarden, and that the plaintiff below was not duly elected churchwarden, and that the defendants below were justified, on the day when, &c., in turning him out of the vestry-room for the cause aforesaid; but the counsel for the plaintiff below insisted to the contrary: and the Chief Justice did then and there declare and deliver his opinion in point of law to the jury, that, upon the evidence aforesaid, if believed, the said James Maund was duly elected churchwarden; [*871] that the 10th section of the *local act 5 G. 4, c. cxxvi. took the parish of Paddington out of the operation of stat. 58 G. 3, c. 69, as to the election of churchwardens by a plurality of votes in a single person by reason of rateable property in the parish: and that, a poll being demanded according to the provision of that statute, under the circumstances above stated, the chairman was not justified in holding it at all, and therefore the election must be determined by the show of hands, the majority of single votes upon the show of hands being allowed to be in favor of the plaintiff's election; and, with that di-

rection, the Chief Justice left the same to the jury. Whereupon the counsel for the defendants below excepted, &c. The bill stated that a verdict was found for the plaintiff below.

Joinder in error.

The case was argued on Tuesday, November 1st, 1836, before TINDAL, C. J., Lord ABINGER, C. B., PARK, J., BOLLAND, ALDERSON, and GURNEY, Bs.

Sir *F. Pollock* for the plaintiffs in error. First, it was proper, under the circumstances, that a poll should be taken. Sir William Scott, in *Anthony v. Seger*, 1 Hag. Ca. Cons. Court, 13, said, as to the election of a churchwarden, "Where a poll is demanded, the election commences with it, as being the regular mode of popular elections; the show of hands being only a rude and imperfect declaration of the sentiments of the electors. It often happens that, on a show of hands, the person has a majority, who on a poll is lost in a minority; and if parties could afterwards recur to the show of hands, there would be no certainty or *regularity in elections. I am of opinion, therefore, that when a poll is demanded, it is an abandonment of what has been done [*872] before; and that everything anterior is not of the substance of the election, nor to be so received." Here the poll was demanded; the supposed election by show of hands is therefore a nullity. It will, however, be contended that, either by sect. 8 of Sturges Bourne's Act, stat. 58 G. 3, c. 69, or under sect. 10 of 5 G. 4, c. cxxvi., or at common law, the ancient custom of taking by show of hands, in this parish, is to be adhered to; and, therefore, that the poll was not properly demanded, inasmuch as the demand was that a poll should be taken pursuant to stat. 58 G. 3, c. 69, which, it will be argued, is inapplicable to the parish of Paddington. Now, supposing it, for argument's sake, to be inapplicable, the demand was nevertheless good, because the presiding officer was not prevented, by the terms of the demand, from holding it according to the legal method, whatever that was. This disposes of the case, independently of the question to be next discussed; because, if the poll was rightly demanded, then, inasmuch as Maund, at the poll, was in a minority, reckoning either by gross numbers, or by votes taken according to property under stat. 58 G. 3, c. 69, he was not duly elected.

But, secondly, the proper method of taking the poll was under stat. 58 G. 3, c. 69, s. 3. That applies to all parish vestries, except in London and Southwark. It is true that sect. 8 makes an exception in the case "of any ancient and special usage or custom." No such custom, however, is in evidence here. There is simply an absence of any demand of a poll; that is very different from a custom not to elect by poll, though demanded. A *similar answer [*873] applies to the argument which will be suggested from sect. 10 of stat. 5 G. 4, c. cxxvi. The usual manner of electing, since stat. 58 G. 3, c. 69, must be understood to have been under the last-named statute; for, although that statute had not actually been called into operation, inasmuch as no poll had been demanded, yet (in default of special custom, which has not been proved here) the poll, if taken, was liable to the statute; and therefore stat. 5 G. 4, c. cxxvi. found the parish subject to stat. 58 G. 3, c. 69, and this latter act is not repealed by sect. 10 of stat. 5 G. 4, c. cxxvi. The election of vestrymen is, by sect. 3 of the local act, expressly directed to be made according to the provisions of stat. 58 G. 3, c. 69, except that it is to be by ballot. And the object of sect. 10 of the local act was merely to prevent the election of churchwardens from being subject to the changes which the act introduced as to vestrymen. The fact that stat. 58 G. 3, c. 69, had never been called into operation, cannot affect the question.

Although the plaintiffs in error contend that they are entitled to succeed, even if stat. 58 G. 3, c. 69, do not apply to the parish of Paddington, it is the wish of both parties to obtain the judgment of the Court on the question whether it does so apply.

Sir *J. Campbell*, Attorney-General, contra. The question is reduced to that

of the applicability of stat. 58 G. 3, c. 69. For, supposing that statute to be inapplicable, the only question, upon which the show of hands being taken, was, whether it was in favor of Maund. Any person, who disputed that, might call for a poll to put an end to the doubt; that is all which can be inferred from [*874] *Anthony v. Seger, 1 Hag. Ca. Con. Court, 13; but the poll could be called for on that ground only. Here no such poll was demanded. In effect, the party making the demand, did not dispute that the show of hands was in Maund's favor, nor require that question to be tried by the poll; but he insisted on applying stat. 58 G. 3, c. 69. [LORD ABINGER, C. B. Do you say that a person not present at the show of hands, could not afterwards vote on a poll being granted?] In strictness he could not. The common law assumption seems to be, that all who have a right to vote are present when the show of hands is taken. A poll in many cases, as for instance on the question who is to be chairman (if indeed it can be taken at all on such a question), must be confined to parties present at the time when the question arises: and the law must be the same as to other questions. [LORD ABINGER, C. B. But there must often be a poll lasting for more days than one, as in the case of an election of a member of the House of Commons.] That is the case of a county court, which the sheriff has a common law power to adjourn. In Prideaux on Churchwardens, p. 46 (ed. 10, by Tyrwhitt), it is said that, at a vestry meeting, "the present include the absent, and the major part of the present include all the rest. For those who absent themselves after such public notice given, do it voluntarily, and therefore do thereby devolve their votes upon those who are present, and every act of the major part of the present in all such meetings is, in construction of law, the act of the whole parish," and see *Ib.* p. 70. Prideaux's book was stated to be one of authority in the Ecclesiastical Courts, by Sir John Nicholl, in *Wilson v. M'Math*, 3 B. & Ald. 248, note (b). In *Rex v. The Archdeacon of Chester, 1 A. & E. 342, the churchwardens gave notice of their intention to adjourn, if a poll should be demanded, in the original notice of meeting: and Lord DENMAN, C. J. said, "Those who summon a meeting of this kind, must necessarily lay down some order for the proceedings." But that does not show that parties who have once, by meeting, the entire cognizance of a question submitted to them, are to be afterwards interfered with by others who were not at the meeting. [LORD ABINGER, C. B. The practice is against your position.] The practice, if otherwise, is legal only when it takes place under an act of parliament, or special custom. The presumption must be in favor of the common law practice. Here it appears that the majority of electors present were for Maund. Even if the common law admitted parties who were absent on the show of hands, to vote at a poll, the special usage here would overrule that, and the enactment in sect. 10 of 5 G. 4, c. cxxvi. was perhaps introduced for the very purpose of protecting the usage in that respect. [ALDERSON, B. The contest here was between two and two, on the show of hands; that is not a good election, according to *Rex v. Player*, 2 B. & Ald. 707.] That may be correct as to corporators; but the usual method of electing churchwardens is as here. It is, however, enough, in this case, that the custom in the particular parish has been followed.

Then, as to the question whether stat. 58 G. 3, c. 69, be applicable to the parish of Paddington. Sect. 10 of stat. 5 G. 4, c. cxxvi., provides in express terms for preserving the custom, or *lex loci*. According to the argument on the [*876] other side, this section would have been *totally unnecessary: for it is contended that it left the elections to the existing law. [LORD ABINGER, C. B. The object might be to prevent the churchwardens from being elected by the select vestry, as substitute for a general vestry. Sir F. Pollock. By sect. 25 the overseers are to be chosen by the select vestry.] That shows conclusively that, independently of express enactment, the churchwardens would have been elected according to the law prevailing before the statute. The object of sect. 10 is, therefore, to provide, not merely for maintaining the law as it

stood before the act, which was unnecessary, but for maintaining the method of election *de facto*, whether strictly legal or not. This is the construction which has been put on similar clauses, as in *Rex v. Birch*, 4 T. R. 608; *The Duke of Bedford v. Emmett*, 3 B. & Ald. 366; *Rex v. The Churchwardens of St. James, Westminster*, *antè*, 391. It is argued that the custom of voting by single votes is not shown here, inasmuch as the plurality could take place only where a poll was taken, and a poll could be taken only where there was a demand, and the evidence merely negatives the demand. But, according to this course of argument, the evidence in support of the custom would be considered weaker, the more prevalent and notorious the custom was. That a poll was never demanded shows the strongest conceivable case of its not being usual.

Sir F. Pollock in reply. The objection to the putting up two names at once is, of itself, fatal to the defendant in error. It is said that parties not present at the show of hands ought not to be let in by the poll; *if so, the practice throughout the country is illegal. Besides, as there was here a [*877] notice of the intention to grant a poll, there was the less necessity for all the electors to attend. In *Rex v. The Archdeacon of Chester*, 1 A. & E. 342, the party which had the minority on the poll had the majority on the show of hands as here: yet the result of the poll was held to be the true election. The doctrine laid down in *Prideaux* may be correct; those present may bind those absent: but the question still remains, whether it is not the parties present at the poll that bind the parish. The cases cited, to show that sect. 10 of stat. 5 G. 4, c. cxxvi., refers to the usage *de facto*, show merely that, where a particular practice is expressly referred to as the exemplar, that must be followed: here there is nothing analogous to such a provision, but only a clause leaving matters as they stood before. It is said that, on this construction, sect. 10 would be unnecessary: but many other objects might be suggested for it; for instance, it might be meant to defeat the canonical right of the minister to elect a churchwarden.¹ But here there is no custom *de facto* against the plaintiffs in error: the custom is of election by a show of hands: to such a custom it is incidental that a poll, if demanded, should be granted. The fact that the incident is not recollected to have taken place, because never wanted, does not destroy the incident.

Cur. adv. vult.

TINDAL, C. J., now delivered the judgment of the Court. After having stated the pleadings, his Lordship proceeded as follows.

*The inquiry at the trial was reduced to this single question, whether [*878] Maund, the plaintiff below, had been duly elected churchwarden or not. The learned Lord Chief Justice told the jury that [His lordship here read the bill, so far as related to the ruling of the Lord Chief Justice, as *antè*, pp. 870, 871.]

To this direction the defendant below excepted in point of law.

The bill of exceptions raises two points, each of which has been argued before us, *viz.*, first, whether the election, which took place at a poll demanded and granted under the circumstances stated in the bill of exceptions, was a legal and valid election? and, secondly, whether the provisions of stat. 58 G. 3, c. 69, apply to and govern the parish of Paddington?

And, upon the first question, we are all of opinion that the election, which took place at the poll demanded and granted in the manner and under the circumstances stated, was a legal and valid election.

We agree to the proposition contended for on the part of the defendant in error, that, whatever was the particular mode of electing churchwardens for the parish of Paddington at the time of passing the local act, the same mode is still preserved and remains unaltered in the parish, by virtue of the 10th section of that act. For the provision in that section, that elections of churchwardens "shall take place on Easter Tuesday, and be conducted from year to year in such manner as hath been usual in the same parish," appears to us to intend the usual

¹ As to which see *Prideaux's Directions to Churchwardens*, pp. 54, 55, and notes, ed. 10.

and customary mode of election *de facto* observed there, whatever it might be, and without any reference to its origin or conformity with the general law.

[*879] *But we are, at the same time, of opinion that the mode of electing churchwardens in the parish of Paddington set out in the bill of exceptions is not inconsistent with, nor does it by any means exclude the right of the parishioners of Paddington to have recourse to a poll in the election of churchwardens for that parish.

All that is stated to have been proved to the jury is, that the mode of electing churchwardens in the parish of Paddington had been by a show of hands, no poll ever having been demanded. There is no evidence before them of any poll having been ever demanded and refused, or of any custom or usage, in negative words, to exclude the granting of a poll when properly demanded.

The question, therefore, becomes this : whether the right to demand a poll is by law incidental to the election of a parish officer by show of hands, where there is no special custom to exclude it?

And we think such right is, in point of law, a necessary incident, or consequence, to the mode of election by show of hands, wherever it is not by special custom excluded. Independently of any authority upon the subject, the recourse to a poll, where the population of the parish is large, appears to be the only mode of ascertaining with precision, the numbers of those who vote on each side, and the right of each elector to vote. Again, it is, under the same circumstances, the only mode by which each individual elector can have the power of expressing his opinion at all ; for, in the case of populous parishes, no vestry-room can be large enough to contain the whole body. Still further, where the election is carried on with any warmth of popular feeling, it is the [*880] only mode by which a large portion of *the community can express their opinion with freedom and security. But, in addition to these general grounds, we think the authority of Lord STOWELL's judgment, in the case, *Anthony v. Seger*, 1 Hag. Ca. Con. Court, 12, referred to in the course of the argument, is entitled to the greatest consideration on a matter of this nature. [His Lordship then read the passage cited, *antè*, p. 871.]

The right to demand a poll being therefore, as it appears to us, by the common law, an incident to the popular election of a person to an office, we think the electors cannot be deprived of it without a special custom of election inconsistent with such right, or expressly excluding it by negative terms, viz., that no such right exists in the particular parish. And we are clear that there is no such finding as the parish of Paddington, or facts stated which could warrant such a finding, but that the case strongly resembles that of *Doe dem. Edmunds v. Llewellyn*, 2 C. M. & R. 503, S. C. 5 Tyrwh. 899, where it was held by the Court of Exchequer, that the finding in a special verdict, that there did not appear upon the Court rolls any entry of a surrender to the use of a will, was no finding of a custom that lands within the manor could not be surrendered to the use of a will.

But it is objected that the demand of the poll was in the present case a nullity, on two grounds ; first, because it was not made until after the show of hands was declared by the chairman to be in favor of the plaintiff, and of the candidate joined with him ; and, secondly, because the demand required that the poll should be taken pursuant to the statute 58 G. 3, c. 69.

[*881] We think it an answer to the first objection, that, in *the nature of the thing, the demand of a poll never is, nor can reasonably be expected to be, made until the necessity for such demand arises ; that, is, until one of the contending parties is dissatisfied with the decision of the chairman upon the show of hands, from which it is in the nature of an appeal. And, as to the second objection, it might be sufficient to observe that there is no evidence in this bill of exceptions, that any one of the parishioners in vestry objected to the demand of the poll on that ground. If the granting of the poll had been objected to on that ground, and refused, the question might by possibility have

question, whether the annexing to the demand of a poll the requisition of a particular mode of conducting it did or did not afford a justifiable excuse for the refusal to allow the poll. But, in this case, neither of the parties objected that a poll should in fact be taken. And, as in point of fact, upon the present occasion a poll was granted, and actually taken between the contending parties, we hold there has been a complete waiver of any irregularity in point of form in the mode of demanding the poll, even if any such irregularity had existed; which, however, we think was not the case.

But it is lastly, and indeed principally, objected that the poll was improperly taken, the electors having been allowed to have a plurality of votes according to the amount of their property as provided by the statute 58 G. 3, c. 69, and not having been each restrained to the exercise of a single vote: whereas the parish of Paddington, as it is contended on the part of the plaintiff below, is excepted out of the operation of that act by the tenth section of the local act 5 G. 4, c. cxxvi., so that no elector can have more than a single vote in *the election of a churchwarden. But, as the evidence before the jury [*882] was that the defendant Hill, and the candidate joined with him, who were declared duly elected at the poll, were not only elected by a majority of votes with reference to property, but also by the plurality of single votes, it becomes a matter of indifference to the parties to this suit, whether the legal right of voting in the parish of Paddington is governed by the statute 58 G. 3, c. 69, or not; for upon neither supposition has the plaintiff below been elected to the office of churchwarden.

As, however, both the parties have been heard on this question before us, and have expressed their desire that we should deliver our opinion upon it, and as we ourselves think the expression of our unanimous opinion may have the effect of preventing any future litigation on this subject, we have thought it right to enter upon the discussion of the second question, that is, whether the mode of election by the statute 58 G. 3, c. 69, does or does not extend to the parish of Paddington?

This question depends for its answer on the proper construction to be put upon the eighth section of the general act, and the tenth section of the local act.

The eighth section of the general act provides [His Lordship here read the section: see p. 568, note 2, *anté*].

Now there is no special usage or custom, as to the mode of electing churchwardens in the parish of Paddington, found upon the bill of exceptions, where they are to be elected in vestry. The churchwardens, at the time of passing that act, were chosen by a show of hands. So were the elective churchwardens, generally speaking throughout most of the parishes in England. It is the general mode of election of churchwardens throughout *the realm. [*883] But it is found that no poll had ever been demanded in the parish. The same may be said of very many, perhaps by far the greater part of the parishes in England, in which the parishioners have never demanded a poll because they have been satisfied by the show of hands. If the custom within the parish of Paddington had by negative words excluded a poll, it would then indeed have been a special usage or custom which would have taken that parish out of the operation of the statute; for it is obvious that an election by show of hands alone is necessarily inconsistent with the allowance of a plurality of votes in any one person. But, if the usage or custom within Paddington, as set out in the bill of exceptions, should be held sufficient to exclude a parish from the operation of stat. 58 G. 3, c. 69, on the ground of its being "special," the statute would have comprehended a very small proportion indeed of the numerous parishes in England.

If then stat. 58 G. 3, c. 69, taken by itself, includes within its operation the parish of Paddington, is there any clause in the local act which can exempt the parish from its operation? The only clause which can be contended to have that

construction is the tenth. [His Lordship here read sect. 10 of stat. 5 G. 4, c. cxxvi. See p. 868, note, ante.]

This clause, as we have before observed, was intended to leave the parish of Paddington precisely in the same condition as it was at the time of passing that act. Now what was the condition of the parish as to its mode of electing churchwardens at that time? We answer, by show of hands, if no poll is demanded, and, if demanded, then by a poll taken according to law. Now by law, at *that time, a poll must taken by plurality of votes as provided by stat. 58 G. [*884] 3, c. 69, where the parish falls within the operation of that statute. And the mere fact that the votes have never been actually taken in that mode since the passing of the statute is no more a proof that the statute does not apply, than the fact of the non-demand of a poll proves that such poll was not demandable of right.

Upon the whole of this second question, we think that the mode of electing churchwardens in the parish of Paddington, before the passing of stat. 58 G. 3, c. 69, was by a show of hands, with a power of going to a poll, in which case the majority of single votes decided the election. That stat. 58 G. 3, c. 69, gave each voter a plurality of votes at the poll, when demanded and held, according to the quantity of his estate; and that, such being the rightful mode of election at the time of passing the local act, it was continued and preserved to the parish by the tenth section.

We think, therefore, that, upon the present record, a judgment of venire de novo must be awarded. Judgment of Venire de novo.

[*885] *IN THE EXCHEQUER CHAMBER.

(ERROR FROM THE KING'S BENCH.)

PITT v. WILLIAMS and Another, Executors of THOMAS FOSTER.
November 26.

An indenture recited that F. and G. were entitled to a fourth part of a colliery for a term of years; that G. was also entitled, by agreement with A., to a lease of land essential for working the colliery, and held the agreement in trust for himself and F. jointly; that P. had a power of sale upon a moiety of the colliery, for the same term, to secure an annuity, which power he was about to exercise; that F. and G. agreed to purchase the moiety, which was to be discharged from the annuity, and to grant a fresh annuity to P., payable out of the profits accruing from the working the coal, by virtue of the term in the three parts of the colliery, and the agreement. By the same indenture, after such recital, the moiety was assigned and the annuity granted; and F. and G. covenanted severally for themselves, their executors, administrators, and assigns, to pay the annuity, as above, from the profits accruing, after payment of all rates, taxes, &c., and of the rents reserved on the term, or by the agreement; a right of entry on the premises charged, and of mortgage and sale, was given to P. on the annuity being in arrear; and F. and G. covenanted severally for themselves, their heirs, executors, and administrators (not naming assigns), to do nothing whereby the annuity might cease, determine, be impeached, or become void and of no effect, or whereby the lease by which the colliery was originally demised, or the agreement, should be forfeited, or the terms thereby created cease.

P. sued in covenant on the indenture, assigning for breaches, (1), that F. and G. took a lease of the land to which G. was entitled under the agreement, in their own names, and not in trust for P., but for other persons, and forfeited and surrendered the agreement, whereby the annuity was impeached, and the plaintiff's right over the land, and in the profits which would have accrued, ceased; (2), that under the land subject to the agreement there were veins of coal, the property of A., and that F. and G. took the land at a higher rent, and otherwise on worse terms, than G. was entitled to by the agreement, in order to obtain the last-mentioned coal on better terms than they otherwise

could have done, whereby, &c. (as before): (8,) that F. and G. afterwards assigned the land, amongst other things, to H., whereby, &c. (as before). On general demurrer to the declaration.

Held, by the Court of Exchequer Chamber, in accordance with the judgment of the Court of K. B., that the want of an averment that profits had, or would have, actually accrued from working the colliery, was no objection to the declaration.

But that the first two breaches showed no cause of action; for that, (1,) the variation between the lease and the agreement did not invalidate the security; and, (2,) the security was not shown to be affected, since the profits of the colliery on which the annuity was secured were those remaining after payment of such rent only as was reserved by the agreement.

But held, reversing the judgment in K. B., (3,) that the third breach showed that the annuity was impeached; since the land in H.'s hands would not be subject to the powers of entry, mortgage, and sale; H.'s interest not being that which the covenantors had under the agreement, and he appearing to come in as a purchaser, nor privy to the covenant and not estopped by it.

THE plaintiff in error declared in covenant against the defendants in error, in the Court of King's Bench. On general demurrer to the declaration, judgment *was given for the defendants in Hilary term, 1835. See the pleadings, [*856] arguments, and judgment, 2 A. & E. 419.

Error was brought in the Court of Exchequer Chamber on the judgment; and the case was argued, Tuesday, May 10th, 1836, before TINDAL, C. J., PARK, GASELEE, and BOSANQUET, JS., and BOLLAND, ALDERSON, and GURNEY, Bs.

Sir W. W. Follett, for the plaintiff in error. There is no distinct or personal grant of the annuity by the covenantors to the plaintiff, but merely a charge upon the profits. The annuity, therefore, is impeached, within the meaning of the covenant, if the plaintiff is in any way hindered in obtaining the money; and there is also a covenant to do nothing whereby the indenture of lease, or the articles of agreement, shall be forfeited, or the terms of years thereby created shall become void. Now the annuity is charged, with powers of entry and sale, on all "the profits, benefits, and advantages whatsoever, and sum and sums of money, if any, which, under the said thereinbefore in part recited indentures of lease and the said agreement of 8th August, 1816, and the powers, provisoes, covenants, and agreements therein respectively contained, should or might be made, accrue." &c., "by the sale of the coal or culm to be wrought out of the said mines and reins" &c., "as aforesaid, or otherwise howsoever." And the covenantors in fact do forfeit the articles of agreement, and assign away the term of years granted in pursuance of the articles. [BOSANQUET, J. The agreement from Lord Ashburnham was to grant a lease after the shipping place should be completed.] In that respect, it is like an ordinary building lease; but it is enough, for the purpose of the *present argument, that the agreement was the subject of the covenant. As long as Gaunt was the party holding interest in the agree- [*857] ment, the land, to the extent of his interest, would be liable to the covenant, by way of estoppel. But, after the agreement was given up, and the lease made to Foster, Bonner, and Gaunt, and by them assigned to Hill, the land in Hill's hands would no longer be subject to the power of entry and sale. A party can grant no interest in land in which he himself has no vested interest; Right *don. J. freres v. Backnell*, 2 B. & Ad. 278, *Yelverton v. Yelverton*, Cro. Eliz. 401. But the judgment below assumes that the land in Hill's hands would be liable to the covenants. This is incorrect, both on the grounds just urged, and because "assigns" are not named in the covenant not to impeach; *Spencer's Case*, 5 Rep. 16 a. Besides, the lands are taken away, by the assignment to Hill, from the parties who are to work the colliery. Independently of the assignment to Hill, the giving up the agreement for a lease on worse terms than those contained in the agreement is a clear impeachment of the annuity charged on the profits of Gaunt in the agreement.

N. J. J. Campbell, Attorney-General, contra. The plaintiff, not being able to show that any profits in fact have arisen, has had recourse to the covenant not to impeach. But no one branch shows that the annuity has been impeached.

The first breach shows merely that the lease has been granted to the three instead of being granted to Gaunt only, who held the agreement in trust for the three.

[*888] But that does not impeach the *annuity. It is true that the lease is not granted in trust for the plaintiff: but that was not covenanted for. Then it is said that the agreement was forfeited. In the sense in which it has been forfeited, that is, by accepting a performance of it, the intention always was that it should be so forfeited; it is not against such a forfeiture that the parties covenant. With respect to the second breach, the annuity was payable out of the profits which should accrue after discharging rates, taxes, &c., and the rents reserved on the then term, or by the then agreement: it is therefore not impeached by an increase in the new rent. As to this, it is sufficient to refer to the ground taken in the judgment of the Court below. As to the third breach, it is to be observed that there is no covenant against assigning. The parties might therefore assign all or any part. It is said that the severance of the lands from the colliery impeaches the rent. But the declaration shows no severance; for, if issue had been taken on the fact of the assignment, an assignment of all together would have supported the issue on the part of the plaintiff: and, again, the defendants could not, on this declaration, take issue, and conclude to the country, as to the fact of the severance. Then is the annuity impeached by the assignment of all together? It is not necessary to discuss the decisions as to estoppel; it is enough that Hill, taking under the covenants, took subject to their covenants in matters relating to the land and running with it; for which purpose the assigns need not be named in the original covenant. Besides, the covenant to pay does name the assigns of the covenants. And this shows that an assignment was contemplated. If, in fact, there had been any impeachment [*889] of the annuity, or if any consequence *had followed from the assignment, whereby the surplus profits, which would otherwise have satisfied the annuity, had been diminished so they could not satisfy it, that should have been averred, and then an issue might have been taken upon such averment. On this point, the authorities cited below are applicable.

Sir *W. W. Follett* in reply. It is true that the first breach is not good, for the reason assigned; inasmuch as an agreement for a lease is not forfeited by taking the lease agreed for. The fallacy in the answer suggested as to the second breach consists in assuming that the profits spoken of are merely the profits arising from the mine, whereas they are the profits arising in any way from all the interest in whatever is the subject of the indentures or agreement. If they had been the profits on the land alone, without the colliery, then taking the land at a higher rent would of course diminish the profits, the landlord's right of distress being for a larger sum than that in the agreement: and the joining the colliery can make no difference as to this. As to the severance, the declaration alleges that the land has been let: if the colliery has been let at the same time, that is a substantive act which it lies on the defendant to assert, not on the plaintiff to negative. [TINDAL, C. J. Perhaps that course of argument might be used, if you were declaring on a covenant not to assign; but here you call on us to infer an inquiry from the fact that the land is assigned. ALDERSON, B. Suppose there were a covenant not to assign Blackacre without assigning Whiteacre: could you show a breach by simply averring an assignment of Black- [*890] acre?] That is not an analogous *case: the complaint here is that land essential to the working of the colliery has been assigned away. But, assuming that there has been no severance, the covenant enabling the plaintiff to enter and sell, becomes of no avail by the assignment to Hill, on the grounds before stated. The interest which the covenants had by the agreement (whether that were merely equitable, or whether the agreement amounted to a lease), is not that which has been assigned to Hill; and the land in Hill's hands is therefore not subject to the covenant. On this point *Land dem. Jefferys v. Bucknell*, 2 B. & Ald. 278, and *Yelverton v. Yelverton*, Cro. Eliz. 401, are conclusive. Hill is a purchaser for a valuable consideration without notice. Even

if there were a grant, instead of a mere covenant, it would not bind the land in Hill's hands.

Cur. adv. vult.

TINDAL C. J., now delivered the judgment of the Court.

This is an action of covenant, brought upon an indenture, bearing date the 2d December, 1816, containing the grant of an annuity to the plaintiff by Foster (the defendant's testator), and two other persons, Bonner and Gaunt, the annuity being made payable out of the three-fourth parts or shares of the said Foster, Bonner, and Gaunt, of and in the profits, benefits, and advantages whatsoever, and sum and sums of money, if any, which, under and by virtue of certain recited indentures of lease of the 19th September, 1807, and the 30th January, 1812, and certain recited articles of agreement of the 8th August, 1816, and the powers, provisoes, covenants, *and agreements therein respectively contained, should or might be made, accrue, or be produced, by the sale of [*891] the coal and culm to be wrought and dug out of the said mines, and veins or seams of coal or culm, as aforesaid, or otherwise, howsoever, after payment of all rates, &c. It appeared, by the recitals in the indenture upon which the action was brought, that Foster, Bonner, and Gaunt were possessed of three-fourths of the premises demised by the two indentures of lease above-mentioned, the remaining one-fourth part being in George Bowser; and that Gaunt held the agreement (to which Foster, Bonner, and Bowser were also parties), dated the 8th August, 1816, being an agreement from Lord Ashburnham for a lease of land to be granted to Gaunt for sixty years, as soon as he should have completed a shipping place on the said land, which land was stated to be essential and absolutely necessary for the working and carrying off the coal and culm to be wrought and raised out of the colliery and premises; and that Gaunt had covenanted and declared that he held the last-mentioned agreement in trust for the joint use and benefit of the said Gaunt, George Bowser, Foster, and Bonner, as tenants in common. The deed contained a several covenant, by each of them, the said Foster, Bonner, and Gaunt, for payment of the annuity out of their three-fourths of the profits which would be made under the said leases, and the said agreement of the 8th of August, 1816, and the powers therein contained; and it also contained a power, in case the annuity became in arrear for a certain period, to enter upon and hold the premises thereby charged with the annuity, and a further power to mortgage or sell the same. The deed then contained several covenants by each of them, Foster, *Bonner, and Gaunt, that they [*892] had not done or suffered anything to be done, whereby the mines and premises were or could be impeached or incumbered in title, estate, or otherwise: and also the following covenant, upon which the plaintiff declares, viz., that each of them, the said Bowser, Foster, Bonner, and Gaunt, so far as related to his own acts and deeds, and not further or otherwise, did for himself, &c., covenant, promise, and agree to and with the other and others of them, and also to and with the plaintiff, that the said Bowser, Foster, Bonner, and Gaunt had not made, done, committed, nor executed, nor should nor would, at any time or times thereafter, make, do, &c., or permit and suffer, &c., any act, deed, matter, or thing whatsoever, whereby or by reason or means whereof the said annuity thereby covenanted to be paid, was, could, should, or might cease, determine, be impeached or become void and of no effect, or whereby, or by reason or means whereof, the same indenture of lease and articles of agreement, or any of them, was or were, or should or might be, forfeited, and the terms of years thereby respectively created, cease, determine, and become null and void.

The declaration then states three breaches of the covenant, upon all which breaches the Court of King's Bench has given judgment in favor of the defendants below. As we concur in opinion with the Court below in the judgment given with respect to the first two breaches, it will be unnecessary to state those breaches with any further particularity, than to observe that the second breach contained an allegation which is referred to in the third, namely, that Foster, Bonner, and Gaunt, on the 28th February, 1820, accepted a lease from Lord

[*893] Ashburnham of the lands and premises agreed to be *demised by the articles of 8th of August, 1816, and also obtained from Lord Ashburnham a lease of certain veins and seams of coal and other minerals lying under and near to the lands and premises agreed to be demised by the articles of the 8th of August, 1816, and near to the colliery and premises originally demised to Bowser, and convenient for working the same. The third breach then alleges that, after the making of the two last-mentioned leases by Lord Ashburnham, Foster, Bonner, and Gaunt, without the knowledge or consent of the plaintiff, assigned to one Charles Hill (amongst other things) all the messuages, lands, grounds, veins of coal, and other premises granted by those two leases, and all their interest in the thereby assigned property, to hold to Hill for the residue of the several terms, by means whereof the annuity became and was impeached and of no effect.

On the part of the plaintiff it was contended, in the first place, that, as the lands comprised in the articles of agreement and the subsequent lease granted thereon by Lord Ashburnham, were in the indenture and in the declaration stated to be essential and absolutely necessary for the working and carrying off the coal and culm to be wrought and raised out of and from the said colliery, and that the same are of little or no value without such lands and premises, so, the assignment of these lands and premises to a stranger, by Foster, Bonner, and Gaunt, must necessarily prevent the working of the colliery and the making of any profits, and so impeach the annuity, by preventing the fund, out of which payment is to be made, from ever arising.

The answer given to this argument by the Court of King's Bench is stated [*894] to be, that the assignment of the *lands to Hill is alleged to be made "amongst other things," which might include the colliery itself; and that it ought to have been affirmatively shown in the breach that the colliery and the lands had become separated: whereas, for anything that appears to the contrary the whole might be in Hill's hands, and the lands might have been all along, and might at this moment be, used for the working of the colliery, and all the plaintiff's remedies may be as complete as if no assignment had been made to Hill.

But it was contended, on the part of the plaintiff, secondly, that, even supposing the assignment to Hill to include the whole premises, that is, both the colliery and the land mentioned in the articles of agreement, so that there was no severance, still it amounted to a breach of the covenant not to do any act whereby the annuity might be impeached: and it was argued that this depended on the question, whether the profits of the colliery in the hands of an assignee were chargeable with the annuity, and whether the grantee of the annuity could enter upon the assignee, so as to receive the profits, and, if necessary, to mortgage or to sell the colliery under the provisions of the indenture. Upon this question the Court of King's Bench have decided in favor of the defendant, on the ground that the power to enter and mortgage or sell was not made to depend upon the colliery continuing in the possession of Foster, Bonner, and Gaunt, but on the annuity being in arrear, in whosoever hands the colliery might be.

We are obliged to differ from the Court of King's Bench in opinion upon this point. The interest of Foster, Bonner, and Gaunt in the land mentioned [*895] in the breach was, at the time of entering into the covenant *in question, only an equitable interest, founded on the agreement with Lord Ashburnham to grant a lease to Gaunt, which lease he, Gaunt, had covenanted to hold for the joint use and benefit, of Gaunt, Bowser, Foster, and Bonner, as tenants in common. After the grant of the annuity, and the entering into the covenant, an actual lease was granted by Lord Ashburnham to Foster, Bonner, and Gaunt, thereby converting the equitable interest into a legal estate in the land for a term of years, which lease is alleged in the breach to have been assigned to Charles Hill. Under these circumstances, it appears to us that the power of entry, and of mortgage and sale, cannot be enforced against Hill, as to

the lands contained in the agreement with Lord Ashburnham, and subsequently demised by him to Foster, Bonner, and Gaunt; for the interest which Hill has taken in the lands by the assignment to him of the lease granted to Foster, Bonner, and Gaunt, subsequently to the covenant, is not the same interest which Foster, Bonner, and Gaunt had in those lands under the agreement. It is an interest newly created since the covenant. Hill is not the assignee of any estate in the lands, to which the power of entry and of mortgage and sale, contained in the indenture, can attach. So that, supposing both the colliery and lands to have been assigned to Hill, the power of entry and mortgage and sale might be enforced against him, so far as regards the colliery, but could not be so with respect to the land: and, although Foster, Bonner, and Gaunt, might be prevented by estoppel from contending that the power of entry, mortgage, and sale did not extend to the land, still such estoppel cannot be held to bind Hill, who comes to the legal estate as a purchaser by assignment, and for anything *that appears upon this record, without being privy to the covenant of Foster, Bonner, and Gaunt, by which the power was given. (See [*896] the judgment of Lord TENTERDEN in the case of *Right dem. Jeffreys v. Bucknell*, 2 B. & Ad. 278.) Upon the whole, therefore, as it appears upon the record that the land is essential and absolutely necessary to the working of the colliery, the power of entry, and of mortgage and sale, becomes nugatory if it is confined to the colliery and does not extend to the land; and such, for the reason before given, appears to be the case in consequence of the assignment to Hill. The necessary consequence of this must be to prevent the raising of the profits of the colliery, that is, in other words, to impeach the annuity. For there is no necessity to confine the meaning of the term "impeachment" to an impeaching of the title to the annuity; but anything that operates as a "hindrance, let, impediment, or obstruction" to the making of the profits, out of which the annuity is to arise, appears to us to amount to an impeachment thereof.

For these reasons, we think that the judgment of the Court below must be reversed, and that our judgment must be given for the plaintiff.

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Per Curiam, this objection comes too late, where the party was detained on a *capias* issued on October 26th, and does not move to be discharged out of custody till November 14th, although no step has been taken by either party in the mean time.

Delay in taking such an objection is not excused by the fact that the party has been in custody ever since.

Semble, per Lord DENMAN, C. J., that, if a Judge is applied to at chambers to discharge on account of irregularity in the affidavit of debt, and refuses to interfere, and an application is afterwards made to the Court for the same purpose, the motion, in point of form, should be, to discharge the Judge's order. *Fowell v. Petre*, 818.

ASSIGNMENT.

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An assignment to trustees for the benefit of all creditors who may execute the deed, is not valid, as against creditors who do not execute, if it authorize the trustees to carry on the debtor's trade, and contain such terms that the creditors subscribing would become partners in the business.

The trade in question being that of an hotel-keeper, it is no objection to such an assignment that the debtor, when it was executed, had not a license for retailing exciseable liquors; there being no evidence that the trustees contemplated selling, or in fact sold, any liquors without such license, and a license having been procured two days after the execution of the deed. *Owen v. Body*, 28.

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Defendant agreed to grant, and plaintiff to take, a lease for a specified term of premises belonging to defendant: and the parties covenanted that the conditions should be named by an arbitrator, so that all questions between the parties might be determined; and they covenanted that all questions between them should be submitted to the arbitrator; that they would perform his award; and that either party, who should neglect to perform the award in all things, should pay 500*l.* as liquidated damages.

The arbitrator awarded that defendant should, within a time named, put the premises in good and tenantable repair to the satisfaction of M., and on a later day named execute a lease to the plaintiff, containing a covenant by plaintiff to keep in repair, and that plaintiff should accept a lease on those terms, and execute a counterpart.

Plaintiff declared in covenant, reciting as above, and averring that defendant had not put the premises in good and tenantable repair to the satisfaction of M., or in any other manner, nor executed a lease on the terms, &c., or any other lease. Breach, non-payment of the 500*l.*

On general demurrer, held a bad declaration, the award being bad as to the delegation to M., and that part not separable from the rest of the award. *Tomlin v. Mayor of Fordwich*, 147.

- II. Revocation of submission: to what cases stat. 3 & 4 W. 4, c. 42, s. 39, extends.

Stat. 3 & 4 W. 4, c. 43, s. 39, which takes away the power of revoking a submission to arbitration, does not extend to a reference, agreed to on the trial of an indictment; but, where such reference has been made at nisi prius, with a proviso for making the order a rule of Court, either party may, by himself or attorney, still revoke his submission.

The Court, however, will not, upon such revocation, make a rule to restrain the arbitrator from proceeding. *Re v. Bardell*, 619.

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Defendant having been arrested, and executed a bail-bond, obtained a summons for time to put in bail above. Pending the summons, but more than eight days after the arrest, he put in bail, who were excepted to, and did not appear on the day of justification, whereupon the plaintiff, on that day, took an assignment of the bail-bond; after which, on the same day, the bail above, whose names continued on the bail-piece, rendered the defendant.

Held, that they might do so; and, the plaintiff having served a writ of summons in an action on the bail-bond, the Court set it aside.

At the time when the writs were served, there had been no affidavit made of notice of render having been given, nor had an exoneretur been entered on the bail-piece: Held, that these steps were not necessary for the purpose of exonerating bail to the sheriff, bail above having been put in, and a render made. *Roxburgh v. Cresswell*, 829.

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A tradesman, having made up goods by order, delivered them at a booking-office, with the customer's address, and booked them, to be forwarded to him, not specifying any particular conveyance, and no particular mode of transmission having been pointed out by the customer. Quære, whether the consignor could maintain an action against the office-keeper for a negligent loss of the goods while under his charge? *Gilbart v. Dale*, 543.

II. Contract made with public by stage-coach proprietors.

Plaintiff sent a parcel, directed to a person in London, to the postmaster of Bradford, to be forwarded to Melksham. The postmas-

ter received 2d. to book the parcel, and sent it by a mail-cart to the King's Arms Inn at Melksham. He was accustomed so to take in parcels for the mail-cart. The innkeeper at M. booked the parcel for London, charging 2d. as "booking" for his own trouble, and also charging on the parcel the demand for carriage from Bradford, which he had paid. He forwarded the parcel by a mail-coach, of which the defendants were proprietors, to London. Several coaches used to stop at the King's Arms; the mail pulled up there, but did not change horses. The innkeeper had no express authority from the defendants to take in parcels, and used his discretion in sending them by mail or any other coach. No regular booking-office was kept at the King's Arms. The parcel was lost.

Held, first, that, for the purpose of taking in the above parcel, the King's Arms was a receiving-house of the defendants, within stat. 11 G. 4, and 1 W. 4, c. 68. Secondly, that the plaintiff might properly sue the defendant on a contract to carry from Melksham to London.

The defendants pleaded non assumpsit, and that the parcel contained property within the description in stat. 11 G. 4, and 1 W. 4, c. 68, s. 1, above the value of 10l.; that it was not delivered at a receiving-house of the defendants, but to their servant; and that plaintiff did not, at the time of delivering the same to such servant, declare the value of the parcel, nor did he ever pay any increased rate of charge for it. Replication, *de injuriâ*. The jury found that the house was a receiving-house of the defendants, and it appeared that no notice was affixed there pursuant to sec. 2 of the statute. The defendant, in moving for a new trial, contended that, independently of the enactments in those sections, the plaintiff could not recover, not having declared the value of the parcel to their servant, and such declaration being, by sect. 1, a condition precedent to the recovery of damages for loss of any goods there mentioned, exceeding 10l. in value.

Held that, on the third plea, and the finding of the jury, this objection could not be maintained.

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- I. To what sessions application for order of filiation to be made.

The sessions made an order of filiation, subject to the opinion of this Court on a case stating that the child was born on 16th August and became chargeable on 29th September; that the sessions next after 29th September were held on 13th October, that no application was made by the overseers till the January sessions following, nor any notice served on the party charged till December, and that the sessions considered the application made in time, and that it was not necessary for the officers to show that they had made diligent inquiry as to the father before the October sessions:

Held that, on the case so stated, the order was bad under stat. 4 & 5 W. 4, c. 76, s. 72, no excuse appearing (if any could be admissible) for the application not having been made at the October sessions. *Rex v. Heath, 343.*

- II. Non-access of husband and wife, how proved. *Evidence, X.*

BILLS OF EXCHANGE AND PROMISSORY NOTES.

Relative situation of endorser and endorsee.

The endorser of a promissory note does not stand in the situation of maker relatively to his endorsee.

The endorsee of a note cannot declare against his endorser as maker, even where the latter has endorsed a note not payable or endorsed to him, and where, consequently, his endorsee cannot sue the original maker. *Gwinnett v. Herber, 436.*

BISHOP.

Power to admit to copyhold land under see, before confirmation. *Copyhold, II.*

BURGESS.

Power of Court to restore name to burgess list of corporations. *Corporation, Municipal, I.*

CAPIAS AD SATISFACIENDUM.

Colorable arrest without warrant, effect of. *Arrest, II.*

CARRIER.

Liability for loss of goods. *Bailment, I. and II.*

CERTIFICATE.

- I. Of apothecary, when proof necessary. *Evidence, XI.*
- II. Of Judge, for costs. See *Costs, I. 3.*

CERTIORARI.

- I. Proceedings previous to application for.
 1. Notice by parish under stat. 13 G. 2, c. 18, s. 5.

For obtaining a certiorari on behalf of a parish, to remove an order of sessions, a notice to the justices, signed by the attorney for the parish, stating the intention of the parish to apply for such writ, is a sufficient notice by the "party or parties suing forth the same," within stat. 13 G. 2, c. 18, s. 5.

The recognisance, under stat. 5 G. 2, c. 19, s. 2, for prosecuting such appeal, must be entered into by one or more of the inhabitants on behalf of themselves and the other parishioners, and also by sureties.

Where a certiorari had been allowed on an insufficient recognisance (it being given merely by two persons appearing on the recognisance to be inhabitants of the parish), this Court refused to quash the certiorari, but quashed the allowance, and enlarged the return to the writ, sending the writ back to the sessions, in order that it might be duly allowed, after the parties prosecuting the writ should have entered into a proper recognisance. *Rex v. Abergyle, 795.*

2. Recognisance under stat. 13 G. 2, c. 18, s. 5, who to enter into. *Anté, I.*

- II. What to be shown on application for.

A defendant, applying to remove an indictment from sessions by certiorari, on account of the probability that difficult points of law will arise, must state in his affidavit specific grounds on which legal difficulties will occur; it is not sufficient to show that the obstruction complained of by the indictment consists of buildings of great value, which have stood thirty or forty years. *Rex v. Joule, 539.*

- III. To remove justices' order for stopping highway, time allowed for. *Highway, II. 1, (1.)*

- IV. Inquisition of jury for assessing composition under local act, when removable. *Jury, III. 1.*

- V. When party entitled to have writ quashed.

A party indicted at sessions for obstructing a highway obtained a certiorari, but, without informing the prosecutor that he had done so, gave notice of trial at a subsequent session. The prosecutor attended with his witnesses, and, on the last day of the sessions, before the case was called on, the defendant lodged his certiorari. This Court, under all the circumstances, quashed the certiorari, and ordered a procedendo. *But,*

Held, that this Court had no power to give the prosecutor his costs of attending at sessions after the issuing of the certiorari. *Rex v. Higgins, 554.*

- VI. Certiorari on insufficient recognisances. *Anté, I. 1.*

- VII. Costs below after removal of writ. *Anté, V.*

CHURCH RATE.

See *Rate*, I. 1; *Mandamus*, I. 2.

CHURCHWARDENS.

- I. Election of.
 1. Poll demandable as of right. *Parish* I. 1.
 2. At parish of Paddington. *Parish*, I. 1.
 3. At parish of St. Martin, Westminster. *Statute*, III.
- II. Service of notice upon, under stat. 41 G. 3. c. 109.
 1. Where parish divided into districts. *Statute*, XIII.
 2. Where year of office has expired. *Statute* XIII.
- III. Power to borrow money on credit of rates. *Rate*, I. 1.
- IV. Mandamus to.
 1. To levy rate to pay interest of money borrowed, *Mandamus*, I. 2.
 2. To elect parish officer. *Mandamus*, I. 5.

COMMON.

Right of pasture appurtenant to a messuage, how proved. *Evidence*, XIV.

COMPENSATION.

- I. Under London Dock Company's Act. *Statute*, XL.
- II. Under local turnpike act. *Jury*, III. 2.
- III. Under Thames and Isis Navigation Act. *Statute*, XLI.

CONCESSIT SOLVERE.

What sufficient consideration to support action. *Inferior Court*.

CONSIDERATION.

What must be shown on action of concessit solvere in inferior court. *Inferior Court*.

CONSISTORY COURT.

When prohibition granted. *Prohibition*.

CONSOLIDATION OF INSURANCE CAUSES.

When Court will compel payment of money into Court pending rule for new trial. *Payment into Court*, I.

CONTRACT.

Parol waiver of written contract within Statute of Frauds, how far good. *Frauds, Statute of*, I.

CONVICTION.

- I. Power of justices to imprison.

Under stat. 17 G. 3, c. 56, ss. 1, 2, 20, 22, two justices may convict and sentence to imprisonment and hard labor; and the party convicted may appeal to sessions, giving notice to the justices at the time of conviction, and at the same time entering into recognisance, with sufficient sureties, to try the appeal and abide the judgment of sessions; but, if he do not at such time enter

into such recognisance, the convicting justices are to commit him till the sessions, unless such recognisance be sooner entered into, and are to transmit the conviction to the sessions; and the sessions, on proof of notice of appeal, and on receiving the conviction, are to hear the appeal; and, if the conviction be affirmed, the party is to suffer the punishment originally adjudged, the time of imprisonment, if inflicted, being computed from the time of affirmance, unless the party has been imprisoned under the original conviction, in which case the time for which he has been so confined is to be included in the order of confirmation.

A party convicted by two justices, and sentenced to eleven weeks' imprisonment and hard labor, gave notice of appeal, and was committed for not entering into recognisance. By the practice of sessions, the appeal is to be entered, and the order for hearing it obtained, by the party disputing the conviction. The party not having entered the appeal, the sessions discharged him.

Semble, that the convicting magistrates had no longer power to commit in execution of the conviction.

But held that, at any rate, no mandamus should be granted to compel them to do so. *Rez v. Twyford*, 430.

- II. Proceedings on appeal against. *Ante*, I.

COPARCENERS.

Remedy by one of two coparceners for breach of covenant by tenant. *Landlord and Tenant*, III.

COPYHOLD.

- I. Who to be admitted on disputed title.

Where two adverse parties claim title, as devisees, to the same copyhold tenement, the steward may admit both, and, proper grounds being shown, this Court will require him by mandamus so to do. *Rez v. Lord of Manor of Hexham*, 559.
- II. How far admittance affected by imperfect title of lord.

Copyhold property, in a manor belonging to the see of Ely, was surrendered to B., who was admitted on this surrender, at a court purporting to be a court of J. Bishop of Ely, lord of the manor. At the time of the admission, no grant of the temporalities had been made to J. since the death of the preceding bishop; nor had J. been confirmed. Held, that the admission was nevertheless good, the lord's title being immaterial, since the admission was not a voluntary act. but in pursuance of a surrender. *Doe dem. Burgess v. Thompson*, 532. (See remainder of placitum, *Ejectment*, II. 2.)
- III. Custom as to person to take surrender.

A surrender of copyhold lands in the manor of F. was proved to have been taken by S., who stated that he held the office of clerk of the castle of F. which was in the manor, by patent from the lord; that there was a custom for him to take surrenders; that the steward also took them, and that he, S., had a concurrent jurisdiction with the steward. The patent contained no authority to that effect. Held, evidence for a jury that S. was entitled by custom to take the surrender. *Doe dem. Stilwell v. Mellersh*, 540

- IV. Devise of, without admittance and surrender. *Devise*, II.
 V. To what devises stat. 55 G. 3, s. 192, extends. *Devise*, II.

CORN RENT.

Liability to poor rate. *Poor*, I, 1. (2.)

CORPORATION, MUNICIPAL.

- I. Power of Court of K. B. to restore name to burgess list.

On the revision of a burgess list, under stat. 5 & 6 W. 4, c. 76, s. 18, the mayor expunged a name. In the succeeding mayoralty, before fresh accessors were elected, application was made for a mandamus to restore the name, on a suggestion that the objection was invalid.

Held (before stat. 7 W. 4, and 1 V. c. 78), that this Court had no power to grant such a mandamus. *In re The Mayor of Hythe*, 832.

- II. Custom of city of London as to election of alderman, whether good. *Custom*, III.

- III. Bankrupt, how far disqualified from holding office of councillor.

An uncertificated bankrupt is not disqualified from being elected a councillor for a borough, and holding the office, under stat. 5 & 6 W. 4, c. 76, unless he became bankrupt while holding. *Re v. Chitty*, 609.

- IV. Funds of, for charitable purposes. *Statute*, XXXV. 3.

- V. Quo warranto to member of corporation on grounds affecting whole corporate body. *Quo Warranto*, 2.

- VI. Municipal Corporation Acts. *Statute*, XXXV. and XXXVI.

See further, *Town Clerk*.

COSTS.

- I. Of action.

1. Of different issues.

(1. To a declaration in two counts, defendant pleaded two pleas to the first count, and one to the second. Issues were joined on one plea to the first count, and on the plea to the second count; the other plea to the first count was demurred to. The plaintiff took the issues of fact to trial, and a verdict was found for the plaintiff on the issue on the first count, and damages assessed; and for the defendant on the issue on the second count. Afterwards on the demurrer to the other plea to the first count the defendant had judgment.

Held, that the plaintiff was entitled to all the costs of the trial on the issue on which he had succeeded, including (in addition to the pleadings, briefs, witnesses, &c.)

And that no objection arose from his having tried the issues of fact before that in law, especially as a judge at chambers had refused an application by the defendant to order the trial of the issue of fact to be postponed till judgment was given on the demurrer. *Bird v. Burgess*, 83.

(2. Where two defendants in trespass sever in pleading, but plead the same pleas, all going to the whole action, and one succeeds upon all the issues, the other upon one only, each defendant is entitled to his separate costs of the issues on which he has succeeded,

and an aliquot part of the joint costs, unless the Master is satisfied that, by reason of special circumstances, less ought to be allowed to either.

The defendants in such a case having appeared by separate attorneys and counsel, but the attorneys being members of the same firm, and the briefs and evidence substantially the same, the Master taxed the costs as if the parties had appeared by the same attorney. Admitted, that the taxation, in that respect, could not be disturbed.

A landlord sued in trespass for an irregular distress, and obtaining judgment against the plaintiff, may recover double costs under stat. 11 G. 2, c. 19, s. 21, though he has pleaded specially. *Gambrell v. Earl of Falmouth*, 403.

2. After special finding endorsed on record under stat. 3 & 4 W. 4, c. 42, s. 24. *Statute*, XXXI. 2, (1.)

3. Under stat. 43 Eliz. c. 6; what constitutes an interest in land.

A right to take water from a well by reason of the occupation of a dwelling-house, and for the more convenient occupation thereof, is an interest in land. Therefore, where nominal damages had been recovered in an action for disturbing such a right (on an issue traversing that the plaintiff was entitled to the use of the well in manner, &c.) and the Judge at Nisi Prius certified that the damages were under 40s., it was held that the plaintiff was entitled to his full costs under stat. 43 Eliz. c. 6, s. 2. *Tyler v. Bennet*, 377.

4. When on new trial defendant suffers judgment by default. *Evidence*, III. and IX. 2.

5. Defendant's costs under st. 43 G. 3, c. 16, s. 3.

Plaintiff held defendant to bail for a debt sworn to be 20l. 2s. 1d. The demand consisted of many items, none exceeding 12s. in amount. Defendant pleaded, 1. Part payment. 2. Infancy; and no other plea. Defendant traversed the payment, and rejoined, to the second plea, that the goods were necessities. On the trial, defendant failed as to the plea of payment, and, the Judge leaving it to the jury whether the goods supplied were necessities, the plaintiff had a verdict for 10l., being the whole of his claim for those articles of which he had proved the delivery:

Held, that defendant was entitled to costs under stat. 43 G. 3, c. 46, s. 3, though plaintiff, upon the motion, put in affidavits to show that goods had been supplied to the whole amount claimed (which defendant, in general terms denied), and though the affidavits stated that plaintiff's failure to prove his whole demand at the trial was owing to a part of the goods having been delivered by himself. *Balantyne v. Taylor*, 792.

6. Double costs under stat. 11 G. 2, c. 19, s. 21. *Ante*, I. 1, (2.)

- II. Of motion to enter judgment after special finding by jury. *Statute*, XXXI. 2, (1.)

- III. Of rule for new trial. *Evidence*, IX. 2.

- IV. Of mandamus under stat. 1 W. 4, c. 21, s. 6. *Statute*, XLI.

- V. In Court below after removal of proceedings by certiorari. *Certiorari*, V.

VI. Of meeting of commissioners of bankrupt, held at the instance of the bankrupt. *Bankrupt*, I.

COVENANT.

- I. How far Court will put a construction on technical words used in a covenant. *Evidence*, V.
- II. What amounts to waiver of forfeiture for breach of covenant. *Landlord and Tenant*, III.
- III. How far one of two co-parceners can take advantage of breach of covenant by tenant. *Landlord and Tenant*, III.
- IV. When breach of covenant sufficiently shown on pleadings. *Pleading*, VIII.
- V. Breach of covenant in preventing tenant from taking possession, how to be averred in pleading. *Landlord and Tenant*, V.

COURT.

- I. Consistory. See *Consistory Court*.
- II. Ecclesiastical. See *Ecclesiastical Court*.

CREDITORS.

Assignment for benefit of, what good as against creditors who do not execute. *Assignment*, I.

CRIMINAL INFORMATION.

See *Information, Criminal*.

CROWN.

How far mandamus lies against officer of crown. *Mandamus* II. 4.

CUSTOM.

- I. In a manor to surrender lands in trust. *Error*, writ of, I.
- II. As to taking surrender in a manor, how shown. *Copyhold*, III.
- III. Of city of London, as to election of alderman.

A custom of the city of London for the Court of Mayor and Aldermen to examine and determine whether or not a person elected alderman of a ward, and returned to the said court as such alderman, be, according to their discretion and sound consciences, a fit and proper person and duly qualified, is a valid custom.

So a custom, that, when the inhabitants of any ward shall three times return to the said court the same person to be alderman, who shall be by the said court, according to the former custom, adjudged on such three returns, according to the discretion and sound consciences of the mayor and aldermen, not a fit person to support the dignity and discharge the duties of the office, the mayor and aldermen may, for remedy thereof, nominate, elect, and admit a fit person, being a freeman, out of the whole body of the citizens, to be alderman of such ward.

The latter custom is not abrogated by stat. 11 G. 1, c. 18, s. 7.

Nor by the by-law of the city, 13 Ann., "for reviving the ancient manner of electing aldermen," which (after reciting that, by the ancient custom of the city, when any ward became vacant of an alderman, the in-

habitants of that ward, having right to vote, were wont to choose one person only, being a citizen and freeman, to be alderman of the ward) enacts that, for reviving that custom, and restoring to the inhabitants their ancient right of choosing one person only to be their alderman, there shall from thenceforth, in all elections of aldermen of the city, at a ward-mote to be holden for that purpose, be elected, according to the said ancient custom, only one able and sufficient citizen and freeman, to be returned to the Court of Mayor and Aldermen, which person so elected shall be by them admitted and sworn.

On quo warranto for exercising the office of alderman of London, the defendant pleaded the two first-mentioned customs, and that, M. S., being three times returned by the ward, and adjudged unfit by the mayor and aldermen, they elected the defendant. The relator took issue upon the existence of the customs and replied that M. S. was a fit, &c., upon which issue was joined. The jury having found the customs, the Judge, without consent of parties, discharged the jury from giving a verdict on the issue as to the fitness, &c., of S.

Held, that he might properly do so. *Rex v. Johnson*, 488.

- IV. Local custom as to interpretation of technical words in a covenant, how far binding on covenanting parties. *Evidence*, V.

CUSTOMS.

Mandamus to commissioners of, to deliver up goods. *Mandamus*, II. 4.

DAYS.

Half holidays at sheriff's office, how counted. *Scire Facias*, I. 1.

DEMAND.

What amounts to demand and refusal. *Mandamus*, I. 5.

DESCENT.

Effect of partition by parceners upon the descent. *Parcener*, I.

DETENTION.

Unlawful detention, when it satisfies averment of unlawful taking. *Replevin*, I.

DEVISE.

- I. What words create an estate for life.

1. Testator devised lands to trustees to raise an annuity for his widow, and subject thereto to the use of testator's son William, for life; remainder to trustees to preserve, &c.; remainders to the use of William's first, second, and every other son successively in tail male; and, on failure of such issue, then (subject to a further annuity for the widow) to the use of his grandson J. G., the son of his late daughter Sophia G., for life; remainder to the use of trustees to preserve, &c.; remainders to the use of the first, second, and every other son of J. G. successively in tail male; and, on failure of such issue, to the use of trustees in trust for the first, second, and every other son of the testator's daughter Anna Maria successively in

remainder (as in the two preceding devises) in tail male; and, on failure of such issue, in trust for testator's right heirs. Powers were given to William, and to J. G., when in possession, to charge the estates with portions for younger children. There were further bequests to the testator's widow, and his said daughter A. M.

By a codicil, reciting that, since the date of the will, testator's son William had died without issue, the testator altered his will as to certain lands not now in question, and charged the lands devised as above with further annuities to his wife and to A. M. By a second and third codicil he made his wife his executrix and residuary legatee and gave a further legacy to A. M.

By a fourth codicil (made sixteen months after the date of the will) the testator recited that he thereby revoked "several of the dispositions" by him theretofore made, and instead thereof he devised all his estates to his daughter A. M.; and, from and after the determination of that estate, he devised the same to J. G. "and his heirs in strict entail, as in my said will directed," with the additional clause, that if J. G. should not be thirty-one years old when the estates should devolve on him by the death of A. M., he should not take possession till he attained that age, but the rents should accumulate and be in the hands of trustees for the benefit of J. G. "and his heirs;" "and in failure of issue of the said J. G." the testator ordered that his estates should go over as was by the will directed. At the date of the codicil J. G. was eleven years old.

Held that, under the will and fourth codicil, J. G. took a life estate only. *Graves v. Hicks*, 28.

2. Testator by his will directed that his debts, &c., should be paid out of the rents and profits arising from his estate; after which he gave and bequeathed to C. V. the rents and profits of his estate, subject to C. V. keeping the whole of the premises in repair during his life: "Only after his death, I give and bequeath unto my three nieces" "a. that freehold or leasehold premises now rented," &c., "situated," &c., "to and for their own use and purposes, equal share and share alike." He then gave and bequeathed some other freehold and leasehold premises, and some plate, &c.; and he left the rest and remainder of his property, be it what it might, to C. V.

Held, that a niece took only a life estate under the will. *Dee dem. Finery, Erc.* 317.
II. Devise of copyhold without admittance and surrender.

Devise, by an heir-at-law, of copyhold descended to him, is good, though he never was admitted or surrendered, or paid the fine due to the lord on the descent of such copyhold.

Stat. 35 G. 3, c. 192, making devises of copyholds valid without surrender to the uses of the will, extended to wills made under the above circumstances. *Dee dem. Perry v. Wason*, 321.

DISCHARGE OUT OF CUSTODY.

Appeals for, on bad affidavit of bail, when to be made. *Arrest*, III.

DISTRESS.

Warrant of, what it must state. *Justices*, II. 1.

EASEMENT.

I. Distinction between easement and profit à prendre.

The privilege of washing and watering cattle at a pond, and of taking and using the water for culinary and other domestic purposes, is not a profit à prendre, but a mere easement.

Such a right may be claimed by reason of the occupation of an ancient messuage, without any limitation as to the quantity of water to be taken.

Semble, that, supposing such a right to be a profit à prendre, a declaration stating the plaintiff to be entitled to it, by reason of his occupation of an ancient messuage with the appurtenances, "for the more convenient use and enjoyment of his said messuage and premises," would not be bad on general demurrer, for want of expressly limiting the claim to water taken by cattle levant and couchant, or to be used on the premises. *Manning v. Waddale*, 758.

II. How right of, to be set out on pleadings. *Anté*, I.

ECCLESIASTICAL COURT.

Prohibition to. See *Prohibition*.

EJECTMENT.

I. Right of entry within twenty years.

E., being in occupation of land, signed an instrument, whereby he recited that he was tenant of the land; that L. claimed the fee, and had entered in the name of taking possession; that E. did thereby attorn to L., and become tenant to him from the preceding Michaelmas for such part as was in his occupation, at the rent under which E. now occupied, and that he had that day paid L. a shilling in part of his rent: Held, that this was an attornment, but not an agreement requiring a stamp, though no title was shown aliunde in L.

Held also, that it was evidence of L.'s ownership, at the time of the attornment against future occupiers, though such occupiers did not claim through E.

The land was copyhold. After the attornment, L. was not admitted, nor did he receive rent, or occupy, or in any way interfere with the land, the fee in which was several times sold, with proper formalities in the copyhold court, within the twenty years following. Held that L. (before stat. 3 & 4 W. 4, c. 27) was absolutely barred from bringing ejectment at the end of twenty years, though E. continued in occupation till within twenty years of the ejectment being brought. *Dee dem. Linsey v. Edwards*, 95.

II. Adverse possession within stat. 3 & 4 W. 4, c. 27, s. 15.

1. D. mortgaged land in fee to J., subject to a proviso of ceasing upon payment of the money secured upon a day more than twenty years before the passing of stat. 3 & 4 W. 4, c. 27. Within twenty years before the passing of the statute, D. acknowledged that the

mortgage-money was unpaid. On ejectment brought by the heir of J. within five years after the passing of the statute, the jury found that the mortgage-money was unpaid. *Held*, that the ejectment was not barred by sect. 2, D.'s possession not being adverse at the time of passing the statute, and therefore the lessor of the plaintiff having, by sect. 15, five years from that time to bring the action, though no proof was given that he had ever been in possession, or received rent or interest. *Doe dem. Jones v. Williams*, 291.

2. W. being owner in fee of certain lands, I. occupied them for twenty years, and until his own death, which was before W.'s death. After I.'s death, his widow, and afterwards the defendant, who was eldest son of I., held on, till and after the death of W., and until ejectment was brought by W.'s devisee, within five years of the passing of stat. 3 & 4 W. 4, c. 27. The jury found that the possession was not adverse to W.: *Held*, that the lessor of the plaintiff was not barred by sects. 2 and 7, but had five years from the passing of the statute, under sect. 15; and that the defendant could not resist the action on the ground that, having had no notice, he still continued tenant at will. *Doe dem. Burgess v. Thompson*, 533. (See remainder of placitum, *Copyhold*, II.)

ELECTION.

Poll at election of parish officers, when demandable of right. *Parish*, I. 1.

ENTRY.

What constitutes entry and expulsion. *Landlord and Tenant*, V.

ERROR, WRIT OF.

I. When it lies.

On a feigned issue directed by the Court of King's Bench to try the existence of certain customs, the plaintiff had a verdict, subject to the opinion of the Court on a special case, the question being, whether the customs, as stated in the declaration, had been sufficiently proved at the trial. The Court having given judgment for the plaintiff, error was brought in the Exchequer Chamber, on the ground that the customs, as stated in the declaration, were not legal customs. The Court of Exchequer Chamber quashed the writ, on the ground that error did not lie on a feigned issue.

Quare, by the Court of K. B., whether the Exchequer Chamber had power to quash a writ of error returnable in the latter Court:

Held, in K. B., that, on sci. fa. to revive a judgment against an executor, it is not a good plea that a writ of error is depending on the judgment.

Agreed, in K. B., that there may be an immemorial custom in a manor to surrender lands in trust. *Snook v. Mattock*, 239.

II. Whether it may be pleaded to scire facias to revive a judgment. *Antd*, I.

III. Power of Court of Error to quash writ. *Antd*, I.

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ESTATE.

- I. For life; what words create, *Devise*, I.
- II. Settlement by. *Poor*, IV.

ESTOPPEL.

When party not allowed to deny execution of deed not produced. *Evidence*, VI. 2.

EVICITION.

What constitutes an entry and expulsion. *Landlord and Tenant*, V.

EVIDENCE.

I. Admissions.

Payment into Court, what it admits. *Pleading*, IV. 6, (1).

II. Attestation.

When proof by attesting witness dispensed with. *Post*, VI. 2.

III. Declarations.

Declarations subsequently made to explain intention of previous transaction.

In assumpsit by the assignee of an insolvent debtor, for money due to the insolvent debtor before his petitioning, defendant pleaded that the insolvent, before he petitioned, and more than three months before the commencement of his imprisonment, assigned his debts and effects to W., in trust for creditors, and made W. his attorney; that W. demanded the debt of defendant; that defendant paid him; and that the insolvent did not execute the indenture with intent to petition. Replication, that the indenture was executed by the insolvent, being then in insolvent circumstances, voluntarily, and within three months before the commencement of his imprisonment, and with intent to petition. Rejoinder, traversing the intention only.

Held, that the plaintiff could not give in evidence, in support of this issue, the contents of the schedule delivered by the insolvent to the Insolvent Debtors' Court, more than four months after the execution of the indenture.

The verdict having been for plaintiff, and a new trial having been granted on account of the admission of such evidence, plaintiff gave fresh notice of trial, whereupon defendant withdrew his pleas, and suffered judgment by default; and a writ of inquiry was executed: *Held*, that plaintiff was not entitled to his costs of the first trial. *Peacock v. Harris*, 449.

IV. Estoppel.

When party not allowed to deny execution of deed not produced. *Post*, VI. 2.

V. Parol evidence to explain written documents.

Meaning of technical words in a covenant.

Lessees of a coal mine covenanted with the lessors that they would, by a certain time, get all the demised coal in the township of B. "not deeper than or below the level of" the bottom of the A. mine under a certain point at the surface. In an action for breach of the covenant, a question arose whether "level" was used in the ordinary sense, of a horizontal plane, or in a peculiar sense, having reference to the drainage: *Held*, that evidence was admissible to show the understanding of the

term "level," used as in the above lease, among coal-miners.

It was referred to an arbitrator to receive evidence as to the meaning of the covenant, according to the custom and understanding of miners, and to state a case for the opinion of the Court. He found that the mine was situated within an extensive coal-mining district in the county of Lancaster; and that, "according to the custom and understanding of miners throughout that district," the terms "level," "deeper than," and "below," signified, &c.; stating the construction of the terms, which was in favor of the defendant. It did not appear as to some of the parties to the lease, that they resided within the district, and they were named, in the lease, as of other places.

Held, that the existence of the custom stated, in the district wherein the mine lay, did not raise a conclusion of law that the covenanting parties used the terms according to such custom, but was only evidence from which a jury might draw that conclusion; and that the Court could not give judgment for the defendant.

Seemle, that they might have done so, if the arbitrator had found the custom of miners without limitation as to a district. *Clayton v. Gregson*, 302.

VI. Secondary evidence of written documents.

1. What will let in. *Post*, 2.

2. What admitted.

(1). In an ejectment tried at Liverpool, notice to produce a deed of feoffment was given to the defendant on the commission day of the assizes, and the trial took place fourteen days after. The Judge at Nisi Prius having held this to be sufficient notice to let in secondary evidence, the Court refused to disturb the ruling.

(2). *Held*, that an abstract, which had been compared with the deed of feoffment, was good secondary evidence of the contents, no proof being given on either side of the existence of any copy of the deed. *Quare*, whether, if the existence of such a copy had been proved, the abstract would have been evidence?

(3). It appeared, by the abstract, that the deed of feoffment purported to be executed by the parties: and it was proved that one H. had, after the date of the feoffment, been in possession of the premises, and of the deed; that he had conveyed (in what way it did not appear) to defendant, and, at the time of the conveyance, had handed over the feoffment to the defendant, and that the feoffment was comprehended in the abstract of title then made, which was the abstract produced at the trial. The witness, who proved as above, stated also that there were attesting witnesses to the feoffment, and that a memorandum of livery of seisin was endorsed upon it, and witnessed. *Held*, that, as against the defendant, there was proof of the due execution of the deed, and that it was unnecessary to call an attesting witness, or prove livery of seisin.

(4). In ejectment on the several demises of A. and B., proof having been offered in support of both A.'s and B.'s title, defendant tendered evidence after the close of plaintiff's case, which was admissible only as against B.'s title: *Held*, that the plaintiff

might, at that stage, abandon the demise of B., and that on his doing so, the evidence was inadmissible as against A.'s title. *Doe dem. Rowlandson v. Wainwright*, 520.

VII. Writing to refresh memory.

Agreement invalid under Statute of Frauds. *Landlord and Tenant*, VI.

VIII. Handwriting.

Proof by comparison with other writing, how far allowed. *Handwriting*.

IX. Presumptions.

1. Of notice previous to binding parish apprentices, on appeal against order of removal. *Poor*, II. 1.

2. What may be presumed at variance with an immemorial custom.

In case, by the lord of a manor, for disturbance of a market, if the lord prove a market immemorially holden in certain places within the manor, it is not a necessary legal inference (no grant being produced) that the market was granted to be holden in those places only; but a jury may presume, from circumstances, that the market was granted to be holden in any convenient place within the manor.

Plaintiff obtained a verdict, and a new trial was granted on account of the admission of improper evidence. Plaintiff drew up the rule for the new trial, and served it on defendant, who informed plaintiff that he would not avail himself of the rule.

The Court ordered that the postea should be delivered to plaintiff, and that he should have his costs of the trial.

But the Court allowed neither party the costs of the rule for a new trial, or of the rule for giving the postea and costs to the plaintiff. *De Ruitzen v. Lloyd*, 456.

3. Division of parish by commissioners of inclosure, how far questionable on trial of appeal against poor-rate. *Statute*, XIII.

X. Husband and wife.

Proof of non-access.

Neither husband nor wife can be examined for the purpose of proving non-access during marriage.

Nor can either be examined as to any collateral fact, for the purpose of proving non-access. As, that the husband, at a particular time, lived at a distance from his wife, and cohabited with another woman. *Ree v. Sourton*, 180.

XI. Certificate of apothecary, when necessary to be proved.

In an action brought since the rules of Hil. 4 W. 4, for medicines furnished, and work done, by plaintiff, as an apothecary, the plaintiff is liable to be nonsuited under stat. 55 G. 3, c. 194, s. 21, if he fail to prove his certificate, or that he was in practice before August 5th, 1815, although the defendant has pleaded only non-assumpsit.

Or although the defendant has pleaded (in debt), as to part, that he never was indebted, and, as to the residue, a tender. *Shearwood v. Hay*, 383.

XII. Custom as to taking surrenders in a manor, how shown. *Copyhold*, III.

XIII. What proof of negligence will make bailee liable. *Bailment*, I.

XIV. Evidence of right of pasture appurtenant to a messuage.

In replevin for sheep, the defendants made cognizance, as bailiffs of the tenant of a mea-

suage and lands called B., that the said tenant, and all those whose estate, &c., occupiers of B., had the sole and exclusive right of pasture and feeding of sheep on L. the locus in quo, as to the said messuage, &c., appertaining; and that the plaintiff's sheep were damage-tenant. By another cognizance they alleged a right of common over L. as appurtenant to B. The plea in part denied the above rights, and alleged that the plaintiff had right of common over L., appurtenant to his messuage, &c., called T. Issues were joined as to the several rights.

At the trial it appeared that L. was a mountain sheepwalk, upon which no act of ownership had been exercised but the feeding of sheep. The defendants abandoned their alleged right of common; and upon the issue as to the exclusive pasturage, the jury (having had their attention called to the difference between a mere privilege and the right of soil) found a verdict for the defendants, and "that L. was part of the farm of B.;" finding also, as to the remaining issue, that the plaintiff had no right of common in respect of T.

On motion to enter a verdict for the plaintiff, or for a new trial, or judgment for the plaintiff, non obstante veredicto on the issue as to the exclusive right of pasture, the Court held that, upon the evidence and finding, the cognizance could not be sustained; and they granted a new trial. *Jones v. Richard*, 413.

XV. How far Court will compel a party to furnish evidence against himself.

The Court will not order a town clerk, against whom a criminal information has been filed for misconduct in his office, relating to an election of councillors of the borough, to produce the election papers which are in his official custody, in order that they may be impounded, to be forthcoming at the trial as evidence against him; though it is suggested that the six months, during which the clerk is required to keep the papers (by stat. 5 & 6 G. 4, c. 76, s. 35), will expire before the trial. *Re v. Nicholls*, 376.

XVI. Evidence how applicable to the record.

1. How far party by abandoning an issue may shut out evidence admissible only as to that issue. *Ante*, VI. 2.

2. What satisfies allegation on pleadings of an entry and expulsion. *Landlord and Tenant*, V.

3. In particular actions.

(1.) Assumpsit.
Action by apothecary, when proof of certificate necessary. *Ante*, XI.

(2.) Concessit solvere.
What consideration must be shown. *Inferior Court*.

(3.) Debt.
What may be given in evidence on payment into Court and plea of non-indebitatus as to any further sum. *Pleading*, IV. 6, (1).

EXECUTION.

Discharge of prisoner on petition of wife.

A person having been in prison twelve months in execution on a judgment for a debt not exceeding 20l. exclusive of costs, was disordered in mind, and unable to transact business. His wife gave notice to the plaintiff that she should apply to the Court

for his discharge under stat. 48 G. 3, c. 123: and she applied accordingly.

Notices had been given by the plaintiff for the purpose of bringing up the defendant under the compulsory clause, 32 G. 2, c. 28, s. 16; but no account had been obtained from him.

Held, that the Court might act upon the wife's application, and discharge the prisoner. *Clay v. Bowler*, 400.

EXONERETUR.

Neglect to enter exoneretur on bail-piece, its effect. *Bail*, III.

EXPULSION.

What constitutes entry and expulsion. *Landlord and Tenant*, V.

FILIATION.

Application for order, to what sessions to be made. *Bastardy*, I.

FORFEITURE.

For breach of covenant; what amounts to a waiver. *Landlord and Tenant*, II.

FRAUDS, STATUTE OF.

I. How far written agreement may be waived by parol.

1. In assumpsit, the first count recited an agreement that plaintiff should grant, and defendant take, a lease of lands; and that all straw, &c., which should be on the lands when possession was given up to the defendant, should be valued to plaintiff by persons named respectively by plaintiff and defendant, and the amount paid to plaintiff by defendant: that, on the execution of the lease, defendant should accept it, and execute a counterpart; and that either party, making default in performance, should forfeit 300l.: mutual promises to perform the agreement: that defendant entered under the agreement, and took possession of the straw, &c.; that afterwards defendant proposed that the straw, &c., should be valued to plaintiff by D., on the respective behalves of plaintiff and defendant; that plaintiff assented: that the straw, &c., was valued to plaintiff by D.; that plaintiff was ready to grant the lease according to the agreement, but defendant did not pay the amount of the valuation. Second count for goods bargained and sold, and taken by the defendant under such bargain and sale.

Plea to the first count, that the first agreement was in writing, signed by plaintiff and defendant; and the proposal and assent that D. should value, only verbal. To the second count, that the goods consisted of straw, &c., which were bargained and sold under a written agreement between plaintiff and defendant, according to which they were to be valued by persons chosen respectively by plaintiff and defendant; and that no such valuation had been made, but only a valuation by D.: that defendant was ready, and had proposed, that they should be valued as in the agreement; but plaintiff refused.

Replication, 1, to the plea to the first count, that by the proposal and assent, and the valuation accordingly made, plaintiff and defen-

dant respectively waived performance of so much of the agreement as related to the valuation and substituted the valuation by D. : 2, to the plea to the second count, that the straw, &c., was bargained and sold under the agreement in the first count mentioned; that afterwards defendant proposed, &c. (as in first count), and plaintiff assented, and D. valued accordingly; by means of which plaintiff and defendant waived, &c. (as in the replication to the plea to the first count).

Rejoinder, to replication 1, that the waiver and substitution were by word of mouth only. To replication 2, that the proposal and assent were by word of mouth only.

On general demurrer to the rejoinder; *Held*, that the original was an entire agreement relating to an interest in lands, and necessarily in writing; that, even if the parties could waive the whole verbally, they appeared by the record not to have done so; and that a part of it could not be verbally waived, even supposing that part to have been, if standing by itself, an agreement not required to be in writing.

2. The plea commenced by a general allegation that plaintiff ought not to have or maintain his aforesaid action thereof against defendant; then followed matter expressly confined to "the first count," with a verification and prayer of judgment whether the plaintiff ought to have or maintain "his aforesaid action thereof." The record then went on thus: "And as to the second count," &c., with matter expressly confined to "the second count," and verification and prayer of judgment, as before:

Held, that the first part was a plea pleaded to the first count only, though informally, and was good on demurrer to the rejoinder. *Harvey v. Graham*, 61.

- II. What tenancy created by entry of tenant after agreement void by Statute of Frauds. *Landlord and Tenant*, VI.

GENERAL ISSUE.

What amounts to, in assumpsit. *Pleading*, IV. 5, (1.)

GUARDIAN.

See *Infant*.

HABEAS CORPUS.

- I. How far Court will interfere by habeas corpus during proceedings in Court of Chancery. *Infant*, I.
- II. When Court will direct meeting of commissioners to discharge bankrupt from custody. *Bankrupt*, I.

HANDWRITING.

Proof of, by comparison with other writings.

1. On a question as to the genuineness of handwriting, a jury may compare the document with authentic writings of the party to whom it is ascribed, if such writings are in evidence for other purposes of the cause; but not else. *Doe dem. Perry v. Newton*, 514.

2. Defendant in ejectment produced a will, and, on one day of the trial (which lasted several days), called an attesting witness, who swore that the attestation was his. On

his cross-examination, two signatures to deposition respecting the same will in an ecclesiastical court, and several other signatures, were shown to him (none of these being in evidence for any other purpose of the cause), and he stated that he believed them to be his. On the following day, the plaintiff tendered a witness to prove the attestation not to be genuine. The witness was an inspector at the Bank of England, and had no knowledge of the handwriting of the supposed attesting witness, except from having, previously to the trial and again between the two days, examined the signatures admitted by the attesting witness, which admission he had heard made in Court.

Per Lord DENMAN, C. J., and WILLIAMS, J. Such evidence was receivable.

Per PATTESON and COLKIDGE, Js. It was not. *Doe dem. Mudd v. Suckermore*, 703.

HIGHWAY.

- I. Indictment for non-repair. Requisites of plea by parishioners showing liability in smaller district.

Indictment, alleging that a public highway within a parish is out of repair, and that the parish ought to repair it. Plea, that the highway lies in a township within the parish; that the inhabitants of the township have been accustomed, and ought, to repair all public highways within it which otherwise would be repairable by the parish at large; that the parishioners never have repaired the said highway; and that, by reason of the premises, the township ought to repair, and the parish ought not to be charged. Replication, traversing the custom for the township to repair all public highways within it which would otherwise, &c. Verdict for defendants.

Judgment arrested, because the plea did not aver that the highway was one which, but for the custom, would be repairable by the parish at large, and so did not show what party other than the defendants was liable to repair.

Judgment for the crown non obstante verdicto, refused. *Rex v. Eastington*, 765.

- II. Order for stopping and diverting.

1. What it may state.

(1.) Under the Highway Act, 13 G. 3, c. 78, s. 19, the justices in special sessions could not, by one and the same order, direct that a highway should be diverted, and that the old way should be stopped. Nor was any alteration made in this respect by stat. 55 G. 3, c. 68. (See stat. 5 & 6 W. 4, c. 50, s. 1, and sects. 82 to 91.)

Under stat. 13 G. 2, c. 18, s. 5, a certiorari to remove an order for stopping a highway may be applied for within six calendar months after such order has been confirmed at sessions, though more than six calendar months have elapsed since the order was made. *Rex v. Justices of Middlesex*, 626.

(2.) An order of justices for stopping an unnecessary highway, under stat. 55 G. 3, c. 68, s. 2, is bad if it stop up half the breadth of a highway, leaving the rest open; although the other half be not within their division.

Quere, whether the justices of the two

divisions could, by orders made concurrently, stop both sides.

Justices cannot stop several highways by one order, except so far as they are authorized by stat. 5 & 6 W. 4, c. 50, s. 86.

Semble (by Lord DENMAN, C. J., and COLERIDGE, J.) that, if an order has been properly made and enrolled for stopping a highway, it is not necessary, to make such order completely effectual, that an actual stoppage should have taken place.

Held, by Lord DENMAN, C. J., and WILLIAMS, J., that, if an order for stopping a highway, under stat. 55 G. 3, c. 68, begins "We," &c., "having upon view found, and it appeared to us," that a certain highway, &c., is necessary, the recital does not imply that the justices acted upon any other information than their own view, and is well enough. *Res v. Inhabitants of Milverton*, 841.

2. Where highway in different jurisdictions. *Anté*, II. 1, (2.)

3. Stopping several highways by one order. *Anté*, II. 1, (2.)

4. Whether actual stoppage necessary to make order effectual. *Anté*, II. 1, (2.)

See further *Turnpike Road*.

HIRING.

Settlement by hiring and service. *Poor*, III.

HUSBAND.

See *BARON AND FEME*.

IMPOUNDING.

For what purpose Court will impound papers in custody of official person. *Evidence*, XV.

IMPRISONMENT.

Under conviction.

1. Power of justices to award. *Conviction*, I.

2. From what time term of imprisonment to be computed. *Conviction*, 1.

INCLOSURE.

From what time legal seizin in allotments takes effect under commissioners' award.

By a local inclosure act it was provided, that the several lands, &c., to be allotted and awarded in pursuance thereof, immediately after such allotments were made, should be, remain, and enure to the several persons to whom the same should be respectively allotted, who should from thenceforth stand and be seized and possessed thereof to the same uses, estates, trusts, and purposes, and subject to the same settlements, &c., charges and incumbrances, as the several and respective lands, &c., in lieu of which such allotments should be respectively made, were then held under, subject to, &c., or might or would have been held under, &c., if this act had not been made.

The commissioners, in 1812, marked out an allotment, in lieu of lands belonging to S., and put him in possession, but their award (in which they made the same allotment to S. in lieu of the same lands) was not

executed till 1825. In the mean time (1818) S. mortgaged the allotment.

Held that, under the above enactment, S. had legal seizin of the allotment from the time of his being put into possession, and might mortgage before execution of the award. *Doe dem. Harris v. Saunders*, 664.

INDENTURE.

Of apprenticeship : allowance by justices. *Poor*, II. 1.

INFANT.

I. Who entitled to custody of.

H., the father of two children, on his wife's death, requested her father and mother to come from America, where they were settled, to England, and take charge of the children, which they did. About four years afterwards H. died, having made his will the day before, in which he left his property to trustees to be converted into money and divided between his two children when of age, the interest to be applied in the mean time, by the trustees, for their education, &c., and he appointed the trustees guardians of the persons and estates of the children, and requested them to cause the children to be properly educated. 3000*l.* bank annuities was vested in other trustees, for the benefit of the children under the testator's marriage settlement. No real property passed to either child from the testator. The grandfather and grandmother, who, ever since their coming to England, had the custody of the children, refused to deliver them up when demanded by the guardians. The Court, on habeas corpus, ordered them to do so.

While the habeas corpus was depending, the grandfather and grandmother filed a bill in Chancery on behalf of the children, against the guardians, for an account, and to have the children and their property put under the protection of that Court. The guardians put in their answer about a month before the above decision.

Semble, that if it had been shown to this Court that a speedy decision in Chancery was to be expected, they would have delayed enforcing the writ. *Res v. Isley*, 441.

II. How far Court will interfere by Habeas Corpus for proper custody of. *Anté*, I.

INFERIOR COURT.

How cause of action must be shown to be within jurisdiction.

In an action brought in an inferior court in Wales, upon a concessit solvere, though the declaration (according to the usage of such court), state merely a promissae and not a consideration, the plaintiff must prove a consideration arising within the jurisdiction.

It is not sufficient to prove that the defendant promised to pay within the jurisdiction, unless it appear that the promissae was made upon an account stated, or other consideration arising there. *Williams v. Gibbs*, 208.

INFORMATION, CRIMINAL.

I. Upon what affidavits granted.

D. obtained a rule nisi for a criminal infor-

mation against the publishers of a libel, on his affidavit that the imputation in the libel was false. The Court discharged the rule, on the sole affidavit of S., who deposed that the imputation was true. Afterwards S. made declarations and depositions in an ecclesiastical suit (but not, apparently, material to such suit), contradicting his affidavit in all particulars. D. then indicted S. for perjury, and the bill was found, but S. left the country. In the term after S. had made the declarations and depositions, and after he had gone away, D. obtained another rule for a criminal information against the publishers, on affidavit of the above facts, and of his innocence as before. In answer, affidavit was made that S. gave the information, after the publication, voluntarily, and that the deponent then and now believed such information to be true; but no affidavit was made as to the information or belief at the time of the publication.

The Court, under the peculiar circumstances, made the rule absolute. *Re v. Eve*, 780.

- II. Interference of Court to compel party to furnish evidence against himself. *Evidence*, XV.

INN OF COURT.

Whether compellable to admit a person a member. *Mandamus*, II. 1.

INQUISITION.

Of jury for assessing compensation under local act. *Jury*, III. 1.

INSANE.

Discharge of insane prisoner under stat. 48 G. 3. c. 123, on petition of wife. *Execution*.

INSOLVENT.

- I. What assignment of a debt by insolvent good as against his official assignees.

M., owing 404*l.* to T., became bankrupt. Defendant advanced 105*l.* to T., who was then solvent, on a *bonâ fide* verbal agreement that he should be repaid out of the debt from M. to T., and the dividends thereon; and A., the solicitor to M.'s commission, was privy to the bargain; but it did not appear that A. acted for M.'s assignees in the transaction, or communicated it to them, or that they knew of it till after T. was taken in execution on a judgment recovered against her in an action commenced more than three months after the time of the agreement. Within three months before the arrest, and before the verdict in the action, but after its commencement, T. gave defendant a written order on M.'s assignees to pay the 105*l.* to defendant. After the verdict, but before the arrest, T. assigned in writing to the defendant the debt due to her from M., and the dividends; and, on the same day, T. for the first time proved her debt against M.'s estate. The dividends amounted to 80*l.*, which defendant received from M.'s assignees. Afterwards T. was discharged by the Insolvent Court, and her assignee sued defendant for money had and received. *Held*,

(1.) That the transfer to defendant of the right to part of the debt due from M. to T.

was not void, under the stat. 7 G. 4, c. 57, s. 32, the *bonâ fide* verbal agreement being sufficient to pass it, and the assent of M., or his assignees, not being necessary to give the defendant an equitable title.

(2.) That the legal property in such part of the debt was not in the plaintiff, the defendant being equitably entitled to that specific part at the time of the imprisonment, although a contingent residue of the whole debt might ultimately come to the plaintiff.

(3.) That the whole debt was not in the disposition of the insolvent, under stat. 7, G. 4, c. 57, s. 30, the knowledge of A. being tantamount to the knowledge of M.'s assignees.

Judgment for defendant. *Tabbitts v. George*, 107.

- II. Order and disposition of insolvent. *Ante*, I.

- III. What constitutes a voluntary preference. *Ante*, I.

INSURANCE.

When Court will compel payment of money into Court on consolidation of insurance causes. *Payment into Court*, I.

JUDGE.

- I. Certificate of, for costs, under stat. 43 Eliz. c. 6. *Costs*, I. 3.

- II. Summing up of a trial, how shown. *Practice*, XI. 3.

- III. Form of motion to rescind order of Judge at chambers. *Arrest*, III.

JUDGMENT.

Entry of, after special finding by jury, under stat. 3 & 4 W. 4, c. 42, s. 24. *Statute*, XXXI. 2, (1); *Practice*, XI. 3; *Verdict*, I.

JURY.

- I. Verdict after special finding by jury. *Verdict*, I.

- II. Power of Judge to discharge jury from giving verdict. *Custom*, III.

- III. Inquisition of, for assessing compensation under local act.

1. What it must state.

The trustees of a turnpike road, under a local act, claiming to take certain premises on paying compensation to the parties interested, served a notice on a party, containing an offer of a sum as compensation for his undivided third part in a term in the premises, with a warning that, in default of his acceptance, a jury would be summoned to assess compensation. They afterwards served him with a second notice, directed to him and several other parties interested in the premises, that, in pursuance of the local act and stat. 3 G. 4, c. 126, a jury would be sworn to assess the sums to be paid to the parties for their respective interests. Notices similar to the first were served on the other parties named in the second notice. The jury were summoned, and sworn to assess the sums to be paid to the parties for their respective estates, but found only the gross value of the premises; and the inquisition stated that the jury found that sum to be the value to be

paid to the parties for their estates, "according to their respective proportions therein," without apportioning it. It appeared by affidavit that some of the parties were bare trustees.

(1.) *Held*, that the inquisition might be brought up by certiorari, being a proceeding under the local act and stat. 3 G. 4, c. 126, s. 85; sect. 145 of that act, which takes away certiorari, being repealed by stat. 4 G. 4, c. 95, s. 86; and stat. 4 G. 4, c. 95, s. 87, taking away certiorari in cases only of proceedings under stat. 4 G. 4, c. 95.

(2.) That the inquisition was bad for not apportioning the value among the parties interested.

(3.) That the objection to the inquisition might be taken before any order was made to pay the money; and the Court ordered it to be brought up by certiorari, though no order had been made.

(4.) The inquisition did not set out that the several parties had been served with notices to treat, but the fact appeared by affidavit. Semble, that for this defect also the inquisition was bad, as not showing a foundation for the jurisdiction. *Ex v. Trustees of Norwich and Watton Road*, 563.

Whether removable by certiorari. *Antd*, I.

JUSTICES.

I. Conviction by.

1. Power to imprison. *Conviction*, I.
2. Proceedings on appeal. *Conviction*, I.

II. Order of, what must be stated on it.

1. An order of justices upon a party, requiring him to pay money to a person claiming it as member of a friendly society (under stat. 49 G. 3, c. 125, s. 3), must find in direct terms that the person applying is a member, that he is entitled to the money, and that the party against whom the application is made, is at the time, an officer of the society.

An order of justices served upon D. does not find him to be an officer, by being directed to "D., steward of," &c.

Nor by reciting a complaint upon oath which states him to be so.

An order does not show the applicant to be a member, and entitled to the money, by reciting that he made complaint upon oath, in which complaint he stated himself to be a member, and the money to be due.

Though the order afterwards direct the money "so due and owing as aforesaid" to be paid.

A warrant of distress, founded upon and reciting such order, and omitting to find as above, is bad: and, if goods be taken under such warrant, the justices are liable in trespass. *Day v. King*, 359.

2. See *Highway*, II.

III. Jurisdiction of, as to binding parish apprentice. *Poor*, II. 1.

IV. Liability of, for proceedings on informal warrant. *Antd*, II. 1.

V. Mandamus to; to commit party to prison pursuant to conviction. *Conviction*, I.

See also, *Sessions*.

LAND.

How far written agreement relating to interest

in land may be waived by parol. *Frauds, Statute of*, I.

LANDLORD AND TENANT.

I. What constitutes an agreement for a tenancy. *Ejectment*, I.; *Post*, VI.

II. Stamp on attornment when necessary. *Ejectment*, I.

III. What amounts to a waiver of forfeiture by landlord.

A lease of lands, &c., by A. to B. contained a general covenant by B. to repair, and a further covenant that A. might give notice to B. of all defects and want of repair, and, if B. did not repair the said defects within two months, A. might enter and do the repairs himself, the expense of which B. was to repay at the time of paying his next rent, and if he did not do so, A. might distrain on him for the expense, as in case of rent arrear. There was also a power to A. to re-enter upon breach of any covenant. The premises being out of repair, A. gave B. notice to repair within six months, and that, if B. did not repair within that time, he would perform the repairs, and charge B. with the expense. The premises were not repaired within the six months. During that time, a negotiation was entered into by A. and B.; and after the expiration of the six months, A. gave notice to B. that if he did not agree to certain terms in three days, A. would hold him to the covenants in his lease. B. did not agree.

Held, that A. could not recover in ejectment for a forfeiture, he having elected to perform the repairs and distrain on B. for the expense, and the general power to re-enter not being revived by the three days' notice.

Semble, that, where a power of re-entry for breach of covenant is reserved in a lease, and the reversion descends to coparceners at common law, one alone cannot maintain ejectment for breach of the covenant. *Doë dem. De Rutzen v. Lewis*, 277.

IV. How far one of two coparceners can take advantage of breach of covenant by tenant. *Antd*, III.

V. Breach of covenant in preventing tenant from entering under lease: how to be alleged.

Where plaintiff declares on a covenant, in a lease by defendant, that plaintiff shall have, occupy, and enjoy the demised premises from a day named, for and during a certain term, and alleges as a breach that plaintiff on the day entered upon the demised premises, and became possessed of them for the term, but that he was not able to occupy and enjoy the said premises in this, viz. that plaintiff being so possessed, defendant entered into the premises, and upon plaintiff's possession, and expelled and kept him out; to which defendant pleads that he did not enter and expel, &c.; such breach is not proved by evidence that plaintiff came to take possession, but was refused entrance by defendant, who continued occupying the premises, and never admitted him.

And it makes no difference that by a clause in the lease (stated in the declaration) it was agreed that, at a time previous to the above-named day, plaintiff should be at liberty to enter the arable lands fit for wheat, for the purpose of sowing, paying at a certain rate

for such lands as should be sown; and that plaintiff had entered on a part of said arable lands, and sown before the day fixed for his taking possession of the premises generally, such entry being alleged in the declaration according to the fact. *Hawkes v. Orton*, 367.

VI. Stipulations in an invalid agreement whether binding on tenant after entry under it.

At a letting of lands, the terms of letting were read from a printed paper, and a party present agreed to take certain premises from Lady-day then next, when the lease of the then tenant would expire. No writing was signed by the parties or their agents, but there was at the foot of the printed paper a memorandum, also read over to the future tenant, stating that the parties had agreed to let and to take, subject to the printed terms, the name of the farm and the rent, and that the letting was for one year certain from Lady-day, and so from year to year, till notice to quit. Some of the terms were special, having relation to husbandry. The new tenant entered at Lady-day, and paid rent.

Held (assuming the first transaction not to have been a demise), that there was a valid demise by parol under stat. 29 Car. 2, c. 3, s. 2, when the tenant entered: that a demise rendered valid by that section might contain the same special stipulations as a regular lease; and that, on the trial of an action by the landlord against the tenant for breach of them, the paper above mentioned might be referred to, to refresh the memory of a witness as to such stipulations. *Lord Bolton v. Tomlin*, 856.

VII. Notice to quit, how construed.

Land and buildings were held by a yearly tenant, the land from 2d February to 2d February, the buildings from 1st May to 1st May. The landlord, on 22d October, 1833, served him with a notice to quit the land and buildings, "at the expiration of half a year from the delivery of this notice, or at such other time or times as your present year's holding of or in the said premises, or any part or parts thereof respectively shall expire after the expiration of half a year from the delivery of this notice."

Held that, as to the lands, the notice was to be considered a notice to quit on 2d February, 1835; and that the landlord might recover both land and buildings after that day, in ejectment. *Doe dem. Williams v. Smith*, 350.

VIII. Landlord's right to double costs under stat. 11. G. 2, c. 19, s. 21. *Costs*, I. 1 (2.)

LEVEL.

How meaning of word "level" in a covenant to be ascertained. *Evidence*, V.

LIBEL.

How privileged communication to be pleaded.

In an action for libel, it is not required by the rules of pleading, Hil. 4 W. 4, that the defence of privileged communication should be specially pleaded. *Lillie v. Price*, 645.

LIEN.

Of town clerk on papers of corporation. *Attorney*, III.

LIMITATIONS.

Of actions, statute of. See *Statute*, XXX.

LONDON.

- I. Custom of corporation of city, as to election of alderman. *Custom*, III.
- II. London Dock Company; compensation under local act. *Statute*, XL.

LUNATIC.

Discharge of, from execution on petition of wife. *Execution*.

MAGISTRATES.

See *JUSTICES*; *SESSIONS*.

MANDAMUS.

- I. When it lies.
 1. To sessions to hear appeal. *Peer*, VII. 1.
 2. To churchwardens to levy rate to pay interest of money borrowed.
Churchwardens, under stat. 59 G. 3, c. 134, s. 40, borrowed 1000*l.* from M., upon the credit of the church-rates, agreeing with M. that the sum should not be called in for twenty years, unless the churchwardens should be desirous of paying off the same at any time before, or as soon as a sufficient sum should be raised by the rates, or otherwise; and that, in the mean time, M. should receive interest at 5 per cent. Some years after the agreement, and before the expiration of the twenty years, interest being in arrear, and no instalments of principal having been paid, nor any money raised to provide for liquidating the principal, this Court, on the application of M., granted a mandamus, calling on the churchwardens to raise by rates a sum for the payment of the interest due, and to pay the same to M.; and also to raise by rate a sum equal to the amount of the yearly interest of the 1000*l.* to be computed from the time of the borrowing, for providing a fund to pay the 1000*l.* But the Court refused to order any payment to be made to M. by way of instalment on the 1000*l.* *Rex v. St. Michael's Pembroke*, 603.
 3. To steward of manor to admit, where title disputed. *Copyhold*, I.
 4. To commissioners of turnpike road to restore officer improperly removed. *Statute*, XXIII. 1.
 5. To churchwardens to proceed to election of a parish officer.
Quære, whether a quo warranto lies for the office of sexton?
Semble, per Lord DENMAN, C. J., that, if the right of electing a sexton be in the inhabitants of a parish, and a mandamus to hold a meeting for such election be *grainable*, the writ may be properly directed to the churchwardens, and not to the inhabitants in general.
Where a requisition had been directed to the churchwardens to call a meeting for such election, which they declined to do, on the ground that the minister had refused his consent, alleging the right of election to be in himself; *semble*, per Lord DENMAN, C. J., on motion for a mandamus to hold such election, that the demand and refusal were

sufficient to warrant an application for a mandamus to the minister and churchwardens.

A mandamus was moved for as above, on affidavits making a *prima facie* case of right in the inhabitants to elect, but affidavits were filed in answer, stating facts to show that the right was in the rector: *Held*, that a mandamus ought not to go, the evidence not being decisive in favor of the applicants, and there being another mode of trying the right, viz. by withholding the sexton's fees, or by submitting to the payment and bringing an action against him for the amount. *Res v. Stoke Damerel*, 584.

II. When it does not lie.

1. To inn of court to admit person a member.

Rule for a mandamus to the Principal and Antients of Barnard's Inn, to admit an attorney into the society discharged, it not appearing that this Court had the requisite authority over the Inn. *Res v. Barnard's Inn*, 17.

2. To justices to commit party to prison pursuant to conviction. *Conviction*, I.

3. To Mayor of Corporation to restore name to Burgess list. *Corporation, Municipal*, I.

4. To officer of crown to deliver up goods rightfully obtained.

The Court will not grant a mandamus to compel the commissioners of customs to deliver up goods placed rightfully in their custody to secure the duty, on a suggestion that the full amount of the duty has been since tendered or paid.

Per LITTLEDALE, J., a mandamus cannot be granted against a party acting merely as officer of the crown. *Res v. Commissioners of Customs*, 380.

5. To vestry to allow inspection of rate-book kept under local act. *Poor*, I. 2.

6. Where a right is in dispute and there is another mode of trying it. *Antd*, I. 5.

7. To compel production of papers before trial in order to be stamped.

The Court will not grant a mandamus, calling upon parish officers, appellant against an order of removal, to produce pauper's indentures of apprenticeship (sworn to be in their custody), at the instance of the respondents, in order that an assignment thereon endorsed may be stamped, so as to be evidence on the hearing of the appeal. *Res v. Westoe*, 786.

III. What constitutes a demand and refusal. *Antd*, I. 5.

IV. Return to, what it must state. *Statute*, XLI.

V. Costs of, under stat. 1 W. 4, c. 21, s. 6. *Statute*, XLI.

MANOR.

I. Custom to surrender lands in trust. *Error, Writ of*, I.

II. How far admittance to copyhold affected by imperfect title of Lord. *Copyhold*, II.

III. Mandamus to steward to admit. *Copyhold*, I.

MARKET.

Place of holding: what may be presumed as to grant. *Evidence*, IX. 2.

MORTGAGE.

Possession of mortgagee, how far adverse to that of mortgagor. *Ejectment*, II.

MUNICIPAL CORPORATION.

See CORPORATION, MUNICIPAL.

NEGLIGENCE.

What proof of negligence necessary to render bailee liable. *Bailment*, I.

NEW TRIAL.

See TRIAL, NEW.

NOT GUILTY.

When a good plea to action of debt on penal statute. *Pleading*, IV. 6, (2).

NOTES.

Of short-hand writer, for what purpose receivable by Court. *Practice*, XI. 3.

NOTICE.

I. In appeals.

1. Of grounds of removal of pauper, what sufficient. *Poor*, VII. 3, (1.)

2. Of grounds of appeal against order of removal. *Poor*, VII. 2.

3. Of appeal under local act, by whom to be given. *Poor*, VII. 1.

4. Of appeal against poor-rate where parish divided into districts. *Statute*, XIII.

5. Of application for certiorari by parish, by whom to be given. *Certiorari*, I. 1.

II. Previous to binding parish apprentice: what will be presumed on appeal against order of removal. *Poor*, II. 1.

III. To quit, how construed. *Landlord and Tenant*, VIII.

IV. To produce documents at trial, what sufficient time. *Evidence*, VI. 2.

V. By stage-coach proprietors, to limit their liability as to value of goods sent. *Bailment*, II.

VI. By commissioners of turnpike road of holding of meeting. *Statute*, XXIII. 1

VII. Service of.

1. Notice by post letter when sufficient. *Seire Facias*, I. 1.

2. Under stat. 41 G. 3, c. 109, what good. *Statute*, XIII.

OFFICE.

Settlement by serving office. *Poor*, VI.

ORDER.

I. Order and disposition of insolvent, what is within 7 G. 4, c. 57, s. 30. *Insolvent*, I.

II. Of justices.

What must be stated in it. *Justices*, II.; *Highway*, II.

OVERSEERS.

What they may include in their accounts.

Overseers' accounts being allowed, and an appeal against them dismissed, the allowance and order of sessions were brought up by certiorari, and an item appeared to be for the expenses of defending an appeal against overseers' accounts. This Court quashed

the allowance and order, such an item being bad on the face of it, inasmuch as no supposable facts could justify it. *Re x v. Johnson*, 340.

PADDINGTON.

Parish of. Election of churchwardens. *Parish*, I. 1.

PARCENER.

I. Effect of partition.

One of two parceners aliened. The alienee and the other parcener agreed to make partition, and, an apportionment having been made, they and each of them, for the perfecting of such partition, conveyed to H., in fee, one portion of the premises, habendum, to the sole use of the alienee in fee, in full of his moiety, and the other portion in like manner to the sole use of the second parcener, in full of his moiety.

Held, that the line of descent through the second parcener was not broken by the conveyance, but that his moiety passed to the heirs ex parte materna. *Doe dem. Crosthwaite v. Dixon*, 834.

II. Remedy by one of two co-parceners for breach of covenant. *Landlord and Tenant*, III.

PARISH.

I. Election of parish officers.

1. The right to demand a poll is by law incident to the election of a parish officer by a show of hands.

At the election of a churchwarden of the parish of Paddington in Middlesex (subsequently to stat. 58 G. 3, c. 79), the show of hands was in favor of M. A poll was demanded by a rate-payer present, who required that it should be taken according to stat. 58 G. 3, c. 69 (allowing plurality of votes to individuals in respect of property), to which mode an inhabitant present objected. The poll was taken by plurality of votes, by which H. and G. had the majority; they also had the majority at the poll, reckoning by single votes. During the poll, several parishioners protested against the mode of taking it, and did not vote. By stat. 58 G. 3, c. 69, s. 8, nothing in that act is to change or affect the right or manner of voting in any vestry or meeting holden by virtue of any ancient or special usage or custom. By stat. 5 G. 4, c. cxxvi., the vestrymen of the parish of P. are to be elected by ballot, by plurality of votes, as under stat. 58 G. 3, c. 69, s. 3; elections of churchwardens are to be conducted in such manner as hath been usual in the same parish; and overseers are to be nominated by the vestry, as may be done by parishioners in vestry in other cases. Before either act passed, and ever since, churchwardens were elected in P. by show of hands, no poll ever having been demanded.

(1.) *Held*, that (assuming stat. 58 G. 3, c. 69, s. 3, to be inapplicable to the parish of P.) G. and H. were duly elected, the irregularity in the form of demanding the poll (if any) having been waived by the poll being in fact taken without objection from either party to *their being a poll*; and H. and G.

having a majority on the poll according to either way of reckoning the votes.

(2.) Also, that stat. 58 G. 3, c. 69, s. 3, was applicable to P.; for that the fact of no poll ever having been demanded did not show that the usage de facto in P. excluded a poll, and the elections were, at the time of passing stat. 5 G. 4, c. cxxvi., subject to stat. 58 G. 3, c. 69, s. 3, in the event of a poll being demanded.

(3.) A poll may be demanded at an election of parish officers, after the chairman has declared the result of a show of hands. *Campbell v. Maund*, 865.

2. See *Mandamus*, I. 5.

II. Application by parish for certiorari. Notice and recognisances under stat. 13 G. 2, c. 18, s. 5. *Certiorari*, I. 1.

PARSON.

Liability of corn rent to poor-rate. *Poor*, I. 1. (2.)

PARTITION.

Effect of partition by parcener. *Parcener*, I.

PASTURE.

Right of, as appurtenant to a messuage, how proved. *Evidence*. XIV.

PAYMENT INTO COURT.

I. When Court will compel, pending rule for new trial.

Sixty-five actions being brought by one party on policies of insurances, against individual underwriters and incorporated companies, for sums amounting in the whole to 27,200*l.*, the defendants obtained a consolidation rule which by its terms bound the plaintiff as well as the defendants. One cause was tried, the plaintiff had a verdict, and a rule nisi was granted for a new trial, on affidavit of surprise and of merits. From the state of the new trial paper, it was expected that cause could not be shown for a very long time; two of the defendants had lately died; and the plaintiff alleged that, while the cause stood over, he lost the interest of the 27,200*l.*

The Court would not, on these grounds, direct the amount insured to be paid into Court, or invested to wait the event of the cause in which a rule nisi had been granted. *Ohrly v. Dunbar*, 824.

II. What it admits. *Pleading*, IV. 6, 1.

PLEADING.

I. Form of action.

1. Liability of justices for proceedings on informal warrant. *Justices*, II. 1.

2. Assumpsit.

(1.) Recovery of money supplied to wife to enable her to proceed against husband.

Where a wife ill-treated by her husband indicts him for assaulting and imprisoning her, a party who advances money for her to the attorney, without which he would not have undertaken the prosecution, cannot recover the amount from her husband as money supplied to procure her necessities.

Otherwise, *semble*, if she exhibit articles of

the peace against her husband. *Grindel v. Godmond*, 755.

(2.) Money had and received, who may maintain.

A debtor of plaintiff transmitted a sum of money to defendant, who admitted having received it, and, being afterwards informed that it was meant to be paid to the plaintiff, said that he would so pay it. These statements were communicated to plaintiff, by defendant's authority.

Held, that, on his failing to pay, plaintiff might sue him for money had and received, and that defendant could not allege a want of consideration moving from plaintiff to himself. *Lilly v. Hays*, 548.

3. Concessit solvere.

What consideration will support action. *Inferior Court*.

4. Ejectment.

What constitutes right of entry within twenty years. *Ejectment*, I.

II. Parties to action.

1. When clerk to a public board may be sued in case for their neglect.

By the Harwich paying act, the commissioners "may sue or be sued for or concerning anything which shall be done by virtue or in pursuance of this act, in the name of their clerk," and are empowered to raise money by rates. Any person may advance money to them, for the purposes of the act, in purchase of annuities, which shall be payable and paid by the commissioners out of the money arising from the rates. The act prescribes the form of the grant; which purports that, by virtue of the act, five of the commissioners, in consideration of the sum advanced to them by the party, grant to him an annuity out of the rates to arise by virtue of the act.

A declaration, in case, against the clerk, stated that the plaintiff advanced a sum to the commissioners for the purchase of an annuity; whereupon, by a grant made according to the form of the statute, five commissioners, by virtue of the act, in consideration of the advance, granted to the plaintiff an annuity of the rates; that a quarterly payment of the annuity became due; that the commissioners then held in their hands, out of the rates, money more than enough to satisfy it; whereupon it became their duty to pay it; and that they had not paid it. It did not appear by the pleadings that there were any annuitants besides plaintiff.

Held, that case was maintainable against the clerk, for this breach of duty by the commissioners.

Although the act provided (in a distinct section from that giving the power to sue as above mentioned) that no suit should be commenced "for anything done in pursuance" of the act till certain notice was given, or after six months "next after the fact committed."

Held, also, that, on general demurrer, the declaration was not bad for want of an averment that the money was advanced for the purposes of the act.

Nor for omitting to aver that the commissioners had received money enough to satisfy all annuitants.

Defendants pleaded that it was not the duty of the commissioners to pay, &c. *Held*

bad, on special demurrer, as a traverse of an inference at law. *Cane v. Chapman*, 647.

2. When consignor may sue common carrier for loss of goods. *Bailment*, I.

3. Whether record may be amended by introducing other parties. *Practice*, XI. 1.

III. Declaration.

1. What averments must be made by party suing under local act to bring cause of action within the act. *Ante*, II. 1.

2. Profit à prendre: how far limitation of right to be shown on pleadings. *Easement*, I.

3. Indebitatus assumpsit.

How defendant's promise to be alleged. *Post*, IV. 5, (3.)

4. Assumpsit for apothecary's bill.

Proof of certificate, whether necessary. *Evidence*, XI.

5. Bill of exchange.

Relative situation of endorser and endorsee. *Bills of Exchange and Promissory Notes*.

6. Covenant.

What shows breach of covenant. *Post*, VIII.

IV. Plea.

1. Informal for not answering all it professes to answer.

A plea commenced by a general allegation that the plaintiff ought not to have or maintain his aforesaid action thereof against defendant; then followed matter expressly confined to "the first count," with a verification and prayer of judgment whether the plaintiff ought to have or maintain "his aforesaid action thereof." The record then went on thus: "And as to the second count," &c., with matter expressly confined to "the second count," and verification and prayer of judgment, as before:

Held, that the first part was a plea pleaded to the first count only, though informally, and was good on demurrer to the rejoinder. *Harvey v. Graham*, 63. (See whole placitum, *Frauds, Statute of*, I.)

2. When bad for duplicity. *Post*, IV. 6, (2.)

3. Conclusion to country.

Trespass for breaking closes of and belonging to plaintiff, encumbering them with stones, &c., and thereby depriving plaintiff of the full use and enjoyment of the closes; also for pulling down rails, &c., thereon. Pleas, 1. Not Guilty. 2. Justification, alleging freehold in defendant: verification. 3. Denying that plaintiff, at the times when &c., was possessed of the said closes, rails, &c., in manner and form, &c.: concluding to the country. 4. Justification, alleging that defendant at the times when, &c., was lawfully possessed of the closes, and traversing that the closes were, at the times when, &c., the closes of plaintiff in manner and form, &c.: conclusion to the country:

Held, on special demurrer, that the third plea was properly concluded to the country. *Fleming v. Cooper*, 221.

4. Pleading several pleas.

The Court will not under the new rules, permit the following pleas to be pleaded together, to a declaration in trespass:—1. A custom for all tinnars in the stannaries to make trenches in any lands for conveying water to any stannary worked by them for the better working of the same. 2. The

like, alleging the custom to be on making reasonable compensation. *Bastard v. Smith*, 827.

5. Assumpsit.

(1.) What amounts to the general issue.

Indebitatus assumpsit for work and labor, with promise to pay on request. Pleas, that the work was done in endeavoring to prevent a chimney from smoking, and on the terms that plaintiff should not be paid unless he prevented it from smoking, and that he had not prevented it. On special demurrer, held bad, as amounting to the general issue. *Hay-selden v. Staff*, 153.

(2.) What may be given in evidence on plea of non assumpsit. *Bailment*, II.

(3.) How a tender to be pleaded.

To indebitatus assumpsit for 20*l.* defendant pleaded. 1. Non assumpsit, except as to the sums of 3*l.* and 1*l.* 2. As to the said 3*l.*, parcel of the sum mentioned in the declaration, that, after the promise therein mentioned as to the 3*l.*, and before action brought, viz. on, &c., defendant tendered the 3*l.* parcel, &c., to plaintiff, &c. (in the usual form). 3. As to the 1*l.*, other parcel, &c., that, heretofore and after the said promise as to the 1*l.*, and before action brought, viz. on, &c., defendant paid plaintiff 1*l.*, parcel, &c. On demurrer to the second plea, assigning for cause that the tender appeared to be only of part of the admitted debt, and that the residue was not shown to have been previously paid: *Held*, that the tender was well pleaded.

Per Lord DENMAN, C. J., a declaration stating that defendant was indebted to plaintiff in 20*l.* for goods sold, and in consideration thereof promised (not adding "the said plaintiff,") to pay plaintiff the said 20*l.* on request, is good, independently of the rule, Trin. 1 W. 4, Schedule, tit. *Common Counts*. *Jones v. Owen*, 222.

6. Debt.

(1.) What non indebitatus puts in issue.

Plaintiff declared in debt for work and labor performed as an attorney for defendant, on his retainer, and for fees due and of right payable in respect thereof; defendant paid a sum into Court, and pleaded non indebitatus as to the residue. *Held*, that defendant might prove that the plaintiff agreed to do the work (on a certain event, which had occurred) for costs out of pocket, which should not exceed a sum named. *Jones v. Reade*, 529.

(2.) What may be pleaded to debt on a penal statute.

To a declaration in debt on stat. 22 G. 2, c. 46, s. 14, charging the defendant that he, being deputy clerk of the peace, practised at the sessions as an attorney, a plea (since the new rules) that defendant was not at any of the times, &c., deputy clerk of the peace, nor did he commit any of the supposed offences in manner and form, &c., is bad for duplicity.

Semble, that a plea of Not Guilty would be good. *Faulkner v. Chevell*, 213.

7. Case.

How privileged communication to be pleaded to action for libel. *Libel*.

8. Replevin.

How a tender to be pleaded. *Replevin*, I.

9. Scire facias.

When bail allowed to plead after judgment.

Scire Facias. I. 1.

V. Replication.

1. De injuriâ, when to be replied.

In an action by the payee of a promissory note against the maker, defendant pleaded that the note was made and delivered to plaintiff in consideration of money and goods then agreed to be thereafter lent and supplied by plaintiff to defendant, but that plaintiff had not lent or supplied, &c. Replication, "that the defendant broke his promise without the cause in his plea in that behalf alleged:" *Held* good, on special demurrer. *Watson v. Wilks*, 237.

2. General traverse, without de injuriâ, what put in issue.

In assumpsit on a bill of exchange against the acceptor, defendant pleaded that, after the accepting and after the time for payment, he, being resident in Scotland, and subject to the laws thereof, in consideration that certain supposed creditors should forbear to molest or sue him, made his deed or writing, duly stamped and attested according to the law of Scotland, by which he conveyed to J. D., and such persons as might thereafter be appointed trustees by the creditors, for the use of the creditors mentioned in the deed, and of other creditors whom the trustees should assume into the benefit of the disposition, all his movable estate in Scotland, in lieu and full satisfaction and discharge of all his debts owing to the said creditors; that notice of the execution of the deed was given to divers supposed creditors in Scotland and England, including the plaintiff; that plaintiff, by writing signed by him, and valid by the law of Scotland, appointed H. R. his attorney, to concur in and adopt the deed, and receive the dividends; that H. R. did adopt the deed and its provisions on plaintiff's behalf, acted therein as plaintiff's authorized agent, took part in the management of the estate, &c.; that other creditors in consideration of the said assignment, and the acceptance thereof by plaintiff, agreed to accept, and did accept, the same, in full satisfaction of their debts; that funds of defendant had since become available under the deed for the benefit of the creditors, sufficient to pay the debts of defendant, including that to plaintiff; and that all the proceedings were pursuant to the laws of Scotland; whereby, and by reason of the premises, and by the aforesaid laws, defendant had become absolutely discharged from the causes of action stated in the declaration.

Replication, that the defendant had not become nor was discharged in respect, &c., in manner and form, &c., on which issue was joined.

Held that, assuming the allegations in the plea respecting the law of Scotland could be rejected (and *semble*, that they could not), and the plea be construed as setting up a defence according to the law of England, such a defence was not shown on the plea; that the pleadings, therefore, must be understood to put in issue the law of Scotland; and that the defendant, to succeed on the plea, was bound to prove such law as a fact. *Woodham v. Edwards*, 771.

VI. Legal effect not to be stated on pleadings without facts leading to the inference.

Declaration in case stated that a suit in Chancery, by J. against F. and the present plaintiff, being pending, it was ordered by

the Court of Chancery that J. should pay money into Court, to the credit of the cause, subject to the further order of the Court: that J. having contemptuously neglected so to do, to plaintiff's damage, plaintiff caused a writ of attachment to be sued out of Chancery against J., directed to defendant, being sheriff of N., which writ was delivered to defendant to be executed; whereupon it became defendant's duty to execute it in a careful and proper manner: yet defendant wrongfully, carelessly, and improperly, and against plaintiff's consent, attached J. by his body, J. being then privileged from being so attached, and defendant well knowing the premises; that J. was discharged by the Court of Chancery from the attachment; and by means of the premises, plaintiff was deprived of the benefit of the writ, and delayed and hindered in compelling J. to pay, and was put to expenses and trouble in causing another writ to be issued, and was also put to costs in opposing J.'s discharge, and was otherwise damaged:

Held bad, for not setting out the nature of J.'s privilege, and that the objection might be taken on demurrer to the declaration, though not assigned for cause.

Semble, also, that the declaration disclosed no cause of action. *Lloyd v. Wood*, 228.

VII. What amounts to a traverse of an influence of law. *Antd.* II. 1.

VIII. What shows breach of covenant.

An indenture recited that F. and G. were entitled to a fourth part of a colliery for a term of years; that G. was also entitled, by agreement with A., to a lease of land essential for working the colliery, and held the agreement in trust for himself and F. jointly; that P. had a power of sale upon a moiety of the colliery, for the same term, to secure an annuity, which power he was about to exercise; that F. and G. agreed to purchase the moiety, which was to be discharged from the annuity, and to grant a fresh annuity to P., payable out of the profits accruing from the working the coal, by virtue of the term in the three parts of the colliery, and the agreement. By the same indenture, after such recital, the moiety was assigned and the annuity granted; and F. and G. covenanted severally for themselves, their executors, administrators, and assigns, to pay the annuity, as above, from the profits accruing, after payment of all rates, taxes, &c., and of the rents reserved on the term, or by the agreement; a right of entry on the premises charged, and of mortgage and sale, was given to P. on the annuity being in arrear; and F. and G. covenanted severally for themselves, their heirs, executors, and administrators (not naming assigns), to do nothing whereby the annuity might cease, determine, be impeached, or become void and of no effect, or whereby the lease by which the colliery was originally demised, or the agreement, should be forfeited, or the terms thereby created cease.

P. sued in covenant on the indenture, assigning for breaches, (1), that F. and G. took a lease of the land to which G. was entitled under the agreement, in their own names, and not in trust for P., but for other persons, and forfeited and surrendered the agreement, whereby the annuity was impeached, and the

plaintiff's right over the land and in the profits which would have accrued, ceased; (2), that under the land subject to the agreement there were veins of coal, the property of A., and that F. and G. took the land at a higher rent, and otherwise on worse terms, than G. was entitled to by the agreement, in order to obtain the last-mentioned coal on better terms than they otherwise could have done, whereby, &c. (as before); (3), that F. and G. afterwards assigned the land amongst other things, to H., whereby, &c. (as before). On general demurrer to the declaration.

Held, by the Court of Exchequer Chamber, in accordance with the judgment of the Court of K. B., that the want of an averment that profits had, or would have, actually accrued from working the colliery, was no objection to the declaration.

But that the first two breaches showed no cause of action; for that, (1), the variation between the lease and the agreement did not invalidate the security; and, (2), the security was not shown to be affected, since the profits of the colliery on which the annuity was secured were those remaining after payment of such rent only as was reserved by the agreement.

But *held*, reversing the judgment in K. B., (3), that the third breach showed that the annuity was impeached; since the land in H.'s hands would not be subject to the powers of entry, mortgage, and sale; H.'s interest not being that which the covenantors had under the agreement, and he appearing to come in as a purchaser, not privy to the covenant, and not estopped by it. *Pitt v. Williams*, 885.

IX. Judgment.

Entry of, after special finding by jury. Statute XXXI. 2, (1.); *Practice*, XI. 3. *Verdict*, I.

X. Variance between pleading and evidence.

Breach of covenant in preventing lessee from entering under lease. *Landlord and Tenant*, V.

XI. Criminal.

Indictment for non repair of road.

Plea by parish showing liability of another district. *Highway*, I.

POLL.

At election of parish officers. *Parish*, I. 1.

POOR.

I. Rate.

1. Liability to rate.

(1.) What a beneficial occupation.

Governors of the poor, hiring a house without their district for the purpose of setting their own paupers to work there, and using it for that purpose only, are rateable in the parish in which the house is, as occupiers, whether the employment of the paupers there be profitable or not. *Governors of the Bristol Poor v. Wait*, 1.

(2.) Parson's corn rent in lieu of tithes.

By an inclosure act, certain allotments were made to the parson, as a compensation for the uninclosed glebe lands of his rectory, and for all rights of common belonging to the rectory; and it was enacted, that the commissioner for inclosure should ascertain the

yearly value of all the tithes on the lands to be inclosed, and the ancient inclosed lands, and that the tithes should be deemed equal in value severally to one-fifth, one-seventh, and one-eighth of the annual net value of different classes of lands respectively, and a corn rent be assigned to the parson, equivalent to the annual value of the tithes:

Held, that the parson was rateable to the poor in respect of such corn rent. *Res v. Wistow*, 250.

(3.) Turnpike tolls under local act.

Trustees were appointed under a local act for making a road, and they and their successors were empowered to purchase lands, which should be conveyed to and vest in them, and to lay such lands into the intended road, to take tolls thereon, and to apply the receipts towards paying the interest of a sum advanced by certain shareholders, and to the putting the act in execution, and to the repayment of the principal advanced. By a subsequent act their powers were continued; and it was enacted that no person should be eligible as trustee unless possessed of five shares in the capital stock raised for making the road, and a penalty of 100*l.* was imposed on any person acting without such qualification. The surplus of the tolls (after making certain other payments) was to be applied in paying the shareholders' interest, and, ultimately their principal; and the act was to expire when the principal and interest were paid off, or, if they were not sooner discharged, in thirty-one years.

Stat. 3 G. 4, c. 126 (the provisions of which, except where expressly altered or repealed, extend, by sect. 4, to all turnpike acts made or to be made) enacts, by sect. 65, that no person, acting as trustee of a turnpike road, shall receive any money to his use or benefit out of the tolls, under a penalty of 100*l.* Sect. 51 enacts, that no tolls to be taken by the trustees of any turnpike road, nor any person in respect thereof, shall be rated to the poor.

Held that, although the trustees of the above road were shareholders and owners of the soil as before stated, and notwithstanding the contradiction between the above clauses in the general and local acts (with other alleged inconsistencies), the road was turnpike within the provisions of the general act, and the trustees not liable, in respect of it, to a rate for "land upon which they had made a road, and in respect of which they received tolls." *Res v. Trustees of Great Dover Street Road*, 692.

2. Rights of rate-payers to inspect rate-books.

By stat. 35 G. 3, c. 73, for the government of the parish of *St. Mary-le-Bone*, it was directed that the vestrymen should annually make a poor-rate and other assessments, and that the rates to be so made should be entered in a book or books, which should state the names of the persons to be charged, the amount of assessment upon each person for each of such rates, and the arrears outstanding at the end of each year. The entry of the rate, made as above, was the original rate. The act said nothing as to inspection by the rate-payers. Such books were accordingly kept, and also books, under Sir John Hobhouse's Act (1 & 2 W. 4, c. 60, s. 32), containing accounts of all sums of money

received and disbursed for parochial purposes, and of the articles, matters, and things for which the sums were received and disbursed; which latter books were open to inspection, and liberty given to take copies, according to the last-mentioned act; but these books did not contain the particulars stated in the book kept under the local act.

A rate-payer demanded liberty to inspect and take copies of the first-mentioned books (not offering any payment); which liberty being refused, he obtained a rule nisi for a mandamus:

Held, that the Court was not authorized by the above statutes, or stat. 17 G. 2, c. 3, or at common law, to compel the granting of such liberty: And, therefore, rule discharged. *Res v. St. Mary-le-Bone*, 268.

II. Settlement by apprenticeship.

1. By what justices indenture binding parish apprentice to be allowed.

Under stat. 56 G. 3, c. 139, s. 2, and stat. 3 & 4 W. 4, c. 63, s. 1, where a district has justices of its own, not exercising jurisdiction in the rest of the county, and the county justices have a concurrent jurisdiction with them within the district, an indenture, binding a parish apprentice by the officers of the district, to serve in the county, without the district, may be allowed, and the order made, by two of the county justices.

On an appeal respecting a settlement under such indenture, if the indenture and allowance do not mention that notice to the officers of the parish where the apprenticeship is to be served was proved or admitted before the justices at the time of allowing and executing the indenture, and no evidence given either to prove or disprove the fact, the presumption is, that such notice was proved or admitted. *Res v. Wilney*, 191.

2. Service with second master with assent of first.

Settlement by apprenticeship cannot be gained by service under a second master, with the assent of the first, unless such assent be given to the particular service.

Quære, whether such assent can relate back to a service previously performed. But,

Held that, where a parish apprentice had served without such assent, until October 1, 1816 (after which, by stat. 56 G. 3, c. 139, s. 9, no parish apprentice could gain a settlement by service under a transfer made without consent of justices), a ratification by the master after that day, without consent of justices, could not render the prior service valid for the purpose of settlement. *Res v. Maidstone*, 326.

3. What will be presumed on trial of appeal as to notice previous to binding parish apprentice. *Antè*, 1.

III. Settlement by hiring and service.

Terms of agreement.

On a case sent from sessions, it was stated: That, on appeal against an order of removal, it appeared that the pauper was bound apprentice to a wheelwright, and served in the appellants parish under the indentures for twenty months; after which the pauper's father bought up the remainder of the time, and the indentures were cancelled, and the pauper afterwards let himself to another wheelwright, under a written agreement signed by the master, the pauper, and his

father,—which was set out in the case, and by which the father, on behalf of the pauper, agreed that the pauper should serve his master in his business of a wheelwright, from 3d December, 1827, to 3d March, 1830, the master paying, at the end of the term, 5l. to the pauper, in the mean time finding him meat, drink, and lodging; the father finding him clothes, washing, and all other necessities: that the pauper stated that he served as an apprentice; that the respondents offered evidence of conversations between the parties, before and at the time of signing the instrument, and also of an endorsement thereon, which, however, was not proved to have been on the paper when the instrument was signed; that the sessions rejected the evidence in both instances, and confirmed the order; and that the order of sessions was to be quashed, or confirmed, according as this Court should, or should not, be of opinion that the agreement was one of hiring and service: *Held*,

(1.) That this Court was not concluded by the confirmation of the order at sessions.

(2.) That the agreement was one of hiring and service, and that the service must be understood to have been performed under the agreement.

(3.) That, as evidence, coming under the description of that which was stated to have been tendered, would in some cases be admissible, and in others not, it did not appear that the rejection was necessarily wrong.

This Court quashed the order. *Rez v. Billinghay*, 676.

(2.) What an exceptive hiring.

Pauper was hired by the proprietors of a colliery, from 5th April, 1816, to the 5th April, 1817, to work as should be necessary for carrying on the colliery, and as he should be required to do by the owners, on the terms that the forfeitures, to be paid by him for such days as he should lay himself idle, should be paid to him to the same amount by the proprietors for every day he should be laid idle by them, except on the pay Saturdays, when the pit was going single shift; but, when the pit was going double shift, the men were to work one shift on the pay Saturdays, to make each shift work eleven days; that he should, except when prevented by sickness, &c., do a full day's work on every working day, except a single shift pit on the pay Saturdays; and, in default thereof, forfeit for every default 2s. 6d.; that he should be paid his wages every fourteen days; and that nothing in the agreement should prejudice the legal remedies belonging to masters and servants, or the jurisdiction of the magistrates. The following facts also were stated in a case sent from sessions. Pay Saturday is every alternate Saturday. The ordinary day's work of a pit is twelve hours; the pit is then said to go single shift. When it is worked all the twenty-four hours, it is said to go double shift; in the latter case, workmen work ten and twelve shifts (of twelve hours each) in alternate fortnights respectively; the proviso as to working one shift on pay Saturday applies only to men working twelve shifts in the fortnight. Sometimes, when a pit is working double shift, a necessary job requires a few individuals (but rarely, if ever, the whole pit's crew) to remain in the pit, after the shift to which they

belong has finished work. The pauper worked sometimes single shift, and sometimes double shift:

Held, an exceptive hiring. *Rez v. Cowpen*, 333.

IV. Settlement by estate.

What equitable estate will confer a settlement.

A mortgagor in possession gave by will all his real and personal property to trustees, in trust to sell and apply the proceeds to pay his mortgage and other debts, and funeral expenses, and the residue to his wife for her own use. He also made the trustees his executors, and left some personal property. After his death, the wife resided in the parish where the land was situated, but not on the land; and the trustees resided on the land, and did not sell or render an account:

Held, that the wife gained a settlement by such residence; although it appeared that the trustees would have been glad to sell the land for the principal and interest due; and although for the purpose of defeating the settlement, evidence was offered that the real and personal estate was not solvent, which the sessions refused to receive. *Rez v. Aslackby*, 200.

V. Settlement by renting tenement.

What constitutes a separate and distinct dwelling-house.

W. rented and occupied the middle floor of a house. Two outer doors, and some steps, which gave access to that floor, were appropriated to him exclusively. A separate flight of steps on the outside of the house led, by a different outer door, to a passage on the middle floor, from which passage a tenant occupying the upper floor reached his premises, by a staircase of his own. One of W.'s rooms opened into this passage, and W. could not reach that room but by going up the last-mentioned steps, and along the passage, or by crossing the passage from his other rooms, by a door in one of them, which was usually locked. All the last-mentioned rooms communicated with each other, and with both the doors appropriated to W.:

Held, that the premises occupied by W. were "a separate and distinct dwelling-house," within stat. 6 G. 4, c. 57, by renting which a settlement might be gained. *Rez v. Great and Little Usworth and North Biddick*, 261.

VI. Settlement by serving an office.

Nature of office.

Pauper, upon a vacancy of the offices of parish clerk and sexton of B., was requested by the rector to perform the duty of clerk for a Sunday, which he did; and the rector afterwards said to him, "I shall appoint you my regular clerk and sexton, and to follow me in marriages and funerals." Pauper accordingly entered upon the office. Soon afterwards, two parishioners objected to what the rector had done, who answered that he should persist. The parish were in the habit of paying a salary to the parish clerk and sexton; the overseer refusing to pay the pauper, the rector threatened him with legal proceedings, upon which the salary was paid, and the vestry afterwards increased it. Pauper executed the office, and received the emoluments, residing in B., for several years: *Held*, that he was well

appointed, and gained a settlement in B. *Rez v. Bobbing*, 682.

VII. Appeal.

1. Notice of appeal under local act, by whom to be given.

By a local act it was provided that, if any person should think himself aggrieved by certain assessments, he might appeal to the quarter sessions, first giving notice, and entering into recognisance to prosecute such appeal. By another act, giving power to certain road-trustees, it was enacted, that they might sue and be sued in the name of any one or more of them; that no action or prosecution so commenced should abate by the death, &c., of such trustee; and that such trustee, in whose name any action or suit should be commenced or prosecuted in pursuance of the act, should be reimbursed his costs thereby incurred, and also the costs of prosecuting any indictment or other proceedings whatsoever, commenced or prosecuted against any person by order of the trustees.

A single trustee gave notice of appeal against a rate, beginning, "I, A. B., one of the trustees, &c., for and on behalf of myself and the others of the said trustees, hereby give you notice, that an appeal will be entered and prosecuted, on behalf of the said trustees, against a certain rate," &c. He also entered into a recognisance (in which no other trustee joined), with the condition, "that the said A. B., or the trustees appointed under a certain act, &c., do appear at the next general quarter sessions, &c., and prosecute an appeal, &c., and abide the order," &c. It did not appear whether A. B. was or was not authorized by the trustees to take these steps, but they had made no disclaimer.

Held, that there was a sufficient notice and recognisance within the first-mentioned statute; and a mandamus issued commanding the sessions to hear the appeal. *Rez v. Justices of Surrey*, 701 (n.).

2. What sufficient notice of grounds of appeal.

The parish of G. gave notice to the parish of P. of an appeal against an order removing H. and his wife, and children of the wife by a former husband, being under the age of sixteen, from P. to G., stating, as the ground of appeal, that H. was not settled in G. (setting out objections to his settlement), and that the children were settled in P., not stating what the nature of their settlement was. *Held*, that this was sufficient notice, as to the children, under stat. 4 & 5 W. 4, c. 76, s. 81.

And, the sessions having refused to receive evidence as to the settlement of the children, distinct from that of the husband, on the ground of insufficiency of notice, this Court issued a mandamus commanding them to enter continuances and hear the appeal. *Rez v. Justices of Cornwall*, 134.

3. How far party confined to terms of his notice.

(1.) Of grounds of removal.

The parish officers of K., intending to remove a pauper to C., sent to the officers of the latter parish a notice of chargeability, the order of removal, and the pauper's examination. The examination stated that

the pauper was born at K., where his father then resided; but that the father then, and until his death, belonged to C., as the pauper had heard and believed; and that the pauper heard him say that he was a certificated man from C. The officers of C. gave notice of appeal on the ground that the pauper's father never was settled in or certificated from C. On the hearing of the appeal, the respondents offered evidence that the pauper's father was settled in C. by apprenticeship.

Held that, under stat. 4 & 5 W. 4, c. 76, s. 79, it was not necessary that more specific information should have been given of the grounds of removal, to render the above evidence admissible. *Rez v. Keldredon*, 687.

(2.) Of grounds of appeal.

A pauper being removed to a parish as settled there by hiring and service, the parish gave notice of appeal, stating, as the ground (pursuant to stat. 4 & 5 W. 4, c. 76, s. 91), that the pauper, at his hiring, stipulated to have two days' holidays at Spalding club feast in July; and that he had such holidays during his year of service. On the hearing of the appeal, the pauper (called for the respondents) proved on cross-examination that he, at his hiring, bargained for one day's holiday to go to Holbeach fair, and had it during the year; but that he did not bargain for, or have, any holiday at Spalding club feast. The sessions having found an exceptive hiring, subject to the opinion of this Court, whether evidence as to the one day's holiday was admissible.

Held, that, under the notice given, such evidence could not be received; and the order founded upon it was quashed. *Rez v. Holbeach*, 685.

4. Service of notice on churchwardens, when parish divided into districts. *Statute*.

XIII.

VIII. Order of filiation.

To what sessions application to be made.

Bastardy, I.

IX. Overseers.

1. What they may include in their accounts. *Overseers*.

2. When Court will compel them to produce indentures before trial of appeal, to be stamped. *Mandamus*, II. 7.

PRACTICE.

I. Amendment of record. *Post*, XI.

II. Arrest.

1. On bad affidavit to hold to bail. *Arrest*, III.

2. On ca. sa. without warrant. *Arrest*, II.

III. Bail.

1. Affidavit to hold to bail.

(1.) What it must state. *Arrest*, III.

(2.) How bad affidavit to be taken advantage of. *Arrest*, III.

2. To sheriff, when exonerated. *Bail*, III.

3. To action, when they may render. *Bail*, III.

4. Scire facias against. *Scire Facias*, I. 1.

IV. Certiorari.

1. Steps previous to application for, by parish.

Certiorari, I. 1.

2. What must be shown on application for.

Certiorari, II.

V. Criminal information.

Upon what affidavits granted. *Information*, *Criminal*, I.

VI. Judge.

Form of motion to Court after hearing by Judge at chambers. *Arrest*, III.

VII. Judgment.

Entry of, after special finding by jury. *Post*, XI. 3; *Statute*, XXXI. 2 (1); *Verdict*, I.

VIII. Notice to produce.

What sufficient time of service. *Evidence*, VI. 2.

IX. Payment into Court.

When Court will compel. *Payment into Court*, I.

X. Production of papers.

When Court will compel, before trial. *Mandamus*, II. 7.

XI. Record.

Amendment of.

1. By inserting other parties.

A married woman, whose husband lived abroad, rented premises in her own name, not stating whether she was married or single. Having paid rent to A., of whom she took the premises, under a threat of distress, she was distrained upon by B., claiming to be the landlord, for the same rent. She brought replevin, and the defendant (the broker) pleaded that she was a married woman, and that the goods were her husband's. A Judge at chambers made an order, at the plaintiff's instance, that the proceedings should be amended by inserting the husband's name in the declaration, unless the defendant would withdraw his pleas and avow, in which case the plaintiff's coverture should not be set up:

Held, that such an order could not be made without the defendant's consent, though in a case of obvious oppression. Order set aside. *Eubanks v. Owen*, 298.

2. By inserting new pleadings.

A cause was referred at Nisi Prius, and a verdict taken for the plaintiff, subject to a reference. The arbitrator certified to the Court, pending the reference, that it would be agreeable to the justice of the case to allow the plaintiff to amend his replication, by substituting *de injuriâ*, or some other replication which should put in issue all the allegations in the plea.

Held, that such amendment could not be ordered without consent of both parties. *Cress v. Metcalfe*, 800.

3. By making pleadings conformable to finding of jury.

In an action of replevin, commenced after stat. 3 & 4 W. 4, c. 42, came into operation, but in which the declaration was dated before the first day of Easter term, 1834, the defendant avowed for rent arrear on a demise at an annual rent of 650*l*. Plea, *non tenuit*. The plaintiff gave evidence that the rent was only 500*l*.; and the defendant, before verdict, refused to amend. The jury found for the plaintiff; and found specially that the rent was 500*l*.; and this verdict was endorsed on the record.

Held, first, that the plaintiff must have judgment.

Secondly, that this Court would not amend the avowry, by making it conformable to the holding at 500*l*., and give judgment on the record so amended.

Thirdly, that the defendant was not entitled to a new trial, in order that he might

have an opportunity of amending the avowry as above.

Fourthly, that the Court would not have granted a new trial under these circumstances, even if the declaration had not been dated before the first day of Easter term, 1834; the defendant's proper remedy, if any, for the mistake in the avowry, being to apply to the Judge at Nisi Prius for leave to amend.

The Court refused to take the summing up of a Judge at Nisi Prius from a shorthand writer's notes. *Serjeant v. Chaffy*, 354.

XII. Rule of Court.

Second application for rule on new statement of facts.

Where a rule had been obtained to discharge a party out of custody, and had been afterwards discharged, the Court refused to entertain the same question on a subsequent application, founded upon facts which had occurred before the previous rule was obtained; it not appearing that the party applying was then ignorant of the facts, though they were not then brought before the Court. *Bodfield v. Padmore*, 785, (n.)

See also *Information, Criminal*, I.

XIII. Trial, new.

To amend pleadings conformably to finding of jury. *Antè*, XI. 3.

XIV. Verdict.

Power of Judge to discharge jury from giving verdict. *Custom*, III.

PRESUMPTION.

See *Evidence*, IX.

PRIVILEGED COMMUNICATION.

I. What is. *Slander*.

II. How to be pleaded. *Libel*.

PROFIT A PRENDRE.

I. Distinction between profit à prendre and easement. *Easement*, I.

II. How right to be set out on pleadings. *Easement*, I.

PROHIBITION.

To Ecclesiastical Court.

When it lies.

1. The Consistory Court of Hereford, upon articles exhibited against a beneficed clerk, pronounced sentence, declaring that the said articles were for the most part sufficiently and fully proved, and suspended him for three years. After sentence, a rule for a prohibition was obtained, on the suggestion that some of the articles contained charges cognisable in courts of common law; but it was not denied that others were of ecclesiastical cognizance:

Held that, after this sentence, it must be presumed that the Ecclesiastical Court had proceeded upon such matters as were within its cognizance; and the rule was discharged. *Hart v. Marsh*, 591.

2. An executor having exhibited an inventory in the Ecclesiastical Court, at the instance of legatees, the latter filed exceptions to the inventory, and the executor put in his answer. The Court examined witnesses *viva voce* as to the correctness of the inventory, and afterwards decreed that the

inventory was false and fraudulent, and ordered it to be amended according to the Judge's minutes. This Court, on motion by the executor, granted a prohibition;

Although the parties had consented to the examination being taken *viva voce*, and the executor had, after such examination, applied for leave to amend the inventory. *Griffiths v. Anthony*, 623.

PROMISSORY NOTE.

See *Bills of Exchange and Promissory Notes*.

QUO WARRANTO.

When it lies.

1. For office of sexton. *Mandamus*, I. 5.
2. To member of corporation on grounds affecting whole corporate body.

The Court will grant a quo warranto information, at the instance of a private relator, against a member of a corporation, on grounds affecting his individual title, although it be suggested that the same objections apply to the title of every member, and therefore that the application is, in effect, against the whole corporate body. *Rez v. White*, 613.

RATE.

I. Church-rate.

Power of churchwardens to borrow money on credit of rates.

1. Under statute 59 G. 3, c. 134, s. 14, churchwardens cannot raise a loan on the credit of the church-rates to pay a debt for repairs, incurred in a past year.

The loan ought to be raised at the time when the repairs are done, and the laying of rates for the repayment should commence immediately, and be continued so as to pay off the debt by ten annual instalments. *Rez v. Churchwardens of Dursley*, 10.

2. See *Mandamus*, I. 2.

II. Poor-rate.

1. Who liable to. *Poor*, I. 1.
2. Inspection of rate-books. *Poor*, I. 2.
3. Appeal against poor-rate. *Poor*, VII. 1.

RECOGNISANCES.

I. Who to enter into, for parish, on application for certiorari. *Certiorari*, I. 1.

II. Allowance of certiorari on insufficient recognisances. *Certiorari*, I. 1.

III. Power of justices to commit to prison on neglect to enter into recognisances. *Conviction*, I.

RECORD.

I. Amendment of. *Practice*, XI.

II. Endorsement of special finding by jury under stat. 3 & 4 W. 4, c. 42, s. 24. *Statute*, XXXI. 2, (1.)

REFUSAL.

I. What amounts to demand and refusal. *Mandamus*, I. 5.

II. By commissioners under local act to entertain complaint, how far an order, determination, and judgment. *Statute*, XLI.

REPLEVIN.

I. Detention how far a taking.

Replevin for taking and detaining, &c. Avowry for rent arrear. Plea, that, after the taking and before the impounding, plaintiff tendered the rent and expenses.

On special demurrer, for that the plea did not go to the taking but only to the detaining. held a good plea, the tortious detention being a taking. *Evans v. Elliott*, 142.

II. Amendment of avowry after special finding by jury. *Practice*, XI. .

RULE OF COURT.

I. Second application for rule on new statement of facts known on first application. *Information*, Criminal, I.; *Practice*, XII.

II. Hil. 4 W. 4.

1. What may be given in evidence on plea of non assumpsit. *Bailment*, II.

2. Proof of certificate by apothecary, when dispensed with. *Evidence*, XI.

III. Mic. 7 W. 4.

Rules upon sheriffs, 519.

SCIRE FACIAS.

I. Against bail.

1. When it may be sued out.

A. obtained judgment against H. of Michaelmas term, and sued out a ca. sa., which was returned, non est inventus, on 13th January. On 14th January, H. obtained a rule nisi for a new trial on nonsuit, and that proceedings should be stayed in the meanwhile; and he had given notice to A. of his intention to move for this rule, before the ca. sa. was sued out. The rule was discharged on 8th June. On 9th June a sci. fa. against the bail was sued out: Held to be regular; and that no fresh entry of judgment, or alias ca. sa. was necessary.

Three of the days during which the sci. fa. lay at the office of the sheriff (of Middlesex) before the return, were Whit Monday, Tuesday, and Wednesday. It appeared by affidavit that these days were half-holidays at the office, the hours of general business being only from eleven to two; but that the sci. fa. book might be searched for the same time as on other days. Held, that these three days were to be counted as searching days.

The sci. fa. was returned nil, on 15th June. R., one of the bail, had left the place where he formerly resided (in Lancashire), and which was described as his residence in the recognisance, and had quitted the realm. A's attorney knew that he had left his residence, but did not know whither he was gone. On 9th July a letter was sent by post to R.'s former residence, giving him notice of the proceedings, which was not returned from the Dead Letter office. On 23d July A. obtained a judge's order for signing judgment against the bail, which was signed accordingly, R. not having been summoned. The Court refused to set the judgment aside.

Held, that, if R. had shown any matter which, had he been summoned, he might have pleaded in bar to the sci. fa., he might have been allowed, on motion, to plead (though not to render), if the matters were not denied; or if they were denied, he

might have had auditā querelā. *Armitage v. Rigbye*, 76.

2. Lying for inspection before sheriff's return. *Ante*, 1.

3. What notice to bail requisite. *Ante*, 1.

4. How insufficiency of notice to bail may be taken advantage of. *Ante*, 1.

II. To revive judgment.

Whether pending writ of error may be pleaded. *Error, Writ of*, 1.

SCOTLAND.

Law of, to be proved as set out on pleadings. *Pleading*, V. 2.

SEISIN.

In allotments under local inclosure act, from what time it takes effect by commissioners' award. *Inclosure*.

SESSIONS.

Court of quarter.

1. Jurisdiction of, to award compensation under local act. *Statute*, XLI.

2. How far Court of K. B. concluded by inference of facts drawn by sessions. *Poor*, III. 1.

3. What Court of K. B. will presume to support decision of sessions. *Poor*, III. 1.

SEXTON.

I. Right of election to office, how to be determined. *Mandamus*, I. 5.

II. Whether quo warranto lies for the office. *Mandamus*, I. 5.

SHORT-HAND WRITER.

Notes of, for what purpose receivable by court. *Practice*, XI. 3.

SLANDER.

Privileged communication.

Words spoken by a subscriber to a charity in answer to inquiries by another subscriber, respecting the conduct of a medical man in his attendance upon the objects of the charity, are not merely on account of those circumstances, a privileged communication. *Martin v. Strong*, 535.

See also *Libel*.

ST. JAMES.

(Westminster.) Election of churchwardens, how to be made. *Statute*, III.

ST. MARTIN.

Westminster.) Election of churchwardens, how to be made. *Statute*, III.

STAGE-COACH.

Liability of proprietors of. See *Bailment*.

STAMP.

I. On agreement ad valorem.

By the same agreement close A. was demised at a rent of 200*l.* a year, and close B.

at the same rent which was paid by the tenant then in possession, not otherwise describing the amount. The agreement was produced in evidence, with an ad valorem stamp on the annual sum made up of 200*l.* and of the rent paid by the above-mentioned tenant, the amount of which was proved by witnesses.

Held, that the document was rightly stamped, and properly admitted in evidence. *Parry v. Deere*, 531.

II. On attornment, when necessary as for agreement. *Ejectment*, I.

III. Whether Court will compel parties to produce documents before trial to be stamped. *Mandamus*, II. 7.

STATUTE.

First: Decisions on public and general statutes.

I. 43 Eliz. c. 6. (Costs.) What constitutes an interest in land. *Costs*, I. 3.

II. 29 Car. 2, c. 3. (Frauds.) Parol demise under s. 3. *Landlord and Tenant*, VI.

III. 1 Jac. 2, c. 22. (Division of parish of St. Martin, Westminster.) Election of churchwardens, how to be made.

By statute, 1 Jac. 2, c. 22 (1685), the parish of St. James, Westminster, was created, by dividing a district from the parish of St. Martin; and it was enacted, that the inhabitants of St. James's "shall be from time to time subject to the laws and statutes now in force, or hereafter to be made for the choice of churchwardens," &c., "and such other like parish officers, and other parochial duties within the said parish, in like manner as the inhabitants of the said parish of St. Martin's are or might be subject and liable unto." St. Martin's had been governed by a select vestry; and provision was made for continuing such a vestry in St. James's.

Before 1685 the practice in St. Martin's on the election of the two churchwardens had been, that the vestry chose them by scoring certain prepared lists (the greatest number of scores carrying the election); but, by usage, the junior churchwarden of the preceding year was re-elected of course. It did not appear how or when this practice originated. The power of the select vestry to choose the churchwardens was often disputed in St. Martin's after 1685; and for the last two years, the elections by them were discontinued, and the officers chosen according to stat. 58 G. 3, c. 69. No alteration was made in St. James's.

Held, that the mode of election practised in 1685 was one of the laws then in force, by which, under stat. 1 Jac. 2, c. 22, the parish of St. James was to be governed. And that the abandonment of the custom by St. Martin's did not oblige St. James's to discontinue it also.

St. James's had adopted Sir John Hobhouse's act. Agreed, that this made no difference. *Re v. Churchwardens of St. James, Westminster*, 391.

IV. 11 G. 1, c. 18. (City of London.) Effect of, upon custom of city of London as to election of aldermen. *Custom*, III.

V. 5 G. 2, c. 19. (Appeal to sessions and certiorari.) Recognisances on application for certiorari. *Certiorari*, I. 1.

- VI. 11 G. 2, c. 19. (Landlords and tenants.) Double costs under. *Costs*, I. 1, (2.)
- VII. 13 G. 2, c. 18. (Certiorari.) Notice previous to application for certiorari. *Certiorari*, I. 1.
- VIII. 17 G. 2, c. 3. (Poor-rates.) Right of rate-payers to inspect books. *Poor*, I. 2.
- IX. 22 G. 2, c. 46. (Attorneys and solicitors.) What may be pleaded to action of debt for penalty. *Pleading*, IV. 6, (2.)
- X. 13 G. 3, c. 78. (Highways.)
1. Order of justices for stopping and diverting highway. *Highway*, II. 1, (1.)
 2. Certiorari under s. 5. *Highway*, II. 1, (1.)
- XI. 17 G. 4, c. 56. (Woollen manufacture.) Conviction under: proceedings on appeal. *Conviction*, I.
- XII. 39 G. 3, c. 73. (Parish of St. Mary-le-Bone.) Right of rate-payer to inspect rate-books. *Poor*, I. 2.
- XIII. 41 G. 3, c. 109. (Inclosure.) Notice by commissioner, upon whom to be served.
- A parish was divided into four tithings, A., B., C., and D., A. containing the parish church. Each tithing maintained its own poor, and each had a churchwarden, elected at a vestry of the parish in general, but from and by its own inhabitants. The minute of appointment included all the four, and stated them to have been nominated to serve the office of churchwardens for the tithings for the year ensuing. All were sworn in together at the archdeacon's visitation, the oath being administered to them and each of them, "truly to execute the office of churchwarden within your parish." None ever acted out of his own tithing, unless in signing the annual presentments to the archdeacon of the state of the church, &c. Each of the tithings (except A., which was exempt) raised its own church-rate, and paid it to the vestry clerk; and he kept a separate account for each churchwarden, who accounted with the inhabitants of his own tithing.
- A commissioner of inclosure under a local act and the general act, 41 G. 3, c. 109, s. 3, made an order settling the boundaries between the above parish and another parish adjacent, and adjudging certain lands to be in the latter; and he, within a month, served a description of the boundaries on a party then acting as churchwarden of tithing A. Until the order, the lands in question had been rated to tithing B.
- On appeal against a poor-rate made upon the above lands as situate in tithing B., notwithstanding the commissioner's order:
- Held*, that the description of boundaries had been sufficiently served according to the proviso of stat. 41 G. 3, c. 109, s. 3, requiring such a description to be served upon "one of the churchwardens or overseers of the poor of the respective parishes."
- Although the party served had finished his year of office, but continued to do the duties, because his successor had not been sworn in or acted.
- Held*, also that the sessions had acted rightly in rejecting evidence offered to show that the commissioner, in his inquiry into the boundaries, had not conducted his examination in the manner required by stat. 41 G. 3, c. 109, s. 3. *Rez v. Marsh*, 468.
- XIV. 43 G. 3, c. 46. (Frivolous arrests.)
- When defendant entitled to costs under s. 3. *Costs*, I. 5.
- XV. 48 G. 3, c. 123. (Imprisonment for small debts.) Discharge of prisoner on petition of wife. *Execution*.
- XVI. 55 G. 3, c. 68. (Highways.) Order of justices for stopping and diverting highways. *Highway*, II. 1.
- XVII. 55 G. 3, c. 192. (Devises of copyhold estates.) To what devises it extends. *Devise*, II.
- XVIII. 55 G. 3, c. 194. (Apothecaries.) Proof of certificate, when necessary. *Evidence*, XI.
- XIX. 56 G. 3, c. 139. (Parish apprentices.)
1. Jurisdiction of justices in allowing indenture. *Poor*, II. 1.
 2. How far consent of justices necessary to existing service. *Poor*, II. 2.
- XX. 58 G. 3, c. 69. (Parish vestries.) Plurality of votes under s. 3, to what parishes applicable. *Parish*, I. 1.
- XXI. 59 G. 3, c. 134. (Church building.) Power of churchwardens to borrow money under s. 14. *Mandamus*, I. 2; *Rate*, I. 1.
- XXII. 3 G. 4, c. 126. (Turnpike roads.)
1. How far it controls local act as to rateability of tolls. *Poor*, I. 1, (3).
 2. Certiorari how affected by 4, G. 4, c. 95. *Jury*, III. 1.
- XXIII. 4 G. 4, c. 95. (Turnpike roads.)
1. Construction of ss. 39, and 43, as to notice previous to revoking commissioners' orders. Sect. 43, of the general turnpike act, 4 G. 4, c. 95, empowering commissioners of turnpike roads to remove their clerks, &c., must be taken in conjunction with sect. 39, which requires certain notices to be given when it is intended to revoke any order of the commissioners.
- And, therefore, where commissioners had discharged a clerk by a resolution made without such notices, a mandamus was granted to restore him. Although at a former meeting, the commissioners had ordered proper notices to be given of a meeting for the purpose of such discharge, and the notice had not been given, nor the meeting held, owing to the misconduct, as was alleged, of the clerk himself. *Rez v. Trustees of Wrexham and Denbigh Roads*, 581.
2. In what cases certiorari within ss. 86 and 87. *Jury* III. 1.
- XXIV. 6 G. 4, c. 57. (Settlement of poor.) What constitutes a separate and distinct dwelling-house. *Poor*, V.
- XXV. 7 G. 4, c. 57. (Insolvent debtors.) What assignment void under ss. 30, and 32. *Insolvent*, I.
- XXVI. 11 G. 4, & 1 W. 4, c. 68. (Stage-coaches.)
1. What is a receiving-house within s. 1. *Bailment*, II.
 2. What notices to be given by coach proprietors. *Bailment*, II.
- XXVII. 11 G. 4, & 1 W. 4, c. 70. (Administration of justice.) Effect of, on admission of attorney. *Attorney*, I.
- XXVIII. 1 W. 4, c. 21. (Prohibition and mandamus.) Costs under s. 6. *Post*, XII.
- XXIX. 1 & 2 W. 4, c. 60. (Regulation of vestries.) Right of rate-payers to inspect rate-books. *Poor*, I. 2.
- XXX. 3 & 4 W. 4, c. 27. (Limitation of actions.)

What constitutes adverse possession under s. 15. *Ejectment*, II.

XXXI. 3 & 4 W. 4, c. 42. (Amendment of the law.)

1. Revocation of submission to arbitration. *Award*, II.

2. Endorsement of special finding on record. (1.) Declaration against sheriff for an escape. Pleas, Not Guilty, and that defendant did not arrest. Issues thereon. At the trial, the plaintiff's evidence showed that the plaintiff had not arrested, but had negligently omitted to do so. The Judge would not amend the record, under stat. 3 & 4 W. 4, c. 42, s. 23, but allowed the case of negligent omission to be proved. The jury found the fact of omission specially, and assessed the damages at 30*l.*; and a verdict was entered for the defendant on both issues, and the special finding endorsed on the record, under sect. 24.

Held, that this Court might give judgment for the plaintiff according to the right of the case, the variance being immaterial and the defendant not prejudiced.

Quere, whether the Judge, in acting upon sect. 24, might impose terms on the party availing himself of the statute. But, he not having imposed them, this Court declined doing so.

The postea stated the finding as to the sheriff's default, and the assessment of damages, and that, it appearing to the Court that, according to the very right, &c., plaintiff ought to have judgment to recover his damages (not mentioning costs), therefore, &c.

The Court on a subsequent application by plaintiff, ordered the master to tax plaintiff his general costs of the cause, but to allow defendant his costs of the issues; and that each party should pay his own costs of the motion to enter judgment according to the right. *Guest v. Elwes*, 118.

(2.) See *Practice*, XI. 3.

XXXII. 3 & 4 W. 4, c. 63. (Indentures of apprenticeship.) Jurisdiction of justices in binding parish apprentices. *Poor*, II. 1.

XXXIII. 4 & 5 W. 4, c. 76. (*Poor*.)

1. Sec. 72. To what sessions application for order of filiation to be made. *Bastardy*, I.

2. Sec. 79. What sufficient notice under. *Poor*, VII. 3, (1.)

3. Sec. 81. What to be stated in notice of appeal. *Poor*, VII. 2.

XXXIV. 5 & 6 W. 4, c. 50. (Highways.) Requisites of order of justices for stopping and diverting highways. *Highway*, II. 1.

XXXV. 5 & 6 W. 4, c. 76. (Municipal Corporations.)

1. Power of Court to restore name to burgess list. *Corporation, Municipal*, I.

2. How far bankrupt disqualified from holding office. *Corporation, Municipal*, III.

3. Funds for charitable purposes.

Seem, that, if property be granted to a corporation, subject to a payment for charitable purposes imposed by the grantor, this falls under the provisions of sect. 71, of stat. 5 & 6 W. 4, c. 76; and that sect. 68 applies, not to such property, but to cases where the payment has been by the gift of the corporation itself. *Rex v. Sankey*, 423. (See remainder of placitum, *Attorney*, III.)

XXXVI. 7 W. 4 & 1 V. c. 78. (Municipal Corporations.) Power of Court to restore

name to burgess list. *Corporation, Municipal*, I.

SECONDLY: Decisions on local acts.

XXXVII. Paddington parish regulation Act.

Election of parish officers. *Parish*, I. 1.

XXXVIII. Great Dover Street Road.

1. Rateability of tolls. *Poor*, I. 1, (3.)

2. Notice of appeal. *Poor*, I. 1, (3.)

XXXIX. Inclosure act.

1. At what time legal seisin in allotments takes effect under commissioners' award. *Inclosure*.

2. Liability to poor-rate of parson's corn rent in lieu of tithes. *Poor*, I. 1, (2.)

XL. London Dock Company's compensation for injury to property.

The London Dock Company were empowered by statute to make a new entrance to their docks, and to purchase houses, lands, &c.; and a jury was to assess (in case of disagreement) the purchase-money to be paid for houses, &c., and the compensation to be made for good-will, improvements, or for any injury to be sustained by any person interested in houses so purchased. By subsequent sections they were empowered to take down all houses, &c., to be purchased by them under the act, to level the ground, and to stop up all ways on the lands to be purchased (with one exception); to stop or turn any highway interfering with their works, with consent of two justices, &c.; and to provide such sluices, bridges, roads, &c., communicating with the docks and works, as they should from time to time judge necessary. It was then enacted that, if any person having an estate or interest not less than a tenancy from year to year in any houses, lands, &c., should be injured in his said estate or interest, by the making of any such cut, sluice, bridge, road, or other work, such person should be compensated by the company for such injury, the compensation to be assessed by a jury in case of disagreement.

The company, acting under the statute, pulled down a number of houses, and made a cut which intercepted several thoroughfares, and obliged those who had formerly used them to take circuitous routes. The tenants of a neighboring public-house demanded compensation for injury to their estate and interest, inasmuch as the pulling down of premises and the obstruction of access had diminished the resort of persons to the house; and also, as the occupiers of the house were cut off from thoroughfares to the house formerly used; and thereby the value of the premises to sell or let as a public house or shop, but not as a private residence, was lessened.

Held, that the claimants were not entitled to compensation. *Rex v. London Dock Company*, 163.

XLI. Thames and Isis navigation: compensation.

By acts relating to a river navigation, commissioners were authorized to make such cuts as they should deem necessary for the navigation, provided that no cut should divert or stop up the present channel of the river, or alter the course of the stream; and to make such horse towing-paths as they should think convenient for the navigation. If any person should think himself aggrieved,

damaged, or injured, by any work made by the commissioners, or by the operation or effect of any such work, and should make complaint to the commissioners, they were to hear, and report to a subsequent general meeting, at which the commissioners were to make such order, determination, and judgment thereon as to them should seem just, and give such satisfaction as they should think reasonable. And, if the party complaining should be dissatisfied with such order, &c., he might appeal to the quarter sessions, who should make adjudication thereon, and award such costs to either party as they should think reasonable, which order and determination should be final and conclusive to all intents and purposes whatever.

A mandamus recited that B. was seized in fee of an ancient towing-path, on a part of the river, and to the exclusive right of towing barges at that part, taking reasonable tolls for such towing by his horses; that the commissioners made a cut, by which the barges were enabled to avoid that part of the river, dispense with the use of the horses, and withhold the toll; that the commissioners had, by the cut, injured the old channel of the river, and made the navigation of the part aforesaid less easy and convenient, and diverted the navigation of the river from B.'s towing-path, and rendered the towing-path, and his exclusive right, wholly unprofitable; that so B. was aggrieved, &c.; that he had complained to the commissioners and demanded compensation adequate to the injury which he had sustained; that the commissioners, at a subsequent general meeting, made an order, determination, and judgment that they could not accede to B.'s application; that B. being dissatisfied with such order, appealed to the quarter sessions, who ordered the commissioners to pay B. 1000*l.* in full compensation for the injury sustained by him, and 200*l.* costs, which they refused to pay; and the writ commanded them to pay.

Return, That the commissioners, believing B. had no claim to compensation, did not hear evidence on the complaint, or the amount of the alleged loss, and notified to B. that they refused to accede to his application; that B. treating this refusal as an order, &c., appealed; that, on the appeal, the commissioners objected that the refusal was not an order, but the quarter sessions overruled the objection; that the cut enabled navigators to avoid a dangerous bend of the river; that B. was no further entitled to the path than as owner of the land; that they had not obstructed his towing-path, nor placed any obstacle to the navigation against the towing-path; that parties might, and sometimes did, still navigate by the old channel, *Held*,

(1.) That the refusal of the commissioners was an order, determination, and judgment, from which an appeal lay to the sessions.

(2.) That the sessions had jurisdiction to award compensation to B., both for the damage suffered by his towing path being less used, and for the obstruction of the old navigation.

(3.) That the order of sessions was final and conclusive, and must be held to have been made on both complaints, inasmuch as the writ assuming it to negative the obstruction

of the navigation) did not deny that the sessions had found such obstruction.

(4.) A peremptory mandamus was awarded to the commissioners to pay the money.

(5.) But the Court would not give the prosecutor costs of the mandamus, under stat. 1 W. 4, c. 21, s. 6, considering the question to have been very doubtful. *Rex v. Commissioners of Thames and Isis*, 804.

XLII. Harwich paving act.

Liability of clerk to commissioners for their negligence. *Pleading*, II. 1.

STEWARD.

Of manor; mandamus to, to admit to copyhold. *Copyhold*, I.

SURRENDER.

Of copyhold estate.

1. By whom to be taken. *Copyhold*, III.
2. Devise of copyhold by heir without surrender. *Devise*, II.
3. To what devises stat. 55 G. 3, c. 192, extends. *Devise*, II.

TENDER.

I. How to be pleaded.

1. In indebitatus assumpsit. *Pleading*, IV. 5, (3.)
2. In replevin. *Replevin*, I.

II. What it admits. *Evidence*, XI.

TENEMENT.

Settlement by renting. *Poor*, V.

TOLLS.

Rateability to poor-rate. *Poor*, I. 1, (3.)

TOWN CLERK.

I. Lien of, on papers of corporation. *Attorney*, III.

II. Interference of Court to compel him to furnish evidence against himself. *Evidence*, XV.

TRADE.

Assignees for benefit of creditors how far empowered to carry on trade of assignor. *Assignment*, I.

TRIAL, NEW.

I. Verdict against evidence. *Evidence*, XIV.

II. To amend pleadings conformably with special finding of the jury. *Practice*, XI. 3.

III. Costs of rule. *Evidence*, IX. 2.

IV. When Court will compel payment of money into Court pending rule for new trial. *Payment into Court*, I.

TURNPIKE ROAD.

I. Removal of officers by commissioners under stat. 4 G. 4, c. 95. *Statute*, XXIII. 1.

II. Tolls under local act, whether rateable to poor-rate. *Poor*, I. 1, (3.)

VARIANCE.

What variance between record and facts proved will entitle plaintiff to judgment under

stat. 3 & 4 W. 4, c. 42, s. 24. *Statute XXXI. 2, (1.)*

See also *Pleading, X.*

VERDICT.

I. How verdict to be entered after special finding by jury.

The Judge at Nisi Prius having told the jury that, in case of their believing a particular fact, the verdict must be for the plaintiff, the jury retired, and the Judge and counsel on both sides quitted the Court, leaving the associate. The jury returned into Court, and told the associate that they found the fact; the associate then informed them that this was a verdict for the plaintiff, and entered it so: but the jury expressed to him their dissent, and said that they were not agreed to find for the plaintiff.

The Court discharged a rule nisi, obtained on affidavit of these facts, for setting aside the verdict and having a new trial, upon the ground (only) of the jury not having agreed to find for the plaintiff. *Doe dem. Lewis v. Baster, 129.*

II. Special finding under stat. 3 & 4 W. 4, c. 42, s. 24, its effect on judgment and costs. *Statute, XXXI. 2, (1.)*

III. Power of Judge at trial to discharge jury from giving verdict. *Custom, III.*

VESTRY.

Election of parish officers. *Parish, I.*

WAIVER.

Parol waiver of written contract, when good. *Frauds, Statute of, I. 1.*

WARRANT.

I. Of distress, what to be stated in it. *Justices, II. 1.*

II. Arrest without sheriff's warrant, its effect. *Arrest, II.*

WATER.

Right of enjoyment of. See *Easement, I.*

WAY.

See *HIGHWAY; TURNPIKE ROAD.*

WIFE.

See *BARON AND FEME.*

WILL.

See *DEVISE.*

WRIT OF ERROR.

See *ERROR, WRIT OF.*

WRITING.

I. How far agreement in writing under Statute of Frauds may be waived by parol. *Frauds, Statute of, I. 1.*

II. Proof of handwriting. *Handwriting.*











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